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# TABLE OF CONTENTS

## ARTICLES

|  | PAGE          |
|--|---------------|
| ALIENABILITY OF CHOSSES IN ACTION, THE: A REPLY TO PROFESSOR WILLISTON.<br><i>Walter Wheeler Cook</i> . . . . .                          | 449           |
| CONTINGENT REMAINDERS. <i>John L. Thorndike</i> . . . . .  | 226           |
| COVERT LEGISLATION AND THE CONSTITUTION. <i>Charles Merrill Hough</i> . . . .  | 801           |
| EARLY HISTORY OF THE CORPORATION IN ENGLAND, THE. <i>Harold J. Laski</i> . . .   | 561           |
| END OF LAW AS DEVELOPED IN JURISTIC THOUGHT, THE. <i>Roscoe Pound</i> . . . .  | 201           |
| ENGLISH CIVIL LAW. <i>Edward Jenks</i> . . . . .   | 1, 109        |
| EXPANSION OF AMERICAN ADMINISTRATIVE LAW, THE. <i>A. A. Berle, Jr.</i> . . . .   | 430           |
| FEDERAL INCORPORATION OF RAILWAY COMPANIES. <i>Charles W. Bunn</i> . . . .   | 589           |
| GERMANIC AND MOORISH ELEMENTS OF THE SPANISH CIVIL LAW. <i>Peter J. Ham-<br/>ilton</i> . . . . .   | 303           |
| GOOD AND BAD TRUSTS. <i>Albert M. Kales</i> . . . . .  | 830           |
| INSANITY AND CRIMINAL RESPONSIBILITY. <i>Edwin R. Keedy</i> . . . . .  | 535, 724      |
| IS THE RIGHT OF AN ASSIGNEE OF A CHOSE IN ACTION LEGAL OR EQUITABLE?<br><i>Samuel Williston</i> . . . . .                                | 99            |
| JUDICIAL INTERPRETATION OF THE CONSTITUTION ACT OF THE COMMONWEALTH<br>OF AUSTRALIA. <i>Charles G. Haines</i> . . . . .                  | 595           |
| JURISDICTION OVER FOREIGN CORPORATIONS AND INDIVIDUALS WHO CARRY ON<br>BUSINESS WITHIN THE TERRITORY. <i>William F. Cahill</i> . . . . . | 676           |
| LOOKING FORWARD. <i>R. W. Lee</i> . . . . .  | 792           |
| NEW ENGLISH WAR CABINET AS A CONSTITUTIONAL EXPERIMENT, THE. <i>A. V.<br/>Dicey</i> . . . . .  | 781           |
| NOVA METHODUS DISCENDAE DOCTENDAEQUE JURISPRUDENTIAE. <i>John H.<br/>Wigmore</i> . . . . .   | 812           |
| PROMOTERS' LIABILITY: OLD DOMINION v. BIGELOW. <i>R. D. Weston</i> . . . . .   | 39            |
| SOME PHASES OF THE LAW OF MARRIAGE. <i>Albert Swindlehurst</i> . . . . .   | 124           |
| STATE LIABILITY FOR TORT. <i>John M. Maguire</i> . . . . .   | 20            |
| STATUS OF STATE MILITIA UNDER THE HAY BILL. <i>S. T. Ansell</i> . . . . .  | 712           |
| SURETYSHIP AT "LAW MERCHANT." <i>Anan Raymond</i> . . . . .  | 141           |
| TORT AND ABSOLUTE LIABILITY — SUGGESTED CHANGES IN CLASSIFICATION.<br><i>Jeremiah Smith</i> . . . . .                                    | 241, 319, 409 |
| VOLUNTARY TRANSFERS OF CORPORATE UNDERTAKINGS. <i>Edward H. Warren</i> . .   | 335           |
| WAR EMERGENCY LEGISLATION — A GENERAL VIEW. <i>Eugene Wambaugh</i> . .   | 663           |



## INDEX-DIGEST

References in heavy-faced type are to **Notes**; [in plain type to **Recent Cases**; and in italicized type to **Articles**.

## A

**ACCRETION.**

Accretion to a servient tenement under same restriction as the tenement itself. 89

**ACTIONS.**

Right to discontinue action for annulment of marriage. 292

Rights of child under unexecuted contract of adoption. 642

**ADMINISTRATIVE LAW.**

Scope of the subject of administrative law in the United States.

The "three powers": impossibility of separating them in administrative bodies. 430-448  
436-444

**ADMIRALTY.**

**Jurisdiction:** Condemnation of goods insured against war risk as enemy property. 389

How far international law limits the law administered in prize courts. 66, 86

**Jurisdiction** of a court of neutral country to decree restriction of prize made in breach of that country's neutrality. 161, 182

Power of state court to decree the sale of vessel. 182

**ADOPTION.****ADVERSE POSSESSIONS.**

**Continuity of adverse possessions:** Adverse possession in contempt of court. 80

Power of a special administrative body to exclude from its field of operations the ordinary governmental agencies. 445-447

**AGENCY.**

See also *Pleading; Master and Servant.*

**Creation of agency:** Whether an interpreter acts as an agent. 397

**Principal's liability to third persons in contract:** Quasi-contractual liability of principal for

benefits received under contract made by unauthorized agent.

**Principal's liability to third persons in tort:** Liability of principal for felonious assault of agent. 402  
389

**Principal's rights against agent:** Injunction of use of list of customers by agent. 655

**ALIENS.**

**Naturalization of aliens:** Filipinos: Eligibility to naturalization under federal law. 653

**ALIMONY.**

See under *Divorce.*

**APPEAL AND ERROR.**

**Determination and disposition of cause:** Refusal to reverse after lower court sustained defendant's demurrer when only nominal damages could be recovered. 80

**APPOINTMENT, POWER OF.**

See *Powers.*

**ARMY AND NAVY.**

Right of parent to procure discharge of minor after wrongful enlistment. 285

**ASSAULT AND BATTERY.**

**Civil liability:** Liability of master for felonious assault of servant. 389

**ASSIGNMENTS.**

Of a contract of indemnity, see *Choses in Action.*

Of mortgagor's power of sale, see *Mortgages.*

Of shares of stock, see *Transfer of Stock.*

**ASSOCIATIONS.**

See *Voluntary Associations.*

**ATTACHMENT.**

**What property may be attached:** Whether attachment of saving's



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

bank account covers subsequent dividends. 513

#### ATTORNEYS.

**Duty to the court:** Duty to disclose truth in a criminal case. 642

**Privileges attached to the office:**  
Lien on document in attorney's

hands enforced out of funds realized thereby. 191

**Relation between attorney and client:** Action by attorney for breach of contract by client's discharging without cause. 183

## B

#### BANKRUPTCY.

**Administration:** Right of stockholders of bankrupt building association to vote for trustee. 285

**Bankruptcy Act of 1898 and amendments:**

§ 1 (9). 644

17 a (2). 643

17 a (4). 643

60 b. 619, 644

70 a (3). 645

70 a (5). 644

**Discharge:** Debts not affected: broker's conversion of stock. 643

Debts not affected: right of reimbursement of one induced by false representations to become surety. 184

**Fraudulent Conveyances:** Right of stockholder under so-called conditional sale of stock to surrender stock and become a creditor. 503, 518

**Preference:** Bankrupt pledgee's redemption of stock from subpledgee and return to pledgor. 644

Judgment, levy, and sale by creditor. 619, 644

**Property passing to trustee:** Life insurance policies: in general. 644

**Provable claims:** Tort claims where claimant might elect to sue in contract. 644

#### BANKS AND BANKING.

See also *Bills and Notes*.

**Deposits:** Attachment of saving's bank account held to cover future dividends. 513

#### BASTARDS.

Whether devise to unborn bastard is void for uncertainty. 652

#### BILLS AND NOTES.

**Defenses:** Application of French moratorium to a bill payable in another country. 390

Failure of consideration in temporary loss of collateral. 514

**Delivery:** Delivery under contemporaneous parole condition as a conditional delivery or delivery in escrow. 746

**Discharge of Indorsers:** Discharge by extension agreement with third party. 759

**Negotiable Instruments Law:**  
§ 120. 759

Whether doctrines of suretyship as applied to negotiable paper are adopted by the law. 149-158

**Overdue paper:** rights of donee after maturity of a note voidable for legality. 515

**Purchaser for value without notice:** Right of payee of a stolen certified check who has given value for it. 515

Whether incidents of suretyship attach to a negotiable instrument. 141-158

#### BILLS OF LADING.

See *Carriers*.

Construction of "Restraint of Princes" clause. 516

#### BILLS OF PEACE.

Restraining suits against the vendees of a patent infringer pending the original suit against the infringer himself. 398

#### BROKERS.

Wrongful sale of stock: right of customer to similar stock not acquired for purpose of restitution. 80



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

## C

**CANCELLATION OF INSTRUMENTS.**

Contracts: unilateral mistake of fact by offeror. 637, 649

**CARRIERS.**

**Bills of lading:** Construction of "Restraint of Princes" in a bill of lading. 516

Liability of consignor for freight. 760

**Custody and control of goods:**

Sellers' liability for freight after stoppage in transitu. 296

**Demurrage:** Right of carrier to charge demurrage on privately owned cars on public and on private tracks. 756, 765

**Federal regulation:** Power of commission to raise rates after elimination of water competition due to natural causes. 276, 291

**Limitations of liability:** Agreed valuation: in general 645

Validity where goods are converted. 645

**Passengers: who are passengers:**

Child riding free at invitation of motorman. 286

Recovery of person not a passenger for injury caused by misfeasance of conductor. 289

**Personal injuries to passengers:**

Duty to protect from assault. 81

**Sleeping cars:** Liability of carrier for Pullman employees to trespasser. 81

**CERTIFICATION.**

Of checks, see *Banks and Banking; Bills and Notes.*

**CHARTER-PARTY.**

See *Contracts.*

**CHECKS.**

See under *Bills and Notes.*

**CHILD LABOR LAWS.**

See *Infants.*

**CHOSES IN ACTION.**

**Gifts:** Parol extinguishment of debt. 760

**Manner and effect of assignment:**

Effect of assignment at law and in equity. 449-485

**Rights and liabilities of assignee:**

Debtor's right to set off against the assignee claims against the assignor. 101-102, 106, 473-475

Latent equities: how far binding on assignee. 102-104, 107, 475-480

Partial assignments. 104-105, 107-108, 481-484, 646

Successive assignments: effect of notice to the debtor. 484

Whether assignment gives the assignee complete ownership at law. 97-108, 449-485

What is meant by saying that the assignee is legal owner. 452-473

**What may be assigned:** Assignability of contract of indemnity. 286

Effect of waiver of restriction on assignment. 287

**COLLATERAL SECURITY.**

Loss of collateral as defense to liability on negotiable paper. 514

**COMMISSIONS.**

See *Constitutional Law.*

Of executor who was also trustee. 189

**CONFLICTS OF LAWS.**

See also *Taxation.*

**Effect and performance of contracts:** Application of French moratorium to a contract to be performed in another country. 390

**Jurisdiction for divorce:** Non-resident husband bringing action in state alleged to be separate residence of wife. 390

Validity of foreign decree against non-resident based on constructive service. 82

**Jurisdiction of courts: in general:**

Sources classified 676-678

**Personal jurisdiction:** Service: service by publication as a denial of due process. 761

Consent as basis. 677-678, 689-695, 702

Service: substituted service on non-resident individual doing business in state by notice to place of business. 696-702

**Jurisdiction of courts: jurisdiction in rem:**

Jurisdiction of federal courts to adjudicate jurisdictional facts in bankruptcy cases and to adjudicate bankruptcy. 640

**Recognition of foreign judgments:**

Equitable decree as a cause of action in another state. 522

**Remedies: right of action:** Recovery for mental anguish due to negligent non-delivery of interstate telegram. 391



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

|   |  |
|---|--|
| <b>Rights and obligations of foreign corporations:</b> Nature of the right evidenced by a share of stock. 486, 516  | <b>religious:</b> Liberty to contract as affected by "Bulk Sales" Law. 517   |
| Whether shareholder in a corporation is bound by the laws of state incorporation or of state in which business is conducted. 393  | Restriction on freedom of press by enjoining publication of injurious falsehoods. 172, 188   |
| <b>CONSIDERATION.</b>   | Validity of city ordinance making it a misdemeanor to refuse to pay taxicab hire with imprisonment as a penalty. 394   |
| <b>What constitutes consideration:</b> Promise to supply indefinite needs of a business. 517  | <b>Powers of the judiciary:</b> Power of Australian judiciary to hold statutes unconstitutional. 599, 609-613  |
| <b>CONSTITUTIONAL LAW.</b>  | <b>Powers of legislature: delegation of powers:</b> Power of administrative board to declare a statute unconstitutional. 386, 394  |
| <b>Army and navy clauses:</b> Implications for war legislation. 667-675   | <b>Powers of legislature: taxation:</b> Constitutionality of an income tax on a corporation engaged in export trade. 82  |
| <b>Construction, operation and enforcement of constitution:</b> Constitutional interpretation in Australia, Canada and the United States compared. 615-618                | <b>Powers of legislature: implied powers:</b> Federal power to incorporate railway companies and regulate them. 589-593  |
| <b>Construction, operation and enforcement of constitutions:</b> Construction of the Australian Constitution Act by reference to American authorities. 601-607            | <b>Powers of legislature: delegation of powers:</b> Under English law. 664-666   |
| Enforcement of the Australian Constitution Act: by the high court of Australia. 600-611   | <b>Powers of legislature: implied powers:</b> War emergency legislation. 667-675   |
| Enforcement of the Australian Constitution Act: by Australian state courts. 611-615   | <b>Powers of legislature: military organization:</b> Effect of creation of national guard on militia. 176, 191, 712-723  |
| Enforcement of the Australian Constitution Act: whether the privy council has authority. 605-608  | <b>Privileges, immunities and class legislation:</b> Conditioning business activities of non-resident individual on subjection to jurisdiction by non-personal service. 696-702  |
| Meaning of term legislature in federal constitution. 184  | Conditioning business activities of non-resident unincorporated associations doing business within state. 702-711  |
| <b>Due process of law:</b> For service on non-resident, see <i>Conflict of Laws (Jurisdiction of Courts)</i> . 672-674  | Right of prisoner to be confronted with witnesses against him. 84  |
| War emergency legislation. 672-674  | <b>Personal rights: civil, political and religious:</b> Right to speedy and public trial. 771  |
| Validity of experimental legislation: Adamson Law. 739  | <b>Privileges, immunities and class legislation:</b> Statute requiring autoist injuring any person to return to scene of the accident and reveal his identity as affecting the privilege against self-incrimination. 195 |
| <b>Enforcement of judgments:</b> Full faith and credit to findings of jurisdictional facts. 640   | Validity of statute abolishing injunctive remedy in labor disputes. 75, 85   |
| <b>Federal and state powers:</b> Federal power to incorporate railway companies and regulate them. 589-593  |  |
| <b>Nature and development of constitutional government:</b> Development of constitutional government under the Constitution Act of the Commonwealth of Australia. 595-618 |  |
| English War Cabinet (1916-) as a constitutional experiment. 781-792   |  |
| Features of the Australian Constitution Act. 597-600  |  |
| <b>Personal rights, civil, political and</b>  |  |



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

- Separation of powers:** Impossibility of enforcing separation in the organization of special administrative bodies. 436-447
- Power of administrative board to declare a statute unconstitutional.** 386, 394
- Power of legislature to punish for contempt.** 384, 395
- Suspension of sentence as exercise of the pardoning power.** 369, 396
- Trial by jury:** Public trial. 771
- CONSTRUCTIVE TRUSTS.**
- Misconduct by non-fiduciaries:** Insured person murdered by beneficiary: trust in favor of estate. 622, 651
- Title acquired by murderer held subject to constructive trust.** 622, 647
- CONTEMPT.**
- Acts of conduct constituting contempt:** Refusal to pay alimony. 518
- Punishment for contempt:** Power of legislature to punish contempt. 384, 395
- CONTRABAND.**
- Confiscation of neutral ship for carrying contraband cargo.** 497, 529
- CONTRACTS.**
- See also Choses in Action; Insurance; Sales; Specific Performance; Telegraph and Telephone Companies; Conflict of Laws; Bills and Notes; Damages; Restraint of Trade.*
- Construction of contracts:** Contract of insurance in mutual company includes contemplation of raise in assessments. 85
- Demurrage rate after unreasonable delay.** 647
- Suits by third persons not parties to the contract:** Recovery of addressee for non-delivery of telegram. 391
- Construction of contracts:** Whether right of dramatization includes moving picture rights. 83
- Contracts implied in facts:** Whether right of dramatization includes moving picture rights. 83
- Creating servitudes, see Easements.**
- Defenses: fraud:** Right of parent to procure discharge of minor procuring enlistment in the army by fraudulently misrepresenting age. 285
- Defenses: impossibility:** Impossibility caused by domestic law. 185
- Remedies for breach of contract:** Action by attorney because of client's discharging him without cause. 183
- Suits by third persons not parties to the contract:** Vendor's lien given to beneficiary of contracts for sale of land. 92
- CONVEYANCES AND TRANSFERS OF PROPERTY.**
- See also Dower; Tenancy in Common.*
- COPYRIGHT.**
- Injunction by one co-owner of a copy-right against infringement by the other.** 91
- CORPORATIONS.**
- See also Voluntary Associations; Taxation; Agency; Conflict of Laws; Trademarks and Trade names; Process.*
- Capital, stock and dividends:** Nature of the right represented by a share of stock. 486, 516
- Right of assignee of holder of stock certificates in excess of charter limit.** 185
- Citizenship and domicile:** Enemy character attaching to domestic corporation with alien enemies as shareholders. 83
- Citizenship and domicile of corporation:** Franchise tax on corporation incorporated in more than one state. 510, 527
- Corporations de facto:** Creation by consolidation unauthorized until charter amendment. 761
- Dissolution:** Effect of incorporation of voluntary association and subsequent dissolution. 657
- Power of a majority of the stockholders to effect a dissolution against the wish of minority stockholders.** 335-353
- Distinction between corporation and its members:** Disregarding corporate fiction: garnishment of debt owed corporation in action against stockholder. 762
- Growth of the distinction and the understanding of it in early English institutions.** 561-588
- Insolvency of corporations:** Right of stockholder under option to



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

|  |              |
|--|--------------|
| surrender stock and become a creditor.   | 503, 518     |
| <b>Nature of corporation:</b> Historical discussion of legal status.   | 678-686      |
| <b>Presence of corporation:</b> Doctrine that corporation is present where its business is carried on.   | 686-696      |
| <b>Promoters:</b> Fiduciary relation: liability of a promoter to the corporation and to future shareholders.   | 39-61        |
| Measure of damages.  | 45-50        |
| Whether a fiduciary relation to the company in reality exists.   | 39-44, 50-55 |
| <b>Reorganization and consolidation:</b> Power of a majority of the stockholders to sell the assets to another company, or to form a new company in another state and transfer to it the assets. | 335-366      |
| <b>Stockholders: individual liability to corporation and creditors:</b> Effect of failure to pay statutory percentum of subscription.  | 763          |
| Individual liability as affected by transfer of stock.   | 656          |
| <b>Stockholders: powers of majority:</b> To dissolve the corporation against the consent of minority stockholders.   | 335-353      |
| To sell the assets to another corporation.   | 353-360      |
| To form a new company in another state and transfer the assets to it.  | 360-366      |
| <b>Stockholders: rights incident to membership:</b> Right to have a fair election of officers.   | 763          |
| Right of stockholders of bankrupt building association to vote for trustee.  | 285          |
| <b>Stockholders: individual liability to corporation and creditors:</b> Protection of stockholder receiving stock for overvalued property by no recourse clause.                                 | 395          |
| Statutory liability for corporate debts; time of accrual.  | 767          |
| Stock registered in another's name:  |              |

|   |                  |
|---|------------------|
| liability of true owner's agent to owner of record.   | 656              |
| <b>Stockholders: individual liability to corporation and creditors:</b> Whether a shareholder's liability is governed by the laws of the state of incorporation or of the state in which business is conducted. | 393              |
| <b>Tort and crimes:</b> Responsibility for libel communicated from officer to agent of corporation.   | 88               |
| <b>COURTS MARTIAL.</b> Right of court martial to hear criminal case in camera.  | 771              |
| <b>CREDITORS.</b> Rights of, See <i>Corporations (Stockholders).</i>  |                  |
| <b>CRIMINAL LAW.</b> See also <i>Constitutional Law.</i>  |                  |
| <b>Former jeopardy:</b> Conviction for lesser offense no bar to prosecution for greater offense when the court trying the lesser offense had no jurisdiction over the greater.                                  | 287              |
| Judgment on pleading a bar to second prosecution.   | 400              |
| <b>Insanity:</b> General relations of insanity and criminal responsibility: discussion of legislation proposed by the American Institute of Criminal Law and Criminology.                                       | 535-560          |
| Insanity as a defense in crimes where no specific intent is necessary.  | 538-546          |
| Insane delusions.   | 555-560          |
| Irresistible impulse.   | 546-551          |
| Law of Massachusetts, New York, Illinois.   | 724-735          |
| Possible partial responsibility of insane offenders.  | 551-553          |
| Tests of irresponsibility: scope of the present law.  | 554-560          |
| Proposed criminal responsibility bill.  | 535-560, 724-738 |
| <b>Sentence:</b> Discretion of trial court in suspending sentence.  | 369, 396         |
| <b>Trial:</b> Attorney's duty to disclose truth.  | 642              |
| Right of court-martial to hear criminal case in camera.   | 771              |

## D

### DAMAGES.

**Consequential damages:** Recovery for failure to deliver telegram meant to complete a contract. 90

**Liquidated damages:** Whether demurrage rate applies to unreasonable delay. 647  
**Measure of damages: tort: Lia-**



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

bility for unauthorized repetition  
in slander. 87

#### **DANGEROUS PREMISES.**

**Liability to licensees:** Liability of  
contractor to persons coming on  
a scaffold under an arrangement  
between the contractor and the  
owner. 186

#### **DEATH BY WRONGFUL ACT.**

**Common law liability:** Applica-  
tion of statutory liability to tort  
committed upon high seas. 742, 771

**Statutory liability in general:** At-  
tempt to impose liability under  
one statute giving damages for  
injury and a second statute giv-  
ing damages for death. 396

Justification of death statute. 742, 771

#### **DEBT.**

Imprisonment for violating statute  
making it a misdemeanor to re-  
fuse to pay taxicab hire as im-  
prisonment for debts. 394

#### **DECEIT.**

**Particular cases:** Effect of misrep-  
resentation as to age as effecting  
infant's right to recover for in-  
jury occurring in violation of  
child labor law. 528

#### **DEEDS.**

**Construction and operation in  
general:** Life estate raised by  
implication. 187

#### **DESCENT AND DISTRIBUTION.**

See also *Constructive Trusts*.

Effect of homicide by insane heir. 622, 647

Effect of murder of insured by bene-  
ficiary. 622, 651

Rights of child under unexecuted  
contract of adoption. 642

#### **DIVORCE.**

See also *History of Law; Conflict of  
Laws; Marriage*.

**Alimony:** Equitable decree for ali-  
mony as a cause of action in a  
second state. 522

Refusal to pay alimony punish as  
contempt. 518

**Grounds:** Uncorroborated testimony  
of adultery insufficient. 520

**Jurisdiction:** Non-resident husband  
bringing action in state alleged  
to be separate residence of wife. 390

Validity of foreign decree against a  
non-resident based on construc-  
tive service. 82

#### **DOMICILE.**

See also *Conflict of Laws*.

Domicile of wife as basis of action for  
divorce brought by non-resident  
husband. 390

Domicile of corporation whose stock-  
holders are alien enemies. 83

#### **DOWER.**

Dower barred by estoppel in pais. 647

Effect of avoiding a fraudulent con-  
veyance in which dower is re-  
leased. 288

Effect of ignorance of one's rights:  
void divorce. 647

#### **DRAINAGE.**

See *Waters and Watercourses*.

## **E**

#### **EASEMENTS.**

See also *Injunctions*.

**Modes of acquisition: implied  
grant and reservation:** Im-  
plied reservation of right to  
flowage of water in mill race. 648

**Nature and classes of easements:**  
Conveyance of easement for pipe  
line in return for privilege of  
using hydrant creating servitude  
upon pipe line. 297

Right of access to gas and oil car-  
rying with it easement by neces-  
sity of erecting machinery on  
surface. 84

#### **EMINENT DOMAIN.**

**Compensation:** Claim and respect  
of loss of profits caused by grad-  
ing street. 187

Compensation to owner of domi-  
nant tenement when servient  
tenement is condemned. 89

Whether necessary in time of war. 672-673

**When is property taken:** Damage  
to land on streams tributary to  
streams improved. 764

#### **EMPLOYER'S LIABILITY ACTS.**

See under *Master and Servant*.



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

**EQUITABLE ELECTION.**

Heir's claim to both legacy and lapsed residuary devise. 649

**EQUITABLE OWNERSHIP.**

Fundamental characteristics of, and distinctions between, equitable and legal ownership. 459-473

**EQUITY.**

See also *Injunctions; Specific Performance; History of Law; Cancellation of Instruments.*

Equitable relief against merger of homestead right and fee. 650

**Jurisdiction:** Equitable relief for unilateral mistake of fact. 637, 649

Power to appoint a receiver when such appointment is the sole object of the suit. 273, 289

Power to award damages after equitable remedy has become undesirable. 188

Power to restrain probate of will made in breach of specifically enforceable contract to devise. 192

Power to restrain publication of injurious falsehoods. 172, 188

Restraining interference with plaintiff's selling system as unfair competition. 166, 195

Use of injunction to protect political rights. 397

**EVIDENCE.**

See also *Constitutional Law; Witnesses; Wills; Parol Evidence Rule.*

**Confessions:** Confession of wife to adultery insufficient to warrant decree of divorce. 520

**Documents:** Carbon copies as duplicate originals. 764

**Hearsay in general:** Evidence offered by interpreter of the opponent's declaration. 397

**Opinion evidence:** Admissibility of non-expert opinion as to age. 519

**ESTOPPEL.**

**Estoppel in pais:** Who is estopped: married woman estopped, despite ignorance of invalidity of divorce, to assert dower. 647

Who is estopped: municipality estopped from asserting public rights in streets. 769

**EXECUTORS AND ADMINISTRATORS.**

**Proceedings by or against:** Allowance for counsel fees incurred in defense of bequests. 290

**Rights, powers and duties.** Whether an executor who was also a trustee is entitled to double commissions. 189

**EXPERT TESTIMONY.**

See *Evidence (Opinion Evidence).*

**F****FEDERAL COURTS.**

**Jurisdiction based on diversity of citizenship:** Interpleading a claimant who is a citizen of the same state as the plaintiff. 521

**Relation of state and federal courts:** Competency of witness in federal court who has been convicted of crime in a state court. 529

State rule of procedure as involving a federal right. 650

**FOREIGN CORPORATIONS.**

See *Conflict of Laws.*

**FRANCHISES.**

**Taxation of franchises.** Franchise tax on corporation incorporated in more than one state. 510, 527

**G****GARNISHMENT.**

**Effect of garnishment:** Judgment of interpleader by garnishee as bar to action by judgment creditor against garnishee. 86

**Property subject to garnishment.** Debt owed corporation of which defendant is stockholder. 762

**GIFTS.**

**Gifts inter vivos:** Parol extinguishment of promissory note. 760

**GROUPS.**

See *Corporations; Voluntary Association.*



REFERENCES in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

## H

**HABEAS CORPUS.**

Unconstitutional procedure in territorial court as ground for issuance of writ by federal court. 84  
Use of writ by member of state militia for refusing to take federal oath. 176, 191

**HISTORY OF LAW.**

**Constitutional law:** Making of the constitution act of the Commonwealth of Australia and development of government and constitutional law thereunder. 595-618

**Corporations:** History of the development of the corporate entity in early English institutions. 561-588

History of legal status of corporations and other group forms. 678-686

**Domestic relations:** How far ecclesiastical law of divorce is embodied in the common law. 283, 289

**Equity:** Early history of English equity. 16-17

**Miscellaneous:** Germanic and Moorish elements of the Spanish civil law. 303-318  
Methods of teaching law. 812-818

**HOMESTEAD.**

Effect in equity of purchase by widow at foreclosure sale. 650

Right of judgment creditor against homestead foreclosed to debtor's widow. 650

Rights of minor children, in equity. 650

**HUSBAND AND WIFE.**

**Privileges and disabilities of coverture:** Competency of divorced wife to testify against former husband. 87

**Rights and liabilities of wife as to third parties:** Right of husband's creditor to charge the profits of a wife's separately owned business to the extent of salary paid the husband. 85

## I

**ILLEGAL CONTRACTS.**

**Contracts against public policy:** Proper tribunal and method of approach. 763, 770

**INCOME TAX.**

See also *Taxation*.

**INCORPORATED SOCIETIES.**

See *Voluntary Associations*.

**INFANTS.**

**Actions for injury to infants:** Effect of misrepresentation as to age as affecting right to recovery under child labor law. 528

**INJUNCTIONS.**

**Acts restrained:** Enjoining probate of will made in breach of specifically enforceable contract to devise. 192

Interference with political rights. 397

Interference with trade secrets by use of employer's list of customers. 655

Mandatory injunction to remove municipal building interfering with easement. 88

One co-owner of a copyright enjoining infringement by the other. 91

Publication of photograph when exclusive photographic privileges have been granted to another. 521

Restraining interference with the plaintiff's selling system as unfair competition. 166, 195

Restraining use of power of sale by assignee of mortgagee. 524

Suits against vendees of a patent infringer while a suit against the infringer himself is pending. 398

Legislative abolition of injunctions in labor disputes unconstitutional. 75, 85

Use of employer's list of customers. 655

**INSANE PERSONS.**

See *Criminal Law (Insanity)*.

**INSURANCE.**

See also *Bankruptcy*.

**Construction and operation of conditions:** Validity under "suicide statute" of reduced recovery for death caused by poison. 189

**Construction of particular words and phrases in standard forms:** "Sole and unconditional ownership." 399



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

**Marine insurance:** Right of enemy insurer to possession of goods in enemy country after payment of loss on war risk. 389

**Mutual Benefit Insurance:** Right of society to raise premiums. 85

**Rights of Beneficiary.** Murder of insured by beneficiary. 622, 651

#### INTERLOCUTORY DECREE.

Under federal law, in patent suit. 653

#### INTERNATIONAL LAW.

See also *Admiralty; Conflict of Laws; War.*

**In general:** Changing law as to confiscation of neutral ships carrying contraband. 497, 529

**Nature and extent of sovereignty:** Power of nation to make prize court rules contrary to so-called law of nations. 66-86

Right to sequester prizes in neutral ports: Immunity of ship from suit because of foreign sovereign's interest. 161, 182

**Prizes:** Confiscation of enemy property to which title has passed, in transit, to neutral. 651

**Rights of citizens against foreign governments:** Right of enemy insurer to subrogation after payment of loss to insured. 389

#### INTERPLEADER.

Jurisdiction of federal court where one claimant lives in the same state as the applicant. 521

#### INTERSTATE COMMERCE.

See also *Conflict of Laws.*

**Control by Congress:** Enforcement of uniform demurrage code provision for charge on privately owned cars on public and on private tracks. 756, 765

**Regulation of rates:** burden of proof where discrimination is alleged. 652

**Regulation of wages:** Adamson Act. 740

Remedy for indirect damage to business caused by illegal overcharge is to be had in federal court only. 400

Safety appliance act: application to automatic coupler on electric car. 765

**Discrimination and overcharge:** Discrimination prevented by demurrage charge on privately owned cars on public and on private tracks. 756, 765

**Interstate commerce commission:** Power of commission to require tank cars. 381, 399

Power of courts to review finding of fact. 290

Reopening application for reduced rates after elimination of water competition by natural causes. 276, 291

Tort jurisdiction. 749

Whether the commission has power to fix a joint rate in connection with a carrier not yet doing business. 190

**Jurisdiction based on nature of subject matter:** Federal jurisdiction of suits for damages to interstate business caused by illegal rates is exclusive. 400

**Interstate commerce commission:** Procedure: burden of proof where discriminatory rates are alleged. 652

#### INVITED PERSONS.

See under *Dangerous Premises.*

### J

#### JUDGMENT.

**Collateral attack:** Mistake concerning death of legatee as ground for attack on probate decree. 190

On adjudications of jurisdictional facts. 640

**Foreign judgments:** Equitable decree as a cause of action in another state. 522

**Operation as bar to other actions:** Judgment of interpleader by garnishee as bar to action by

judgment creditor against garnishee. 86

Judgments for defendant for conspiracy to violate bankruptcy act ground for quashing an indictment for conspiracy in a broader sense. 400

#### JURISDICTION.

Over crime of treason committed abroad, see *Treason.*

To adjudicate jurisdictional facts, see *Conflict of Laws (Jurisdiction of Courts: Jurisdiction in rem).*



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

To adjudicate ownership of share of stock. 486, 516

## JURISPRUDENCE.

Development during nineteenth century. 201-225

**Law:** Characteristics of the English civil law. 1-19, 109-123

Law of contract and law of property. 3-5

Family law and law of torts. 5-12

Statute law and judicial law. 12-19

Common law and equity. 16-17

End of law as developed in juristic thought: the nineteenth century. 201-225

**Schools of jurisprudence:** Sir Henry Maine: validity of his status to contract generalization. 209-221

## L

### LABOR UNIONS.

See *Trade Unions*.

### LANDLORD AND TENANT.

**Surrender by operation of law:** Right of tenant to excess rent paid landlord by new tenant. 766

### LAW.

Classifications of the law: objects to be aimed at in making them. 418-420

How far ecclesiastical law is part of a common law. 283, 289

### LAW AND FACT.

**Provinces of court and jury:** Competency of witnesses depending on the main issue. 87

### LEGACIES AND DEVISES.

**Ademption:** Effect of distribution of subsidiary shares to take the place of shares bequeathed. 523

**Construction:** Application of rule in Shelley's case where remainder is left to "issue share and share alike." 195

Deduction of extinguished note under set-off clause. 298

### Lapsed bequests and devises:

Whether heir must elect between legacy and lapsed residuary devise. 649

**Payment.** Interest: by way of maintenance. 766

**Titles and rights of devisees and legatees:** Right to reopen pro-

bate decree based on mistake concerning death of legatee. 190

**Void or voidable bequests and devises:** Whether devise to unborn bastard of specified father is void for uncertainty. 652

### LIBEL AND SLANDER.

**Acts and words actionable:** Sending card of rival undertaker to families in which there was serious illness. 292

**Damages:** Liability for unauthorized repetition. 87

**Publication:** By officer of corporation to agent. 88

Does an intercepted letter create liability for publication? 291

### LIENS.

Attorney's lien on document enforced out of fund realized thereby. 191

### LIFE ESTATE.

Life estate raised by implication to fill a gap in the limitations. 187

### LIMITATION OF ACTION.

**Accrual of action:** Construction of stockholder's liability statute. 767

Whether statute touching written contracts or one touching oral contracts governs implied warranty. 295

**Pleading:** Amendment from common law action to statutory action after statute has run. 294

## M

### MANDAMUS.

**Acts subject to mandamus:** Sentence of criminals. 369, 396

Temporary possessions of public office pending result of contest. 767

**Persons subject to mandamus:** Officers of state ordered to disregard a void law. 184

### MARRIAGES.

**Nullification:** Right to discontinue action for annulment. 292



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

|  |   |
|--|---|
| <b>Validity:</b> Presumption of divorce from former spouse. 500, 523   | Unilateral mistake of fact, as ground for cancellation of contract, see <i>Cancellation of Instruments</i> .                                  |
| Requisites of valid marriage. 124-140  | <b>MORTGAGES.</b>   |
| Age: requirements of various laws. 124-133   | <b>Priorities:</b> Priority of mechanic's lien over mortgage for purchase money to one other than the grantor. 293                            |
| Consent: requirements of various laws. 134-140   | <b>Priority:</b> Priority of notes secured by the same mortgage. 769  |
| <b>MASTER AND SERVANT.</b>   | <b>Rights of mortgagee:</b> Deed of trust purporting to secure joint rights as security for claims held severally. 524                        |
| <b>Duty of master to provide safe fellow servants:</b> Assault by fellow servant known to be vicious. 768            | <b>Transfer of rights and property:</b> Informal assignment of power of sale. 524   |
| <b>Employer's liability acts:</b> Assault by fellow servant. 768   | <b>MUNICIPAL CORPORATIONS.</b>  |
| <b>Workmen's compensation act:</b> Effect of natural death of employee upon payment of installments not yet due. 523 | See also <i>Eminent Domain</i> .  |
| <b>MECHANIC'S LIEN.</b>  | <b>Actions by and against municipal corporations:</b> Mandatory injunction ordering removal of municipal building extending over sidewalk. 88 |
| Priority over mortgages for purchase money to persons other than the grantor. 293                                    | <b>Liability for torts: governmental functions:</b> Recovery for injury by animal in public zoo. 270, 294                                     |
| <b>MILITIA.</b>  | <b>Municipal property:</b> Public rights in streets barred by estoppel. 769   |
| See <i>National Guard</i> .  |   |
| <b>MISTAKE.</b>  |   |
| As to, for whom goods sold are intended, see <i>Sales</i> .  |   |
| Of fact as ground for quasi-contractual recovery. See under <i>Quasi-contracts</i> .                                 |   |

## N

|   |  |
|---|--|
| <b>NATIONAL GUARD.</b>  | Interstate Commerce Commission. 749  |
| Status of state militia under the Hay bill. 176, 191, 712-723   | <b>NOTICE.</b>   |
| <b>NATURALIZATION.</b>  | By surety that he will not remain liable, see <i>Suretyship</i> .                                |
| See <i>Aliens</i> .   | <b>NUISANCE.</b>   |
| <b>NEGLECTANCE.</b>   | <b>What constitutes nuisance:</b> Dangerous agency created under legislative franchise. 377, 404 |
| See also <i>Proximate Cause</i> .                               |  |
| <b>Duty of care:</b> Duty of one trespasser toward another. 519 |  |
| <b>NEGLIGENT MISREPRESENTATION.</b>                             |  |
| In general: Reparation ordered by                               |  |

## P

|   |  |
|---|--|
| <b>PARENT AND CHILD.</b>  | <b>PARTIES.</b>  |
| <b>Adoption:</b> Rights of child under unexecuted contract of adoption. 642                           | Joinder of principal and willful agent. 525                              |
| <b>PAROL EVIDENCE RULE.</b>   | <b>PARTITION.</b>  |
| Substantive law expressed in terms of evidence: Bills and notes: contemporaneous parol condition. 746 | See <i>Tenancy in Common</i> .   |
|   | <b>PARTNERSHIP.</b>  |
|   | <b>Partnership property:</b> Taxation of non-resident partner on his in- |



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

- terest in local partnership property. 90
- PATENTS.**  
**Procedure:** What constitutes an interlocutory decree. 653
- PLEADING.**  
 Amendment from common law action to statutory action after the period of statute of limitations. 294  
 Joinder of principal and willful agent. 525
- POLICE POWER.**  
**Nature and extent:** Extent of state jurisdiction over non-resident corporations and individuals doing business within state. 701-711
- POLITICAL PARTIES.**  
**Jurisdiction of equity:** To restrain acts of party committee. 397
- POWERS.**  
 Specific enforcement of contract to exercise power of appointment. 401
- PRESUMPTIONS.**  
**Existence and effect of presumptions in particular cases:**
- Death after seven years; presumption rebutted by actuarial table. 654.  
 Presumption of divorce from former spouse. 500, 523  
 Presumption that salary paid to a husband for managing wife's separate estate remains in business unless accounted for. 85
- PROCEDURE.**  
 See *Parties; Pleading.*
- PROCESS.**  
 For service on non-resident, see *Conflict of Laws.*  
**Manner and effect of service:**  
 Privilege of non-resident witness from service as officer of corporation. 655
- PROMOTERS.**  
 See under *Corporations.*
- PROXIMATE CAUSE.**  
**Intervening causes:** Intervention of negligent act of third party. 526
- PUBLIC OFFICES.**  
 See under *Mandamus and Quo Warranto.*

## Q

- QUASI CONTRACTS.**  
**Rights arising from mistake of fact:** Recovery for benefits con-

ferred under a contract with an unauthorized agent. 402

## R

- RAILROADS.**  
 See *Interstate Commerce; Carriers.*
- REAL PROPERTY.**  
 See *Accretion; Statute of Frauds; Taxation; Vested, Contingent and Future Interests.*
- RECEIVERS.**  
 Power to appoint a receiver when such appointment is the sole object of the suit. 273, 289
- RENT.**  
 See under *Landlord and Tenant.*
- RES JUDICATA.**  
 See also *Judgments.*  
**Persons concluded:** Judgment of interpleader by garnishee as bar to action by judgment creditor against garnishee. 86  
**What judgments are conclusive:**  
 Judgment on pleading a bar to second prosecution. 400
- RESTRAINT OF TRADE.**  
**Combination by agreements as to product or prices:** How far a basis of illegality. 853-854  
**Contracts not to engage in certain business:** Validity of contract between agent and principal. 751, 770  
**Monopoly:** How far a basis of illegality. 830-834  
 Tests of validity of contract tending toward monopoly. 752, 770  
**"Trusts" and combinations in general:** Combinations of labor: how far illegal. 854-872  
 Good and bad trusts. 830-872  
 How far combination lawful. 834-838  
 Public policy in permitting combination. 838-843  
 Size as an element of illegality. 843-853



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

**Sherman anti-trust law:** Whether combination may be illegal solely on account of size. 843-854

### RESTRICTION AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY.

Accretions to servient tenement under same restriction as tenement itself. 89

Compensation to owner of dominant tenement when servient tenement is taken under eminent domain. 89

### RULE AGAINST PERPETUITIES.

See also *Vested, Contingent and Future Interests*.

Limitation of the rule against a possibility on a possibility. 294

**Interests subject to rule:** Estates expectant upon estates too remote. 770

Rule against limitation to unborn generations in succession. 238-240

Effect of enactment doing away with the rule. 226, 238-240

### RULE IN SHELLEY'S CASE.

Operation of rule on remainder to "issue share and share alike." 195

## S

### SALES.

As to constitutionality of "Bulk Sales" Law, see *Constitutional Law*.

**Rights and remedies of buyers:** Recovery for breach of implied warranty after statute of limitations has run on implied or oral contracts but not on written contracts. 295

**Stoppage in transitu:** Liability of seller for freight after stoppage. 296

**Time of passing of title:** Delivery of separate quantities of fungible goods to agent of two separate buyers. 402

Passage of title to grain lying in a mass. 402

### SERVICE.

See *Conflict of Laws*.

**Manner and effect of service:** Service on non-resident individual doing business within state. 696-702

Service on non-resident unincorporated association doing business within state. 702-711

### SERVITUDES.

See under *Easements*.

### SHERMAN ANTI-TRUST LAW.

Recovery of treble damages against a labor union for violation of a law. 263, 291

### SLANDER.

See *Libel and Slander*.

### SPECIFIC PERFORMANCE.

**Affirmative contracts:** Enforcement of contract to exercise power of appointment. 401

**General nature and scope of equitable relief:** Denial of specific performance of contract to reduce an agreement to writing. 193

Right to relief on oral contract to make a will where promisee is in default. 192

### STATES.

Liability of states for torts committed in the course of public work. 20-38

### STATUTE OF FRAUDS.

**Contracts not to be performed within one year:** Denial of specific performance of contract to reduce an agreement to writing. 193

**Part performance:** Effect of part performance of promise to support in return for promise to devise realty. 192

### STATUTE OF LIMITATIONS.

See also *Limitations of Actions*.

### STATUTES.

See *Death by Wrongful Act*.

**Impeachment of statutes:** Power of administrative board to declare statute unconstitutional. 386, 394

**Interpretation:** Of "added" and "mixed" ingredients within the Pure Food Law. 193

Statutory principles in the common law in Lord Campbell's Act. 742, 771

### STOCK.

See *Corporations; Transfer of Stock*.

### STOCKHOLDERS.

See *Corporations*.



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

## STOPPAGE AND TRANSITU.

See also *Sales*.

## STUDY OF LAW.

Modernization of legal education by addition of five other methods to case system. 812-828

## SURETYSHIP.

**Surety's defenses: miscellaneous:**

Effect of notice by surety that will not remain liable. 494, 526

**Surety's right of exoneration:**

Right of reimbursement of person induced by false representations to become surety; whether affected by discharge in bankruptcy. 184

Whether doctrines of suretyship apply to negotiable instruments.

Under the law merchant. 141-158  
Under the negotiable instruments law. 142-149  
149-158

# T

## TAXATION.

**Federal corporation tax:** Allowance for depreciation caused by mining ore in a leased mine. 526

**General limitations on taxing power:** Constitutional restrictions: validity of income tax on a corporation engaged in export trade. 77, 82

**Interpretation:** Federal corporation tax: allowance for depreciation in leased mining property. 526

**Particular forms of taxation:** Tax on income of person dying before the passage of the law. 193

**Powers of legislature: taxation:** Franchise tax on corporation incorporated in more than one state. 510, 527

**Where property may be taxed:** Franchise tax on corporation incorporated in more than one state. 510, 527

Inheritance tax on non-resident partner's interest in local partnership realty. 90

## TEACHING OF LAW.

See *Study of Law*.

## TELEGRAPH AND TELEPHONE.

**Damages for error, delay or non-delivery:** Measure of damages where telegram formed a completed contract. 90

Recovery for mental anguish due to negligent non-delivery of interstate telegram. 391

## TENANCY IN COMMON.

Discharge of Indorsers.

**Choses in action:** partial assignor and assignee. 646

Effect of partition conveyance by metes and bounds. 403

Right of one co-owner of a copyright

to restrain infringement by the other. 91

## TORTS.

See also *Conflict of Laws; Telegraph and Telephone Companies*.

For Jurisdiction of Interstate Commerce Commission, see *Interstate Commerce*.

**Defenses: Accident.** 326, 327-334, 409-418

Mistake. 326-327

Statutory authority to erect dangerous agency. 377, 404

For torts in particular relations, see *States*.

**Nature of tort liability in general:**

Absolute liability and liability for fault: in what cases each exists. 319-334, 409-418

Validity and wisdom of absolute liability doctrine. 409-416

Suggested changes in the classification of the cases. 241-262, 319-334, 409-420

Definition of the term "tort" and classification of the subject. 241-262, 319-334, 409-420

The term "tort" as at present used. 249-254

Fault as an element in torts: definition of the fault required. 258-262

**Unusual cases of tort liability:**

Child injured by wild animal in public zoo. 270, 294

Recovery by person falling from vestibule of train where he had been seen by the conductor clinging to the hand bars. 289

Destruction of will leaving a legacy to the plaintiff. 527

Trespasser on railway train injured by trespassing wire. 519

## TRADEMARK AND TRADE NAMES.

Protection apart from statute:

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Failure to comply with state statute as bar to relief against unfair competition. 528

### TRADE SECRETS.

List of customers: Use by former employee. 655

### TRADE UNIONS.

See also *Injunctions; Constitutional Law.*

Conspiracy: Recovery of treble damages under Sherman Anti-Trust Law. 263, 297

Statutes and interpretation: Clayton Act: labor provisions. 632

### TRANSFER OF STOCK.

See *Corporations.*

Jurisdiction to determine ownership of stock in foreign corporation. 486, 516

Right of transferee of certificate issued in excess of charter limit of stock. 185

Right of vendor of stock, untransferred on books, to charge broker, acting for and assigning to an undisclosed principal, for calls on stock. 656

### TREASON.

Jurisdiction: punishment for breach of allegiance committed abroad. 194

### TRIAL.

Modes of trial: Proceedings in camera: right of court-martial to hear criminal case in camera. 771

### TRUSTS.

See also *Executors and Administrators.*

Cestui's interest in res: Right of cestui to compel exercise of discretionary power of conversion. 657

Creation of validity: Validity of trust with condition contrary to public policy. 296

Creditor's rights under trust's deed: Trust deed purporting to securing joint rights as security for claims held severally. 524

Following trust property: Recovery of property similar to that wrongfully converted. 80

Powers and obligations of trustees: Obligation to prefer one sort cestuis over another. 657

## U

### UNFAIR COMPETITION.

In general: Failure to comply with state statute as bar to relief against unfair competition. 528

Interference with another's selling system. 166, 195

### UNINCORPORATED GROUPS.

See *Voluntary Associations.*

## V

### VENDOR'S LIEN.

See under *Vendor and Purchaser.*

### VENDOR AND PURCHASER.

Remedies of vendor: Vendor's lien given to beneficiary in contract of sale. 92

### VESTED, CONTINGENT AND FUTURE INTERESTS.

See also *Rule against Perpetuities.*

Contingent remainders: effect of enactment that they take effect as though they were executory devises or springing or shifting uses. 226-240

Limitations of the rule against a possibility on a possibility. 294

### VOLUNTARY ASSOCIATIONS.

Jurisdiction over foreign associations by presence and substituted service. 702-711

Revival of association after incorporation and subsequent dissolution. 657

Trade unions: recovery of treble damages under Sherman Anti-Trust Law against a labor union. 263, 297

Unincorporated associations: legal status in general. 678-686



References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

## W

**WAR.**

- Confiscation of neutral ships for carrying contraband cargo. 497, 529  
 Constitutionality of war emergency legislation. 663-675  
 Enemy property; shipment from enemy country where title passes in transit to neutral consignee. 651

The code of maritime neutrality. 627

**WARRANTY.**

In sales of personal property, see *Sales*.

**WATER AND WATERCOURSES.**

Conveyances and contracts: Conveyance of easement for pipe in return for privilege of using hydrant creating a servitude on the pipe line and water system. 297

**Surface waters:** Liability for accelerating flow by artificial depressions. 404

**WILLS.**

See also *Rule against Perpetuities; Vested, Contingent and Future Interests; Legacies and Devises*.

**Construction:** Application of rule in Shelley's case where remainder is left to "issue, share and share alike." 195

Deduction of extinguished note from legacy under set-off clause. 298

From what time does a will speak? 298

Gift to a class on a contingency: con-

tingency not imported into determination of the class. 772

**Execution:** Attesting witnesses: proof of execution of lost will where attesting witnesses unknown. 773

**Probate:** Effect of probate of will part of which has been maliciously destroyed. 527

Enjoining probate of will made in breach of specifically enforceable contract to devise land. 192

**Revocation:** Irrevocable will. 401

**WITNESSES.**

See also *Evidence*.

**Competency in general:** Competency itself depending on main issue in dispute. 87

Effect in criminal trial in federal courts of former conviction in state courts. 529

**Miscellaneous questions of privilege:** Privilege of non-resident witness from service of process. 655

**Privileges against self-incrimination:** Constitutionality of statute requiring operator of motor car who has injured a person to return to the scene of the accident and disclose his identity. 195

**WORKMEN'S COMPENSATION ACTS.**

See under *Master and Servant*.

## BOOK REVIEWS

|   | PAGE |
|---|------|
| BAR: A History of Continental Criminal Law . . . . .  | 299  |
| BARNEY: Equity and Its Remedies. . . . .  | 407  |
| BEALE: A Treatise on the Conflict of Laws, or Private International Law . . . . .                     | 196  |
| BLACK: A Treatise on the Rescission of Contracts and Cancellation of<br>Written Instruments . . . . . | 300  |
| BONGER: Criminality and Economic Conditions . . . . .   | 405  |
| BROWN: International Realities . . . . .  | 533  |
| CHAPIN: Handbook of the Law of Torts . . . . .  | 778  |
| CLARK: Handbook of the Law of Private Corporations . . . . .  | 532  |
| DAVIS: Elements of International Law . . . . .  | 199  |
| EHRLICH: The Law of Promoters . . . . .   | 302  |
| FEDERAL BUREAU OF CORPORATIONS: Trust Laws and Unfair Competi-<br>tion . . . . .                      | 774  |
| GUTHRIE: Magna Charta and Other Addresses . . . . .   | 302  |
| HALL: Possessory Liens in English Law . . . . .   | 779  |
| HOLLAND: The Elements of Jurisprudence. Twelfth Edition . . . . .                                     | 778  |
| HONNOLD: A Treatise on the American and English Workmen's Com-<br>pensation Laws . . . . .            | 530  |
| JONES: Telegraph and Telephone Companies. Second Edition . . . . .                                    | 776  |
| JUDSON: The Law of Interstate Commerce and its Federal Regulation . . . . .                           | 773  |
| MILLER: American Debate . . . . .   | 662  |
| MODERN LEGAL PHILOSOPHY SERIES. Volume VII: Modern French<br>Legal Philosophy . . . . .               | 92   |
| MUNICIPAL COURT OF CHICAGO. Eighth and Ninth Annual Reports . . . . .                                 | 95   |
| ODENCRANTZ AND POTTER: Industrial Conditions in Springfield, Illinois . . . . .                       | 95   |
| ROSCOE: Lord Stowell and the Development of English Prize Law . . . . .                               | 660  |
| STOWELL AND MUNRO: International Cases, Arbitrations and Incidents . . . . .                          | 658  |
| THURSTON: Cases in Quasi Contract . . . . .   | 661  |
| TUCKER: Woman's Suffrage by Constitutional Amendment . . . . .  | 406  |
| VISSCHER: Belgium's Case: A Judicial Enquiry . . . . .  | 531  |
| VOORHEES: The Law of the Public School System of the United States . . . . .                          | 200  |
| WARREN: Select Cases and Other Authorities on the Law of Wills and<br>Administration . . . . .        | 776  |
| WATKINS: Shippers and Carriers of Interstate and Intrastate Freight. . . . .                          | 200  |
| WAXWEILER: Belgium and the Great Powers: Her Neutrality Explained<br>and Vindicated . . . . .         | 531  |



## TABLE OF CASES

References in heavy-faced type are to NOTES; all others are to RECENT CASES. Citations to decisions which were noticed before their appearance in any regular report have been supplied wherever possible.

|  | PAGE             |   | PAGE             |
|--|------------------|---|------------------|
| Abernethy, Louisville & Nashville R. Co. v. . . . .      | 525              | Bordwell v. Williams . . . . .                                      | <b>265</b>       |
| Abrahams v. Saunders . . . . .                           | <b>372</b>       | Borwick's Settlement, <i>Re</i> . . . . .                           | 296              |
| Admiralty Commissioners v. S. S. Amerika . . . . .       | <b>742</b> , 771 | Brady v. Anderson . . . . .   | 193              |
| Aerated Bread Co., Haigh v. . . . .                      | 193              | Brann, <i>In re</i> . . . . .                                       | 523              |
| Alabama Fidelity, etc. Co. v. Dubberly . . . . .         | 761              | Brant, Whitcomb v. . . . .  | 766              |
| Alexander v. Standard Oil Co. . . . .                    | 528              | Bridgewater v. Ocean City Ass'n . . . . .                           | 89               |
| American Laundry Co. v. E. & W. Dry-Cleaning Co. . . . . | <b>752</b> , 770 | British Union & National Ins. Co. v. Ranson . . . . .               | 286              |
| Anaheim Sugar Co., T. W. Jenkins & Co. . . . .           | 517              | Brosemer v. Brosemer . . . . .                                      | 759              |
| Anderson, Brady v. . . . .                               | 193              | Brown, Durand v. . . . .  | <b>503</b> , 518 |
| Anderson v. Stayton State Bank (159 Pac. 1033) . . . . . | <b>619</b> , 644 | Buffalo Gas Co., Wozneak v. . . . .                                 | 523              |
| Appam, The . . . . .                                     | <b>161</b> , 182 | Bullen v. O'Leary . . . . .   | 195              |
| Arbuckle's Estate, <i>In re</i> . . . . .                | 90               | Bunze, Inverkip Steamship Co. v. . . . .                            | 647              |
| Ardtully Copper Mines, Ltd., <i>In re</i> The . . . . .  | 191              | Burson Knitting Co. v. C. M. & St. P. Ry. Co. . . . .               | 652              |
| Arnold's Estate . . . . .                                | 290              | California Development Co., The, Jones v. . . . .                   | 404              |
| Arnson, Stromberg Motor Co. v. . . . .                   | 653              | Cameron, Malaney v. . . . .   | 642              |
| Aspinwall v. Aspinwall . . . . .                         | 390              | Caminetti v. United States (37 Sup. Ct. 192) . . . . .              | <b>491</b>       |
| Atchison, etc. R. Co., Edmunds v. . . . .                | 764              | Camp, Martin v. (114 N. E. 1072) . . . . .                          | 183              |
| Atchison, etc. R. Co., Fennell v. . . . .                | 81               | Campbell v. Hunt . . . . .  | 767              |
| Atchison, etc. Ry. Co., Roebuck v. . . . .               | 768              | Capital Trust Co., Great Northern Ry. Co. v. . . . .                | 396              |
| Avery, <i>Ex parte</i> . . . . .                         | 285              | Card v. Stowers Pork Packing & Provision Co. . . . .                | 294              |
| Babbitt v. Read . . . . .                                | 395              | Carey, Fisher v. . . . .  | 182              |
| Bailey, Dulin v. . . . .                                 | 527              | Cargo Fleet Iron Co., Booth Steamship Co. v. . . . .                | 296              |
| Baker v. Baker, Eccles & Co. (37 Sup. Ct. 152) . . . . . | <b>486</b> , 516 | Carpenter, Mallette v. . . . .                                      | 522              |
| Bank of Covington, Georgia Realty Co. v. . . . .         | 769              | Carvill v. Mirror Films, Inc. (163 N. Y. Supp. 268) . . . . .       | 646              |
| Barrett, D'Utassy v. . . . .                             | 645              | Casement, Rex v. . . . .  | 194              |
| Beaham, New York, etc. R. Co. v. . . . .                 | 650              | Catlin v. Union Oil Co. of California . . . . .                     | 526              |
| Bee Publishing Co., Howell v. . . . .                    | <b>172</b> , 188 | Central of Georgia Ry. Co. v. Jones . . . . .                       | 88               |
| Bogni v. Perotti . . . . .                               | <b>75</b> , 85   | Cescinsky v. Routledge & Sons, Ltd. . . . .                         | 91               |
| Booth Steamship Co. v. Cargo Fleet Iron Co. . . . .      | 296              | Charleston & Norfolk S. S. Co. v. Chesapeake & Ohio Ry. Co. . . . . | 190              |

|   | PAGE     |   | PAGE     |
|---|----------|---|----------|
| Charteris, <i>Re</i> . . . . .  | 657      | Dunfee, In the matter of (56 N. Y. L. J. 287) . . . . .                           | 184      |
| Chesapeake & Ohio Ry. Co., Charleston & Norfolk S. S. Co. . . . .                 | 190      | Dunlevy, N. Y. Life Ins. Co. v. . . . .   | 86       |
| Chicago, M. & St. P. Ry. Co., Burson Knitting Co. v. . . . .                      | 652      | Durand v. Brown . . . . .   | 503, 518 |
| Chicago & Northwestern Ry. Co., Healy & Towle v. . . . .                          | 749      | Durham Traction Co., Ferrell v. . . . .   | 519      |
| Christy, Shearer v. . . . .   | 767      | D'Utassy v. Barrett . . . . .   | 645      |
| City of Bradford Gas & Power Co., Clark v. . . . .                                | 193      | E. & W. Dry Cleaning Co., American Laundry Co. v. . . . .                         | 752, 770 |
| City of New York, Hellinger v. . . . .  | 88       | Earls, Lenox v. . . . .   | 92       |
| City of Pittsburg, Iron City Automobile Co. v. . . . .                            | 187      | Edmunds v. Atchison, etc. Ry. Co. . . . .   | 764      |
| City of Superior v. Northwestern Fuel Co. . . . .                                 | 769      | Eisen Co., Stone v. . . . .   | 389      |
| City of Wichita, Hibbard v. . . . .   | 270, 294 | Elliott v. C. P. Roberts & Co. . . . .  | 186      |
| Clark v. City of Bradford Gas & Power Co. . . . .                                 | 193      | Emerson, Sweetser v. (236 Fed. 161) . . . . .                                     | 176, 191 |
| Clark, James, Distilling Co. v. Western, etc. Ry. Co. (37 Sup. Ct. 180) . . . . . | 491      | Empire Trust Co. v. Manhattan Co. . . . .   | 515      |
| Cleveland Ry. Co., Ward v. . . . .  | 89       | Everest v. Gault Lumber Co. . . . .   | 293      |
| Cleveland Short Line Ry. Co., Doan v. . . . .                                     | 89       | Eyre, <i>In re</i> . . . . .  | 766      |
| Cohn, Kantor v. . . . .   | 647      | Farmers' Loan & Trust Co. v. Mortimer . . . . .                                   | 401      |
| Commonwealth Cotton Oil Co. v. Hudson . . . . .                                   | 655      | Fennell v. Atchison, Topeka & Santa Fe R. Co. . . . .                             | 81       |
| Continental Building & Loan Association, Merchants National Bank v. . . . .       | 285      | Ferrell v. Durham Traction Co. First National Bank of Seattle v. Gidden . . . . . | 519      |
| Continental Coal Corporation, Roszell Bros. v. (235 Fed. 343) . . . . .           | 640      | Fisher v. Carey . . . . .   | 514      |
| Continental Tyre & Rubber Co., Daimler v. . . . .                                 | 83       | Fisher v. Poling . . . . .  | 182      |
| Cress, United States v. . . . .   | 764      | Flynn v. New York, Westchester & Boston Ry. Co. . . . .                           | 85       |
| Crowley v. State . . . . .  | 287      | Forty Barrels of Coca Cola, United States v. . . . .                              | 89       |
| Curran, <i>In re</i> James P. . . . .   | 84       | Fowler v. Fowler . . . . .  | 193      |
| Daimler v. Continental Tyre & Rubber Co. . . . .                                  | 83       | Fullarton v. North Melbourne Electric Tramways & Lighting Co., Ltd. . . . .       | 518      |
| Davis, Hildebrant, State of Ohio <i>ex rel.</i> , v. . . . .                      | 184      | Garnham, <i>In re</i> . . . . .   | 377, 404 |
| Delaware & Hudson Co., Grocz v. . . . .   | 397      | Garrett v. Garrett . . . . .  | 294      |
| Denny v. Skelton . . . . .  | 402      | Gault Lumber Co., Everest v. . . . .  | 520      |
| Director of Posts v. Inchausti & Co. . . . .                                      | 386, 394 | Gelston, Powell v. . . . .  | 293      |
| Doan v. Cleveland Short Line Ry. Co. . . . .                                      | 89       | General Film Co. of Maine, General Film Co. of Missouri v. . . . .                | 291      |
| Doan v. Jones . . . . .   | 657      | General Film Co. of Missouri v. General Film Co. of Maine . . . . .               | 528      |
| Dowd v. United Mine Workers of America . . . . .                                  | 263, 297 | Georgia Realty Co. v. Bank of Covington . . . . .                                 | 528      |
| Dubberly, Alabama Fidelity, etc. Co. v. . . . .                                   | 761      | Gidden, First National Bank of Seattle v. . . . .                                 | 769      |
| Duel v. Hollins . . . . .   | 80       | Gilmore v. Waples . . . . .   | 514      |
| Dulin v. Bailey . . . . .   | 527      | Ginther v. Ginther . . . . .  | 397      |
|   |          | Goldschmidt v. Sachs . . . . .  | 292      |
|   |          |   | 655      |



|  | PAGE     |   | PAGE     |
|--|----------|---|----------|
| Gooch v. Gooch . . . . .   | 515      | Jeffery v. Selwyn . . . . .   | 763      |
| Goods of Thomas Rowe, The<br>(56 N. Y. L. J. 1669, Surro-<br>gate's Ct.) . . . . . | 654      | Jenkins v. Mollenhauer . . . . .  | 288      |
| Gordon, United States <i>ex rel.</i><br>Marshall v. . . . .                        | 384, 395 | Jenkins, T. W., & Co. v. Ana-<br>heim Sugar Co. . . . .                           | 517      |
| Governor of Lewes Prison, King<br>v. . . . .                                       | 771      | Johnston, O'Hare v. . . . .   | 272      |
| Grand Lodge A. O. U. W.,<br>Sharpless v. . . . .                                   | 622, 651 | Jones v. California Development<br>Co. . . . .                                    | 404      |
| Great Northern Ry. Co. v. Capi-<br>tal Trust Co. . . . .                           | 396      | Jones, Central of Georgia Ry.<br>Co. v. . . . .                                   | 88       |
| Groc v. Delaware & Hudson Co. .  | 397      | Jones, Doan v. . . . .  | 657      |
| Guaranty Trust Co. v. Kron-<br>prinzessin Cecelie (238 Fed.<br>668) . . . . .      | 516      | Jones v. Jones . . . . .  | 190      |
| Haigh v. Aerated Bread Com-<br>pany . . . . .                                      | 193      | Jones v. Register & Leader Co. .  | 80       |
| Hakan, The . . . . .   | 497, 529 | Kansas City v. Pengilly . . . .   | 394      |
| Harper Bros. v. Klaw . . . . .   | 83       | Kansas City, M. & B. R. Co. v.<br>Stiles . . . . .                                | 510, 527 |
| Hauge, Torgerson v. . . . .  | 192      | Kantor v. Cohn . . . . .  | 647      |
| Hayes v. Sampsell . . . . .  | 286      | Kaufman v. Kaufman . . . . .  | 82       |
| Haynes, Provident Gold Min-<br>ing Co. v. . . . .                                  | 393      | Kavanaugh, McIntyre v. . . . .  | 643      |
| Healy & Towle v. Chicago &<br>Northwestern Ry. Co. . . . .                         | 749      | Kelly, United States v. . . . .   | 764      |
| Hellinger v. City of New York .  | 88       | Kemmerer v. Midland Oil &<br>Drilling Co. . . . .                                 | 84       |
| Hewerdine, <i>In re</i> Walker, Dun-<br>kerly v. . . . .                           | 772      | Kennedy, McCook v. . . . .  | 524      |
| Hibbard v. City of Wichita . . .   | 270, 294 | Kilbourne & Clark Mfg. Co.,<br>Marconi Wireless Tel. Co. v. .                     | 398      |
| Highland Park Mfg. Co. v.<br>Steele . . . . .                                      | 403      | King v. Governor of Lewes Prison  | 771      |
| Hildebrant, State of Ohio <i>ex rel.</i><br>Davis v. . . . .                       | 184      | Klaw, Harper Bros. v. . . . .   | 83       |
| Hocking Valley Ry. Co., Swift<br>& Co. v. (37 Sup. Ct. 287) . . .                  | 756, 765 | Klein v. Maravelas . . . . .  | 517      |
| Hodges v. Hodges . . . . .   | 283, 289 | Koettgen, State v. . . . .  | 519      |
| Hollins, Duel v. . . . .   | 80       | Kronprinzessin Cecelie, Guar-<br>anty Trust Co. v. (238 Fed.<br>668) . . . . .    | 516      |
| Homer, <i>In re</i> . . . . .  | 652      | Kropp, St. Nicholas Church v. .   | 637, 649 |
| Howell v. Bee Publishing Co. . .   | 172, 188 | Kouchakji, Taylor v. . . . .  | 390      |
| Hudson, Commonwealth Cotton<br>Oil Co. v. . . . .                                  | 655      | Laird v. State . . . . .  | 87       |
| Hughes v. Samuels Bros. . . . .  | 292      | Lally, New York Towel Co.,<br>Inc., v. . . . .                                    | 655      |
| Hughson's Estate, <i>In re</i> . . . .   | 500, 523 | Lampton, McIlhenny v. . . . .   | 762      |
| Hunt, Campbell v. . . . .  | 767      | Lehigh Valley R. v. United<br>States . . . . .                                    | 290      |
| Inchausti & Co., Director of<br>Posts v. . . . .                                   | 386, 394 | Leiston Gas Co. v. Leiston-cum-<br>Sizewell Urban District Coun-<br>cil . . . . . | 185      |
| International Ry. Co. v. United<br>States . . . . .                                | 765      | Leiston-cum-Sizewell Urban<br>District Council, Leiston Gas<br>Co. v. . . . .     | 185      |
| Inverkip Steamship Co. v. Bunze  | 647      | Lenox v. Earls . . . . .  | 92       |
| Iron City Automobile Co. v. City<br>of Pittsburg . . . . .                         | 187      | Lloyd v. North British & Mer-<br>cantile Ins. Co. . . . .                         | 399      |
|  |          | Loewe, Savings Bank of Dan-<br>bury v. (37 Sup. Ct. 172) . . .                    | 513      |
|  |          | Long, Southwestern Tel. & Tel.<br>Co. v. . . . .                                  | 87       |
|  |          | Loomis, Pierce v. . . . .   | 298      |

|  | PAGE     |   | PAGE     |
|--|----------|---|----------|
| Louisville, etc. R. Co. v. Ohio Valley Tie Co. . . . .                       | 400      | New York, Westchester & Boston Ry. Co., Flynn v. . . . .                      | 89       |
| Louisville & Nashville R. Co. v. Abernethy . . . . .                         | 525      | New York, etc. R. Co. v. Beaham . . . . .                                     | 650      |
| Louisville & Nashville R. Co. v. Marlin . . . . .                            | 81       | Nizolte, Ricketson v. . . . .   | 494, 526 |
| Lowe, Peck & Co. v. (234 Fed. 125) . . . . .                                 | 77, 82   | North British & Mercantile Ins. Co., Lloyd v. . . . .                         | 399      |
| Lowe v. R. P. K. Pressed Metal Co. . . . .                                   | 393      | North Melbourne Electric Tramways & Lighting Co., Ltd., Fullarton v. . . . .  | 377, 404 |
| Ludtke v. Smith . . . . .  | 80       | Northwestern Fuel Co., City of Superior v. . . . .                            | 769      |
| Mabee, McDonald v. . . . .   | 761      | Ocampo, In the matter of Alfred . . . . .                                     | 653      |
| Malaney v. Cameron . . . . .   | 642      | Ocean City Ass'n, Bridgewater v. . . . .                                      | 89       |
| Mallette v. Carpenter . . . . .  | 522      | O'Hare v. Johnston . . . . .  | 372      |
| Manhattan Co., Empire Trust Co. v. . . . .                                   | 515      | Ohio Valley Tie Co., Louisville, etc. R. Co. v. . . . .                       | 400      |
| Maracaibo, The . . . . .   | 497, 529 | O'Leary, Bullen v. . . . .  | 195      |
| Maravelas, Klein v. . . . .  | 517      | Oppenheimer, United States v. (37 Sup. Ct. 68) . . . . .                      | 400      |
| Marconi Wireless Tel. Co. v. Kilbourne & Clark Mfg. Co. . . . .              | 398      | "Our Dogs" Publishing Co., Sports & General Press Agency v. . . . .           | 521      |
| Marlin, Louisville & Nashville R. Co. v. . . . .                             | 81       | Palm Branch, The . . . . .  | 389      |
| Marshall, Gordon, United States ex rel., v. . . . .                          | 384, 395 | Palmieri, In re . . . . .   | 642      |
| Martin v. Camp (114 N. E. 1072) . . . . .                                    | 183      | Peck & Co. v. Lowe (234 Fed. 125) . . . . .                                   | 77, 82   |
| Mason, Re Estate of Maude . . . . .  | 622, 647 | Pengilly, Kansas City v. . . . .  | 394      |
| Mayer, Rosen v. (113 N. E. 217) . . . . .                                    | 188      | Pennsylvania R. Co., United States v. (37 Sup. Ct. 95) . . . . .              | 381, 399 |
| McAllister's Estate, In re . . . . .   | 649      | People v. Steeplechase Park Co. . . . .                                       | 171      |
| McCook v. Kennedy . . . . .  | 524      | Perotti, Bogni v. . . . .   | 75, 85   |
| McDonald v. Mabee . . . . .  | 761      | Phibbs, In re Estate of . . . . .   | 773      |
| McIlhenny v. Lampton . . . . .   | 762      | Pierce v. Loomis . . . . .  | 298      |
| McIntyre v. Kavanaugh . . . . .  | 643      | Poling, Fisher v. . . . .   | 85       |
| McMichaels v. Reece . . . . .  | 650      | Portuguese-American Bank of San Francisco v. Welles (37 Sup. Ct. 3) . . . . . | 287      |
| McQueen's Will, In re . . . . .  | 770      | Powell v. Gelston . . . . .   | 291      |
| Meccano, Ltd. v. Wagner . . . . .  | 166, 195 | Provident Gold Mining Co. v. Haynes . . . . .                                 | 393      |
| Merchants National Bank v. Continental Building & Loan Association . . . . . | 285      | R. P. K. Pressed Metal Co., Lowe v. . . . .                                   | 393      |
| Midland Oil & Drilling Co. Kemmerer v. . . . .                               | 84       | Ramsey, Simms v. . . . .  | 524      |
| Mims, Supreme Lodge, Knights of Pythias v. (241 U. S. 574) . . . . .         | 85       | Ranson, British Union & National Ins. Co. v. . . . .                          | 286      |
| Minor Films, Inc., Carvill v. (163 N. Y. Supp. 268) . . . . .                | 646      | Read, Babbitt v. . . . .  | 395      |
| Mollenhauer, Jenkins v. . . . .  | 288      | Real Estate Owners, etc. Ass'n, In re . . . . .                               | 763      |
| Mortimer, Farmers' Loan & Trust Co. v. . . . .                               | 401      | Reece, McMichaels v. . . . .  | 650      |
| National Life & Accident Ins. Co., Scales v. . . . .                         | 189      | Register & Leader Co., Jones v. . . . .                                       | 80       |
| New, Wilson v. (37 Sup. Ct. 298) . . . . .                                   | 739      |   |          |
| New York Life Ins. Co. v. Dunlevy . . . . .                                  | 86       |   |          |
| New York Towel Supply Co., Inc. v. Lally . . . . .                           | 655      |   |          |



|   | PAGE        |  | PAGE       |
|---|-------------|--|------------|
| Reopening Fourth Section Ap-<br>plications, In the matter of                  | 276,<br>291 | Smith, Watson v. . . . .   | 298        |
| Rex v. Casement . . . . .   | 194         | Smith, Western Union Tel. Co.<br>v. . . . .  | 391        |
| Richards v. Robin . . . . .   | 656         | Smith v. Worcester, etc. Ry. Co.   | 185        |
| Ricketson v. Nizolte . . . . .  | 494, 526    | Solis, In the matter of Marcus<br>Southern Pacific Co. v. Spring<br>Valley Water Co. . . . . | 653<br>297 |
| Roberts, C. P., & Co., Elliott v.   | 186         | Southern Power Co., John A.<br>Roebing's Sons Co. v. . . . .                                 | 295        |
| Robin, Richards v. . . . .  | 656         | Southern Ry. Co. v. Sewell . . . .   | 289        |
| Robinson v. Roe . . . . .   | 644         | Southwestern Tel. & Tel. Co. v.<br>Long . . . . .  | 87         |
| Roe, Robinson v. . . . .  | 644         | Sports & General Press Agency<br>v. "Our Dogs" Publishing<br>Co. . . . .                     | 521        |
| Roebing's, John A., Sons Co.<br>v. Southern Power Co. . . . .                 | 295         | Spring Valley Water Co., South-<br>ern Pacific Co. v. . . . .                                | 297        |
| Roebuck v. Atchison, etc. Ry.<br>Co. . . . .                                  | 768         | Standard Oil Co., Alexander v.   | 528        |
| Rosen v. Mayer (113 N. E. 217)  | 188         | Stanley's Settlement, <i>In re</i> . . . .   | 187        |
| Rosen v. United States (237 Fed.<br>810) . . . . .                            | 529         | State, Crowley v. . . . .  | 287        |
| Roszell Bros. v. Continental<br>Coal Corporation (235 Fed.<br>343) . . . . .  | 640         | State v. Koettgen . . . . .  | 519        |
| Routledge & Sons, Ltd., Cescin-<br>sky v. . . . .                             | 91          | State, Laird v. . . . .  | 87         |
| Rutland R. Co., Underhill v. . .  | 402         | State v. Sterrin . . . . .   | 195        |
| Sachs, Goldschmidt v. . . . .   | 655         | State of Ohio <i>ex rel.</i> Davis v.<br>Hildebrant . . . . .                                | 184        |
| Sachs, Schriener v. . . . .   | 657         | Stayton State Bank, Anderson<br>v. (159 Pac. 1033) . . . . .                                 | 619, 644   |
| St. Mary's Milling Co. v. Town<br>of St. Mary's . . . . .                     | 648         | S. S. Amerika, Admiralty Com-<br>missioners v. . . . .                                       | 742, 771   |
| St. Nicholas Church v. Kropp  | 637,<br>649 | Steele, Highland Park Mfg. Co.<br>v. . . . .   | 403        |
| Sampsell, Hayes v. . . . .  | 286         | Steeplechase Park Co., People<br>v. . . . .  | 171        |
| Samuels, Matter of . . . . .  | 644         | Sterrin, State v. . . . .  | 195        |
| Samuels Bros., Hughes v. . . .  | 292         | Stiles, Kansas City, M. & B. R.<br>Co. v. . . . .  | 510, 527   |
| Sargent Land Co., Von Baum-<br>bach v. (37 Sup. Ct. 201) . . . .              | 526         | Stone v. Eisen Co. . . . .   | 389        |
| Saunders, Abrahams v. . . . .   | 372         | Stowers Pork Packing & Provi-<br>sion Co., Card v. . . . .                                   | 294        |
| Savings Bank of Danbury v.<br>Loewe (37 Sup. Ct. 172) . . . .                 | 513         | Stromberg Motor Co. v. Arnson . .  | 653        |
| Scales v. Nat. Life & Accident<br>Ins. Co. . . . .                            | 189         | Sullivan v. Shea . . . . .   | 760        |
| Schriener v. Sachs . . . . .  | 657         | Supreme Lodge, Knights of Py-<br>thias v. Mims (241 U. S. 574) . .                           | 85         |
| Selwyn, Jeffery v. . . . .  | 763         | Sweetser v. Emerson (236 Fed.<br>161) . . . . .  | 176, 191   |
| Sewell, Southern Ry. Co. v. . . .   | 289         | Swift & Co. v. Hocking Valley<br>Ry. Co. (37 Sup. Ct. 287) . . . .                           | 756, 765   |
| Sharpless v. Grand Lodge A. O.<br>U. W. . . . .                               | 622, 657    | Taylor v. Konchakji (56 N. Y.<br>L. J. 813) . . . . .  | 390        |
| Shaul v. Shaul . . . . .  | 508         | Thompson's Receivership . . . .  | 273, 289   |
| Shea, Sullivan v. . . . .   | 760         | Tippin v. Western Union Tel.<br>Co. . . . .  | 90         |
| Shearer v. Christy . . . . .  | 767         | Torgerson v. Hauge . . . . .   | 192        |
| Sherman Nat. Bank v. Shubert<br>Theatrical Co. (238 Fed. 225)                 | 521         | Town of St. Mary's, St. Mary's<br>Milling Co. v. . . . .                                     | 648        |
| Shubert Theatrical Co., Sher-<br>man Nat. Bank v. (238 Fed.<br>225) . . . . . | 521         |  |            |
| Simms v. Ramsey . . . . .   | 524         |  |            |
| Skelton, Denny v. . . . .   | 402         |  |            |
| Smith, Ludtke v. . . . .  | 80          |  |            |

|   | PAGE     |  | PAGE       |
|---|----------|--|------------|
| Underhill v. Rutland R. Co. . . . .   | 402      | Wagner, Meccano, Ltd. v. . . . .   | 166, 195   |
| Union Oil Co. of California,<br>Catlin v. . . . .                               | 526      | Walker, Dunkerly, <i>In re</i> , v. Hew-<br>erdine . . . . .                           | 772        |
| United Mine Workers of Amer-<br>ica, Dowd v. . . . .                            | 263, 297 | Waples, Gilmore v. . . . .   | 397        |
| United States, The . . . . .  | 651      | Ward v. Cleveland Ry. Co. . . . .  | 89         |
| United States v. Cress . . . . .  | 764      | Watson v. Smith . . . . .  | 298        |
| United States, Caminetti v.<br>(37 Sup. Ct. 192) . . . . .                      | 491      | Welles, Portuguese-American<br>Bank of San Francisco v. (37<br>Sup. Ct. 3) . . . . .   | 287        |
| United States v. Forty Barrels<br>of Coca Cola . . . . .                        | 193      | Western, etc. Ry. Co., James<br>Clark Distilling Co. v. (37<br>Sup. Ct. 180) . . . . . | 491        |
| United States, International Ry.<br>Co. v. . . . .                              | 765      | Western Union Tel. Co. v. Smith<br>Western Union Tel. Co., Tippin<br>v. . . . .        | 391<br>90  |
| United States v. Kelly . . . . .  | 764      | Whitcomb v. Brant . . . . .  | 766        |
| United States, Lehigh Valley R.<br>v. . . . .                                   | 290      | Williams, Bordwell v. . . . .  | 265        |
| United States <i>ex rel.</i> Marshall<br>v. Gordon . . . . .                    | 384, 395 | Wilson v. New (37 Sup. Ct. 298)<br>Worcester, etc. Ry. Co., Smith<br>v. . . . .        | 739<br>185 |
| United States v. Oppenheimer<br>(37 Sup. Ct. 68) . . . . .                      | 400      | Wozneak v. Buffalo Gas Co. . . . .   | 523        |
| United States v. Pennsylvania R.<br>Co. (37 Sup. Ct. 95) . . . . .              | 381, 399 | Yazoo & M. V. R. Co. v. Zemur-<br>ray . . . . .  | 760        |
| United States, Petitioner, <i>Ex</i><br><i>parte</i> (37 Sup. Ct. 72) . . . . . | 369, 396 | Zamora, The . . . . .  | 66, 86     |
| United States, Rosen v. (237 Fed.<br>810) . . . . .                             | 529      | Zemurray, Yazoo & M. V. R.<br>R. Co. v. . . . .  | 760        |
| Von Baumbach v. Sargent Land<br>Co. (37 Sup. Ct. 201) . . . . .                 | 526      | Ziegler, <i>In re</i> . . . . .  | 189        |





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## ENGLISH CIVIL LAW \*

### I

A WRITER who, at the present day, should venture to offer any remarks of a general nature on English Law might well be asked to show his credentials. It may, accordingly, be mentioned, that the writer of these articles has, during the past thirteen years, been engaged, in happy conjunction with four of his former colleagues of the Oxford Law School, in a thorough and systematic examination of the whole body of the civil law of England — *i. e.*, the law governing the relations of English citizens with one another. Further, not only have he and they searched the evidence, but they have bound themselves to state the result in its most compact and logical form — a task which has involved the keenest and most thorough discussion of disputed points, and an elaborate winnowing of the chaff from the grain. And, whilst it would be claiming too much to allege that each one of the 2200 and odd paragraphs of the Digest of English Civil Law<sup>1</sup> represents the individual opinion of all the five authors of that work (such a claim would, in effect, be its own condemnation), it is true

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<sup>1</sup> DIGEST OF ENGLISH CIVIL LAW. By Edward Jenks (editor), W. M. Geldart, W. S. Holdsworth, R. W. Lee, and J. C. Miles. (Boston, U. S. A.; Boston Book Co., London (England); Butterworth & Co. 1905-16.) Referred to in these pages as the 'Digest.'



to say, that no one of these paragraphs has appeared in print without being subject to the scrutiny of at least three critics, whose criticism was none the less keen that it was entirely friendly. At least the writer of these pages, upon whom, as editor of the work, the shafts of criticism most fiercely fell, will hardly forget, whilst life lasts, the long arguments, sometimes prolonged almost to the point of physical exhaustion, which heralded the birth of some of the most contentious paragraphs of the Digest.

The writer and his colleagues would fain hope that this work, though it cannot claim the full tale of Fortescue's *viginti annorum lucubrationes*, may be of some use to the students and practitioners of English Law, and fill an unique, if modest, niche in the temple of legal literature. At any rate, it seems not unfair to claim that its editor, under whose hands the image slowly grew, must have made some close acquaintance with the materials of which it is carved.

The very fact that such a task has been accomplished, even with moderate success,<sup>2</sup> would seem to be in itself of some importance as a refutation of the obscurantist theory, at one time widely prevalent, that English Law (or at least much of it) is incapable of being stated in the form of simple rules or principles. The advocates of this view would appear to have been blind to the grave imputation which it cast upon a system which they profess to admire; but it is not improbable that their attitude, in so far as it was not the result of mere conservative prejudice, was due to an imperfect apprehension of the difference between a Digest and a Code. The terms are, no doubt, used inconsistently by jurists; but, whatever the terms used, there is a clear distinction between a Code which professes to provide for all possible cases, and a Digest which merely professes to state in orderly form authoritative rules of law. That English Law is yet ripe, or ever will be, for codification in the sense above defined, may well be doubted; certainly the writer is not prepared to discuss here the wisdom of proposals for codification. But, as the success of the Sale of Goods Act, the Bills of Exchange

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<sup>2</sup> The authors of the DIGEST may fairly pride themselves upon the fact that, in the eleven years during which the work has been in the press, no mistake of any importance has been discovered in the text. One or two omissions have been detected; and a certain number of changes in the law have been made while the work has been in progress. These have been duly noted in the *Errata* and *Corrigenda* of later volumes, and will be incorporated into the reissue of the completed work.

Act, and the Partnership Act, has shown, the rich materials of English Law may with advantage be moulded into accessible and logical form. And, though the writer believes that he is speaking for his colleagues as well as for himself in disclaiming any comparison with those triumphs of the draftsman's art, he ventures to think that the *Digest of English Civil Law* has shown that the process may be extended a good deal further than it has at present gone.

Another of the obvious lessons learned (or confirmed) from the thirteen years of hard labour which have gone to the making of the Digest, is a realization of the extraordinary inequalities which mark the different parts of the civil law of England. The English Law of Contract, for example, is scientific and complete; it assumed scientific form at a happy time, just when the genius of Lord Mansfield had incorporated the Law Merchant (surely a priceless adoption) into English Law. Had the structure been earlier framed, it might well have been cramped and inelastic; the archaic 'special contracts' which survive alongside the innominate contracts of modern business, and stand in such puzzling relationship to the general theory of contract,<sup>3</sup> are warnings of what might have happened. But they have had their uses in building up a scientific theory, though as models they 'leave to be desired.' A friendly reviewer of the second volume of the Digest expended a certain amount of genial 'chaff' upon a sentence in the Preface to that volume, which spoke of Gaming Contracts as 'social relationships regulated by law'; but the writer of the Preface is wholly unrepentant, for he believes that the primitive and deep-seated gambling instinct of the English race has played no small part in the evolution of the peculiarly English institution of the simple contract, and that the hundreds of lost and forgotten dice recovered from the ancient floor of the Middle Temple Hall may have had a closer connection with the theory of contract than has hitherto been guessed. Still, he would not deny, that the somewhat arbitrary rules which govern the Special Contracts dealt with in the third volume of the Digest, were well superseded by the simpler rules which now apply to innominate contracts.

The English Law of Property, though different in many ways from the Law of Contract, resembles it in fullness and minuteness.

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<sup>3</sup> The true relationship of these two parts of the Law of Contract has been suggested in the Preface to Vol. III of the DIGEST.



In fact, so minute is it, that it not only provides two sets of rules, the one dealing with land, the other with movables;<sup>4</sup> but in one corner of its field of operations it actually provides three alternative sets of rules for a single process, varying with the hands to which that process is entrusted. Thus, if an insolvent estate is administered by executors out of Court (surely a rash proceeding!), the old rules of equity, as they stood at the passing of the Judicature Acts, govern the case. If the estate is being administered by the Chancery Division, these rules are modified by such (but only such) of the bankruptcy rules as are incorporated into that administration by section 10 of the Judicature Act, 1875. If the proceedings are in the bankruptcy jurisdiction, all the bankruptcy rules (with slight modifications) apply. Surely this is excess of zeal.

But if in some directions the English Law of Property is minute and detailed, in others it is extraordinarily incomplete. Thus, while it is possible to state with reasonable precision most of the rules of Real Property Law, yet, for want of an authoritative background, these rules must inevitably appear, to a student unacquainted with the history and the atmosphere of the system, arbitrary to the last degree. The author of Book III of the Digest has endeavoured to state, in the first Title of that Book, the fundamental principles upon which these rules are based; but, like Mr. William Lloyd Garrison's coloured interviewer, and for similar reasons, he will not attempt to disguise from his readers the fact that he has been obliged to supplement his text with a strictly unpermissible buttress of notes, and that, even with such assistance, he has laid himself open to the criticism of a learned friend, who observed that the Book was sadly oblivious of the 'mystery of seisin.'

As for property in movables, the English system has frankly given up in despair any attempt to formulate scientific rules on that subject, and has, substantially speaking, contented itself with dealing only with possession. Analytical jurists, who are seldom less convincing than when they venture to draw conclusions from that history which they ostentatiously profess to despise, have, it

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<sup>4</sup> The narrowness of the territory common to both subjects may be realized from a glance at the scanty proportions of Bk. III, Sect. XV, of the DIGEST. But a certain allowance should be made for testamentary disposition.

is believed, claimed this fact as a proof of the very debatable proposition, that property is the outcome of possession ripened by length of time and legal protection. To the writer, this doctrine appears to be, not only anarchical, and even immoral, but opposed to the well-known facts of English legal history. Surely the Writ of Right, and even the Grand Assize, are older than the Possessory Assizes and the Writ of Trespass; and, though the common law doctrine of larceny was based upon trespass, there is no evidence that the older English law of theft grew out of a law which protected seisin or possession. The matter is, perhaps, strictly irrelevant; but the truth seems to be, that, long ere the distinction between property and possession is recognized, primitive legal systems recognize some kinds of association between persons and material objects as a 'right' which is, at first, no doubt, inconceivable as existing apart from physical control, but which is at least as much proprietary as possessory in its character. And when the time comes for the specialization of ideas to be effected, it is, apparently, possession, rather than property, which is the conscious production of juristic speculation. At least, such appears to be the teaching of English Law; and it is supported by the facts of other systems.

And if we ask why, for example, the common law devoted itself to the protection of the possession, rather than the ownership, of movables, the answer given by English legal history appears to be, that the invention of the great Writ of Trespass, introduced in the interests of public order, and the increasing sharpness of the notion of possession which resulted from it, were found so convenient, with a little adaptation, for deciding indirectly questions of ownership of chattels, that the need of a true proprietary process did not appear urgent. A similar result led to the practical disappearance from land law of the Writ of Right in the century following the invention of the Writ of Trespass; but it may be shrewdly suspected that, so long as the local courts continued to be active tribunals, a good deal was heard in them of questions of title.

If we turn now from the Law of Contract and the Law of Property to Family Law and the Law of Torts, we shall be struck at once by the comparative poverty of these two important branches of English Law. It is assuredly no fault of Professor Geldart that Book IV of the Digest is so scanty, and that much even of its



scanty contents (*e. g.*, the Law of Marriage and Divorce) would appear to fall almost as fitly under Public as Private Law. The Law of Guardianship, for example, which bulks so largely in Continental systems, is, in English Law, a mere fragment.<sup>5</sup> This fact is commonly explained, in the writings of English jurists, by a reference to the completeness and efficiency of the peculiarly English Law of Trusts.<sup>6</sup> But this explanation does not carry us very far. Why does English Law leave to the Law of Trusts the regulation of those important matters which, in most systems of law, are governed by the Law of Guardianship? Is it not significant that, while the Law of Guardianship is what may fairly be called a compulsory system, in which the conduct of the guardian is directed and controlled by the authority of the State, the Law of Trusts is a voluntary system, in which the duties of the trustee and the rights of the beneficiaries are prescribed (sometimes very minutely) by the founder of the trust? It is, no doubt, true, that English Law, in that special department of it known as 'Equity,' has laid down an elaborate system of rules for enforcing the administration of trusts; but these are, substantially in every case, 'subject to the provisions of the settlement.'

Again, it was actually suggested by one of the authors of the Digest, that a complete statement of English Family Law would include the Law of Intestate Succession; and there is, obviously, much to be said for this view. But, apart from the inconvenience of abandoning traditional arrangements, it was felt by the editor that the adoption of this suggestion would really tend to obscure one of the most striking peculiarities of English Law, *viz.*, the unfettered testamentary power wielded by the English parent. Whatever may be the case in systems which have preserved a law of *legitim*, which prevents a parent disinheriting his family without due cause, in English Law intestate succession is, both in theory and practice, at the present day, merely a provision for the careless or unfortunate person who dies without leaving a valid will. It is only in the last resort, that the provisions of the Inheritance Act and the Statutes of Distribution are prayed in aid. The fate of Faulkes de Breanté has been laid to heart by the English nation.<sup>7</sup>

<sup>5</sup> DIGEST, Bk. IV, Sect. II, Tit. III and IV (42 §§).

<sup>6</sup> *Ibid.*, Bk. III, Sect. XVII (70 §§).

<sup>7</sup> 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 356.

Once again, we may note, that English Family Law is not only very scanty, but, comparatively speaking, very modern. Apart from the well-known provision of the Statute of Merton (1235) on the subject of post-legitimation,<sup>8</sup> and that of the Statute of Marlborough (1267) on waste by guardians,<sup>9</sup> there is practically no statute law of any importance in this branch until we come to the Reformation, with its quarrels over Church jurisdiction, and the establishment of the Poor Law system under Elizabeth.<sup>10</sup> Even these important changes were, as has been before hinted, effected far more in the interests of the community as a whole than of the members of the family, or even of the family as a unit. Not until the definite putting away of feudalism at the Restoration, and the subsequent laborious reconstruction of society on a contractual basis, do we begin to get a real development of Family Law; and by that time the Trust is too firmly fixed an institution to give way before general rules. Indeed, the subsequent sweeping away of the few restrictions on testamentary power which still survived from the Middle Ages seemed but to emphasize the emancipation of the family from the bonds of law.<sup>11</sup>

What is the explanation of this peculiarity of English Law? It is customary to attribute it to the legendary 'individualism' of the English character; and it may be that, when we come to dig a little deeper into the foundations of English Law, we shall have to allow some ultimate weight to this alleged psychological element. But is there not a more definite historical explanation, which will at least suggest proximate causes?

We know too little at present of pre-Norman English Law to dogmatize about social conditions before the Conquest; but we shall probably not be far wrong in assuming that the typical patriarchal household, with its apparent despotism strongly fettered by local custom, prevailed largely amongst English folk of that time. It seems to be very doubtful whether any but privileged persons could make wills; and what little we know of the Anglo-

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<sup>8</sup> 20 HEN. III, cap. 9.

<sup>9</sup> 52 HEN. III, cap. 17.

<sup>10</sup> The writer does not forget the provisions of the Statute of Westminster II (1285) on the subject of 'ravishment of ward.' But these, though technically unrepealed, have long been obsolete.

<sup>11</sup> See the writer's *SHORT HISTORY OF ENGLISH LAW* (Little, Brown & Co.), pp. 273-74.



Saxon law of inheritance and succession, leads us to suppose that it provided carefully for an adjustment of family claims.<sup>12</sup>

But this system, whatever it was, received a rude shock from the feudal influences of the Conquest, with their strong preference for the single heir; and there seem quite substantial reasons to believe that, for at least a century after the Battle of Hastings, the Norman lawyers succeeded in subordinating to him the claims of the family on the death of its head, not merely as regards land (for which there were some military reasons) but as regards chattels as well.<sup>13</sup> The natural consequence of such an extreme application of the doctrines of feudalism was to produce a violent struggle for the right of testation; and, so far as chattels were concerned, this struggle appears to have been successful (mainly through the help of the Church, which, for its own reasons, favoured it) by about the end of the twelfth century. It is common knowledge that, as regards land, the struggle was more prolonged, and that a formal victory was not achieved until the Reformation. But, at least a century earlier, the position had virtually been carried by insidious sapping, through the medium of uses; and the result of the long struggle seems to have produced a rule as extreme in another direction as that which it had superseded. Only by virtue of a few local customs which (as mentioned) were swept away in the eighteenth century, was there any restriction left, after 1660, on the victorious power of testation.

If the English Law of Torts is less fragmentary than Family Law, it cannot be described as highly developed or scientific. English Law evidently believes in the existence of a certain class of wrongs which give rise to actions for damages calculated on common law principles, but which are neither breaches of contract nor of trust. The *devastavit* of the personal representative is also (probably) not, technically, a tort, because it was originally an ecclesiastical offence; though the same may also be said of slander, which now ranks as a tort. But of any substantive definition of a tort English Law is still innocent. It is at present only in the pre-

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<sup>12</sup> The evidence comes chiefly from the surviving rules of gavel-kind, 'borough-English,' and local customs generally.

<sup>13</sup> SHORT HISTORY OF ENGLISH LAW, pp. 61-65. Doubtless the heir was expected (as the Assise of Northampton puts it) to 'make the division of the deceased.' But his power must have been great.

liminary stage, in which it says, this act or that is a tort, this or that is not. It is in the position of the rustic who knows by experience that the ale at certain houses is good; but, not being able to read the signs, does not connect this experience with the fact that all these houses supply X.'s ale.

Again, the Law of Torts, though it will always award 'damages' (*i. e.*, pecuniary compensation for damage) to a successful plaintiff, does not always require, as an essential to the plaintiff's success, that he should have suffered 'material damage in fact.' There are some torts which are actionable *per se*; that is to say, there are acts which entitle certain persons to sue for damages, though they have not, in fact, suffered damage from them. This kind of tort is usually, in Continental systems, treated as an adjunct of the criminal law, in which the *partie civile* is allowed to appear alongside the public prosecutor and put in a subsidiary claim for damages.<sup>14</sup> And, therefore, the English Law of Torts, incomplete though it be, is, generally, more comprehensive and detailed than the corresponding branch of Continental systems. But still, even in this connection, it does not say that every crime is a tort against any person who may have directly suffered by it. Thus, if A. forges B.'s signature, B. has no action against A.; even though B. may, in fact, have been seriously damaged by the crime. On the other hand, every unlawful assault is both a tort and a crime by English Law; though, again, every trespass to land<sup>15</sup> or chattels is not, albeit the origin of all three torts is the same. There is, seemingly, no general rule on the subject.

Nothing is more characteristic of the English Law of Torts than the importance which it attaches to acts, as distinguished from omissions. This quality is, doubtless, due largely to the quasi-criminal character of the early remedies in tort, and to the fact that every crime is, historically as well as technically, a breach of the King's peace.<sup>16</sup> But whereas criminal law, especially in its

<sup>14</sup> *e. g.*, French *Code d'Instruction Criminelle*, arts. 363, 366, 368; Belgian, arts. 585, 587.

<sup>15</sup> The writer believes that, until the seventeenth century, it remained quite uncertain whether the common trespass to land was definitely to emerge as a crime, and that until well on into the eighteenth it was commonly treated by rural magistrates as such. Fielding's novels contain useful hints as to the devices adopted to justify this practice.

<sup>16</sup> Even at the present day the doctrine is, in practice, expressly repeated in all indictments; though the technical necessity for laying every indictable offence as



earlier stages, lays great stress upon the *mens rea*, the Law of Torts seems early to have abandoned this idea, without completely adopting the alternative essential of substantial damage to the plaintiff. Thus the English Law of Torts is partly an instrument for punishing reprehensible conduct — a sort of minor criminal law — and partly an instrument for adjusting economic compensation; and, as is usually the case when a person wavers between inconsistent ideals, it very imperfectly attains either object. It is one of the oddest freaks in the history of ideas, that the archaic notion which sees in every accident causing physical damage a direct and obvious purpose, should have survived into the English Law of Torts, in the 'absolute liability' for the harbouring of dangerous animals,<sup>17</sup> and that this archaic survival should really be one of the most complete and justifiable examples of the function which the Law of Torts performs in adjusting economic compensation. But this simple principle of compensation, unfortunately, goes a very little way in that system, which, for the rest of its scope, wavers persistently, in fixing the rules of tortious liability, between the intention, unskilfulness, carelessness, or other fault of the defendant, and the hardship suffered by the plaintiff. The controversy which raged round the recent case of *Hulton v. Jones*,<sup>18</sup> and the admitted hopelessness of all attempts to frame a satisfactory definition of 'malice' for purposes of the Law of Torts, are convincing testimony to the vague and unscientific character of that branch of English Law.

The insistence of the English Law of Torts on acts, as distinguished from omissions, as of the essence of the vast majority of recognized torts, has been already alluded to; but the point is so striking a characteristic of English Law, that it may be permissible to dwell for a moment upon it. The tortious omission is known as 'negligence'; and inasmuch as, for purposes of civil law, the difference between deliberate and unconscious omission of a positive duty is, at least in theory, immaterial, we need not spend time in distin-

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'against the peace of our Sovereign Lord the King' seems to have been abolished by the Criminal Procedure Act, 1851, s. 24.

<sup>17</sup> DIGEST, Bk. II, Pt. III, B. Sect. I, Tit. V, § 784.

<sup>18</sup> [1910] L. R. A. C. 20. This case finally decided that 'malice in fact' is in no sense necessary to defamation. The point had been decided 300 years before *Jones v. Hulton* (in *Mercer's Case*, Jenk. 268 (1586)); but the decision seems to have been forgotten.

guishing between omissions and deliberate forbearances or abstentions. But it is desirable to point out, that the scantiness of the civil Law of Negligence in England is obscured by the practice, adopted by English textbook writers,<sup>19</sup> of including in the 'Law of Negligence' the vast subjects of breaches of contract and even of trust, which, though the former has, doubtless, grown historically out of the Law of Tort<sup>20</sup> (a fact which should not be forgotten), are clearly differentiated from it by the fact that they are breaches of duties voluntarily, and, in most cases, expressly undertaken. The true Law of Negligence is that which holds a person responsible, *ex lege immediatè*, for omissions of positive duty imposed upon him, merely as a member of the community, by the law. The writer has elsewhere<sup>21</sup> insisted on the narrow scope and late development of this branch of the English Law of Torts; but a vivid realization of the fact may be obtained by a glance at the Title of the Digest<sup>22</sup> in which that law is embodied, where it will be found to occupy only seven paragraphs, of which only one<sup>23</sup> really imposes specific duties. If the reader takes the trouble to turn to this paragraph, he will find that except upon persons professing special skill in a recognized calling, upon the handlers of dangerous goods, and upon occupiers of land, the English Law of Torts imposes (apart from special agreement) no positive duties whatsoever which can be enforced by an action for damages.<sup>24</sup> At the present day, a passer-by who sees a man struggling for his life in a canal, and who, being perfectly able to render or procure help without the slightest real inconvenience (much less danger) to himself, should calmly continue his walk without making any effort at rescue, incurs no civil (probably no criminal) liability by English Law. This state of

<sup>19</sup> *e. g.*, the late Mr. Beven, in his well-known work, *NEGLIGENCE IN LAW*, 2 ed., 1908. See especially Vol. II.

<sup>20</sup> As is well known, the action of *Assumpsit*, the typical action of contract till the forms of the action were abolished, was originally an action on the case for negligence or deceit.

<sup>21</sup> In 'Negligence and Deceit in the Law of Torts,' 26 *L. QUART. REV.* 159 (1910).

<sup>22</sup> Bk. II, Pt. III, Sect. I, Tit. I, §§ 728-34.

<sup>23</sup> § 731.

<sup>24</sup> Possibly an exception to this statement should be made in favour of the offence known as a *devastavit*, which, though not, technically, a tort (see *ante*, p. 8) undoubtedly gives rise to an action for damages. But, after all, the personal representative is very like a trustee who has voluntarily undertaken a trust. He cannot be compelled to accept the appointment.



things is so monstrous, that it is with little surprise that we find that at least one well-meaning attempt to remedy it has been made by the judicial bench.<sup>25</sup> But the fate which those attempts have met is not such as to encourage further efforts in the same direction; and the gap remains a most serious disfigurement of the common law.

One other, not quite so conspicuous feature of English Civil Law, may be noticed, before we come to what is, perhaps, its most striking and suggestive formal characteristic. During the past half century, social and economic conditions in England have changed (or have seemed to change) with startling rapidity. The banding together of both capital and labour into vast associations for collective dealing, the almost complete substitution of mechanical for animal means of transport, the spread of elementary and technical education, with the consequent revolution in the conditions of many industries — to name only three of the most striking changes — must, one would suppose, if the test were possible, render English life of to-day almost unrecognizable by one whose experience ended in the middle of the nineteenth century. And this view is, at first sight, confirmed by the enormous bulk of the legislation which has emanated from Westminster in the interval. But appearances are here deceptive. A more careful study of the Statute Book for the last fifty years will show how surprisingly little of this vast bulk of legislation directly affects the civil law. When we have deducted from the average annual volume the statutes rendered necessary by the ordinary administrative work of the year — the Finance Acts, the Army Act, the statutes providing for the rearrangement of State machinery (the statutes dealing with the vast increase of State activities — public health, education, trade, temperance legislation, and the like), the statutes dealing with mere legal procedure such as Bankruptcy Acts, the criminal statutes (which have of recent years been very numerous), and the statutes which merely consolidate or codify portions of the law — there is surprisingly little left. And much the same may be said of the judicial decisions of the period. The numerous volumes in which these are contained show a vast number of decisions upon minor points of application, but comparatively few precedents

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<sup>25</sup> See the well-known judgment of Lord Esher in *Heaven v. Pender*, 11 Q. B. D. 503, 509 (1883).

which mark a real addition to or change in the law. This truth has come home to the Editor of the Digest in a rather forcible way. It has been his duty, as the successive volumes appeared, to note, in the table of *Errata* and *Corrigenda* prefixed to each, the recent changes in the law which have rendered any statement in the previous volumes obsolete or incorrect. Though he has fulfilled this duty to the best of his ability during the last ten years, the tale of his labours has been light, as may be seen by reference to the tables in question; and the impression left upon his mind is one of immense fixity and unchangeableness in the fundamental principles of English Civil Law. This fact may be noted for philosophical consideration hereafter.

Meanwhile, it would seem almost superfluous to call attention at this date to what is familiar to all students of English Law as its most striking and characteristic feature, *viz.*, the overwhelming importance, both in bulk and character, of that part of its principles which rests on judicial decisions. In a general way, this knowledge is commonplace; and a writer who should allude to it might fairly be accused of wasting his reader's time. But it is not quite certain that the full extent of the characteristic is realized by all who profess a lip acquaintance with it; and, in the writer's humble judgment, its full significance is not always understood.

It is, perhaps, difficult to express, in arithmetical terms, the proportion which judiciary law bears to statutory law in the English civil system. But the writer has made a somewhat detailed effort in that direction, and confesses himself startled to find that whereas, to state in fairly complete form the fundamental rules of English Civil Law, it has been found necessary to quote about 1450 statutory provisions (each section of a statute being counted as a separate provision), the same task has required references to not less than 7000 judicial decisions. This fact may, however, be said to be meaningless, unless some estimate be made of the comparative shares contributed by each source of authority to this result. Perhaps, therefore, a sounder conclusion may be drawn from the fact that, out of the 2200 propositions in which, as mentioned at the beginning of this article, the English Civil Law has been embodied in the Digest, only about 800 rest in any way on statutory authority, while not less than 1400 rest on judicial decisions alone. Even this comparison does not, however, bring out the full contribu-



tion of the English judiciary to the substance of English Civil Law; for it leaves out of account the fact that two or three of the most frequently quoted statutes, such as the Sale of Goods Act and the Partnership Act, are little more than codified judiciary law, and ought, therefore, fairly to be reckoned as the work of English judges. If allowance be made for these, it seems absolutely fair to say that, as nearly as arithmetical calculation in such a case can go, two thirds of the fundamental rules of the existing English Civil Law have been contributed by the labours of English judges.

And, if we turn from bulk to quality, what a splendid memorial that is to the high sense of justice, the acuteness of intellect, the patience, the industry, of a long line of illustrious occupants of the English Bench. That there have been mistakes, cannot be denied. The doctrine of 'common employment' can hardly be regarded as a happy effort of judiciary law. The series of decisions which has made of the 'tied house system' so sacred a thing that even Parliament now finds itself helpless to abolish it, is not precisely that aspect of English case law of which the admirers of the system are most proud. The efforts of the Courts to build up a rational law of corporate liability have not been entirely successful. The decision in *Poulton v. L. S. W. Railway Co.*,<sup>26</sup> which virtually laid it down that a corporate employer is not liable for the torts of its servants unless it was within its power to authorize them, was, to put it quite plainly, an unfortunate step, which has caused much trouble and some injustice. But, with all allowance for occasional mistakes, a perusal of the 7000 decisions upon which English Civil Law rests, to say nothing of the many others which have been rejected as merely expository, has left upon the writer's mind, as, doubtless, on the minds of others, a feeling of the most profound admiration for the work of the English Bench in the performance of its historic task, and a firm conviction that, in no other way hitherto attempted, could the task of building up the English Civil Law have been so well achieved. These feelings lead naturally to a difficult question: By what authority, and out of what materials, has this task been undertaken and performed? An attempt to answer this question in the light of historical knowledge may lead

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<sup>26</sup> L. R. 2 Q. B. 534 (1867). The true doctrine is, that an employer is liable for the torts of his servant committed within the scope of his (the servant's) employment.

to interesting conclusions, and, perhaps, to a not wholly orthodox view of the true nature of law.

It is common knowledge, that English judges, at least the judges of the common law jurisdiction,<sup>27</sup> have for many generations steadily refused to admit that they make new law; and that, when faced by the apparent contradiction of creative precedents, they have asserted that even these were no true 'legislation' <sup>28</sup> — *i. e.*, making of new law, but merely an application of existing principles to new facts. This is clearly the Blackstonian theory, put forward with all Blackstone's charm of style and persuasiveness in the Introduction to his famous Commentaries; <sup>29</sup> and much of the rather cheap criticism and ridicule to which it has been subjected seems really to be quite groundless. We have learned a good deal since Blackstone's day about the origin of the common law (in its restricted sense of law which was formulated only in the judgments of the old courts of the King's Bench, Common Pleas, and Exchequer); and the more we learn of it, the more support do we find, in the facts of history, for the old theory of the common law judges. Shortly put, it may be said to be now the accepted view, that the 'common law' (in the restricted sense alluded to above) is the result of the efforts of the King's judges, mainly in the thirteenth and fourteenth centuries, to build up, out of the varying customs of the different parts of England, that 'common custom of the realm' which Blackstone,<sup>30</sup> in the passage just referred to, regards as the equivalent of the common law, and which it was necessary to establish, if England was to become a single commonwealth. The comparison between the Roman Prætor and the English Chancellor at a slightly later stage in the history of English Law, is so familiar as to be almost hackneyed; but it is not always seen that the resemblance between the *jus gentium* applied by the Prætor and the common law administered by the earlier English judges, is equally striking, not merely in the nature of its materials, but in the meth-

<sup>27</sup> The apparently contrary claim put forward by the late Sir George Jessel for the Equity judges in *re Hallett*, 13 Ch. D. 711 (1879), is also well known; but it may be doubted whether Sir George Jessel's words were used in quite the sense in which they are commonly understood.

<sup>28</sup> This is an unfortunate term, if it is intended to convey a distinction between old and new law. 'Legislation' is a question of form, not of essence.

<sup>29</sup> Introduction, § 3, p. 69.

<sup>30</sup> *Op. cit.*, p. 67.



ods of its formulation. There is, in fact, a far greater resemblance between the Register of Writs and the Prætor's Edict, with its list of *formulae*, than between the Edict and the vague processes of the early days of Equity.

But another almost equally important fact in the history of English Law is not so well known; and it deserves to be mentioned here, as it serves to clear away an unnecessary complication, and to reduce to uniformity a process which has hitherto been regarded as manifesting itself in two somewhat inconsistent ways.

It is common to assume, that the special branch of English Law known as 'Equity' did not make its appearance until after the common law, as embodied in the Register of Writs, had virtually ceased to be an expanding system, owing either to the restraints imposed on the invention of new writs by the jealousy of the newly-created Parliament, or to the growing conservatism of the common law judges. This is a natural assumption from the fact that the separate jurisdiction of the Chancellor became prominent just at the time when the Register of Writs (despite the well-known provision of the Statute of Westminster the Second <sup>31</sup>) was practically closed. But recent researches <sup>32</sup> seem to place it almost beyond dispute that, at a considerably earlier date, not merely the grievances, but even the remedies, which we have been wont to associate peculiarly with the Court of Chancery, were familiar to the common law tribunals, and, what is more, that they were dealt with and administered, not only in Westminster Hall, but also on the local circuits. The truth appears to be, that English 'common law' and English 'equity' had almost precisely similar origins, in the claim of the King's prerogative to redress the grievances of his subjects, and that they differed mainly, if not entirely, in the fact, that the older tribunals, having adopted a special form of procedure for dealing with these grievances, and offered their remedies

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<sup>31</sup> 13 EDW. I, st. I, c. 24 (2). Of course the importance of the action of 'Case,' introduced by this provision, must not be underestimated. (As to this, see the author's *SHORT HISTORY OF ENGLISH LAW*, at pp. 137-45.) Still it is clear that, for some reason, this provision had only a limited operation.

<sup>32</sup> See especially Mr. Bolland's edition of *THE EYRE OF KENT* (in 1313-14) for the Selden Society (Vols. 24, 27, 29), especially Vol. 27, pp. xxi-xxx, and the articles of Dr. Hazeltine, 'Early History of English Equity,' in *ESSAYS IN LEGAL HISTORY*, Oxford, 1913, and Professor G. B. Adams, 'Origin of English Equity,' 16 *COL. L. REV.* 87. See also Mr. Bolland's *SELECT BILLS IN EYRE*, also in S. S. series (Vol. 30).

on these terms as a matter of right, rejected other forms of procedure (and, almost inevitably, therefore, all grievances which were not capable of being dealt with by that procedure), while the Chancellor made a new and vigorous, but discretionary,<sup>33</sup> use of the rejected grievances and others of a similar nature, and thus rapidly built up a large supplementary jurisdiction.

Is there any real reason to doubt that, in framing the rules of Equity, the Chancellors relied mainly on the materials which had previously served for the formulation of the common law? The Chancellors did not, of course, underestimate the value of popular catchwords, such as 'grace,' 'conscience,' and 'equity' — *i. e.*, equality; but these served them rather as ideals than as practical guides. It may be that we owe one or two equitable doctrines (*e. g.*, the doctrine of 'clogging the equity of redemption'<sup>34</sup>) to the Canon Law, or to the Roman Law.<sup>35</sup> Most of the early Chancellors had a bowing acquaintance, at least, with one or other of these systems. But can any one doubt that, under such vague expressions as the 'Law of Nature' or the 'principles of Equity,' what the early Chancellors really did was to sanction and enforce rules of conduct which had already established themselves among the better members of the community — that when, for example, they began to enforce uses or trusts, they merely bound the lower type of citizen to do what every decent citizen already felt himself bound to do, or that, when they laid down the famous maxim: 'once a mortgage, always a mortgage,' they merely formulated a principle upon which all reasonable mortgagees, as distinguished from sharks of the type of Trapbois, already acted?

Is this a suggestion which belittles the high office of the judge as an expounder of law, or which the judges themselves would repudiate? To the latter question, the frequent appeals of the common law judges to the conduct of the 'average reasonable citizen' in fixing the standard of negligence, or of the Equity judges to the 'man of ordinary prudence' in the administration of trusts<sup>36</sup>

<sup>33</sup> The principle that the common law is *ex debito justitiæ*, while Equity is *ex gratiâ*, is, perhaps, the most fundamental distinction between common law and equity still subsisting.

<sup>34</sup> The connection was probably through the Usury Laws.

<sup>35</sup> A good example is the well-known equitable doctrine of 'marshalling,' which is the Roman *subrogatio*.

<sup>36</sup> See the well-known *dictum* of Lord Watson, in *Learoyd v. Whiteley*, L. R. 12



would seem to furnish a negative reply; even if the famous doctrine of the universal competence and completeness of the common law, above referred to, were not itself a negative answer. The former will hardly be answered in the affirmative by any competent critic who ponders for a little the difficulties which surround the delicate task of rightly interpreting that subtle but all-important thing, public opinion. Assuredly, it is no easy task for a judge, when confronted with a case for which there is no precedent, to formulate a decision which shall commend itself to the sense of justice — not merely of the litigants before him (who may be considered to be prejudiced), but to the right-thinking members of the community who may be litigants in the future. And, in performing this difficult task, can he have any better guide than the rules of conduct which those right-thinking citizens have already adopted as the result of that subtle process of experiment in the laboratory of life which we call 'practical experience'? A judge must indeed have confidence in his own wisdom beyond the measure of ordinary modesty who will deliberately defy such a guide. That would be to apply *arbitrium*, not *interpretatio*.

If the suggestion thus imperfectly stated be at all near the truth, the scope of judiciary law (perhaps even of parliamentary legislation, though that is another story<sup>37</sup>) is fairly indicated. A tribunal is bound to follow precedent where it is clear and authoritative, at least unless the precedent is manifestly founded on a mistake, or the conditions have changed; because certainty is even more important in the administration of justice than wisdom. Perhaps the most remarkable testimony to this truth which comparatively recent years have produced is the changed attitude of the House of Lords toward its own former judgments. Down to the middle of the nineteenth century,<sup>38</sup> the House declined to be bound by judicial decisions, even by its own. The doctrine is now the other way; and the House of Lords has thus avowedly given

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A. C. 727, 733 (1887), and the earlier *dictum* of Lord Blackburn in *Speight v. Gaunt*, L. R. 9 A. C. 1, 19 (1883).

<sup>37</sup> The writer has suggested grounds for thinking that the limits of parliamentary legislation in civil law are hardly different, in his *SHORT HISTORY OF POLITICS* (Dent), pp. 128-29.

<sup>38</sup> The critical decisions are *Thellusson v. Rendlesham*, 7 H. L. Cas. 429 (1859); *Att.-G. v. Dean and Canons of Windsor*, 8 H. L. Cas. 369 (1860); and *Beamish v. Beamish*, 9 H. L. Cas. 274 (1861).

up<sup>39</sup> its claim to combine its judicial and legislative functions in a single session. But that fact does not relieve the House of Lords (or any other tribunal) from the duty of deciding a case, on the ground of want of precedent or statutory provision. Such a refusal would be a gross breach of duty. In such a case the Court turns, as has been suggested, to the deep well, not of 'public opinion' in the speculative sense, but of public conviction, as evidenced by the conduct of the most upright and experienced members of the community. To appeal to an ideal above or beyond this standard, is to run the risk of creating a precedent which will be regarded with dislike, as 'crotchety,' or 'unpractical'; to act in deliberate defiance of this standard is to invite a reaction which, in its desire to abolish an unpopular decision, may proceed to disastrous lengths.

Having thus considered some of the chief characteristics of English Civil Law, we may proceed to ask ourselves how far they indicate and satisfy the scope and functions of law generally.

*Edward Jenks.*

LONDON, ENGLAND.

*(To be continued)*

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<sup>39</sup> The constitutional importance of the change has hardly received the notice it deserves. The legislative functions of the Great Council have never been formally abolished. Were they finally abandoned in *Beamish v. Beamish*?



## STATE LIABILITY FOR TORT

MUCH ink has flowed and many hot words have been spoken concerning the iniquity of states which break their contracts, and particularly of those which repudiate their bonds. The matter of state liability for tort has attracted comparatively little interest.<sup>1</sup> Circumstances have not pushed it to the front until recently. Twenty or thirty years ago our State and Federal governments discharged few functions of an industrial nature. The citizen might occasionally enter into business relations by lending them money, but he rarely met them in commercial competition. Now the United States is operating a great canal, building a railroad in Alaska, competing with the express companies, threatening to take over the telephone and telegraph systems, and about to launch a merchant marine. Most State administrations have similarly extended their activities. With every advance of the sovereign into industrial fields, determination and enforcement of its non-contractual liabilities become more and more important.

"The King can do no wrong" is a preliminary stumbling-block. These words give rise to a common belief that the government cannot be guilty of a tort. For several reasons this idea must be dismissed. The maxim is pointless where there is no king.<sup>2</sup> Then, like all maxims, it is an elusive creature, worth much less than face value. Blackstone deals with it as a smug statement that the royal conscience is sensitive and will not suffer wrong to go unredressed.<sup>3</sup> Finally, there are plenty of decisions to the point that a citizen may acquire legal rights against a sovereign by reason of the latter's tort.<sup>4</sup>

<sup>1</sup> For convenience, the word "state" is not capitalized herein except where it refers to one of the United States. The writer has also used certain other words in fixed and perhaps arbitrary senses. A state is said to be "liable" to any individual who has a legal right against it; to be "responsible" or "answerable" to him only if, in addition to the right, he has an adequate remedy.

<sup>2</sup> *Langford v. United States*, 101 U. S. 341 (1879).

<sup>3</sup> *BL. COMM.*, bk. 3, ch. 17.

<sup>4</sup> *The Siren*, 7 Wall. (U. S.) 152 (1868); *Metz v. Soule, etc. Co.*, 40 Iowa 236 (1875); *Coster v. Mayor, etc. of Albany*, 43 N. Y. 399, 407 (1871); and see *Goreley v. Butler*, 147 Mass. 8, 10, 16 N. E. 734 (1888).

That American jurists were getting this idea into their heads as early as 1855 ap-

But even if we suppose the most indisputable kind of wrong — breach of contract — a really substantial difficulty remains. Common law provides no remedy against the king or the government. So far as the evidence goes, we must assume that the Sultan of Johore, masquerading as plain Albert Baker, made a valid and binding offer for the heart and hand of Miss Mighell. He certainly did not live up to the terms of that offer. Yet when the lady sued for breach of promise the court had to deny recovery.<sup>5</sup> This was simply and solely because the defendant was a royal person, not at all because of the merits of the case. Plaintiff might have won had she been able to prove that the Sultan, after his metamorphosis from Prince Charming to a Prince of the Malay Peninsula, lost his throne and became an ordinary citizen.<sup>6</sup> We are not afflicted with the vagaries of a personal sovereign. Decisions do strike home to us, though, which hold that a government may operate a railroad or a telegraph line without being answerable for negligence.<sup>7</sup>

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pears from the famous case of the armed brig *General Armstrong*. During the War of 1812 the ships' boats of a powerful British squadron attacked this little vessel in the neutral Portuguese harbor of Fayal. The Portuguese authorities gave no assistance, but the privateersmen were not too proud to fight a very brilliant action, beating off three assaults in which the assailants lost nearly two hundred men. Then the Britishers brought their guns into play, whereat the Americans, seeing that the jig was up, scuttled the *General Armstrong* and abandoned her. Portugal, having failed in its duty of protection, was liable to the privateer's owners. The liability could, however, be enforced only through diplomatic channels. After long delay the United States submitted the dispute to Louis Napoleon as arbitrator and accepted his adverse award. The claimants thus lost their right against Portugal. Asserting that the award was wrong and that the government had selfishly sacrificed the claim to its own interests, they turned to Congress for indemnity. The case was referred to the newly established Court of Claims. Two questions arose. Had the United States bungled? and, granting this, Was it liable? The court split on both points, first deciding two to one for the claimants and then on rehearing two to one against them. 2 Rep. Ct. Cl., 1st sess., 35th Congress, No. 149, pp. 52, 154, 165, 189 (1858); The Case of the Private Armed Brig of War *General Armstrong*, reported and edited by Sam C. Reid, Jr., 1857. On the question of liability, Charles O'Connor's argument and the dissenting opinion of Gilchrist, C. J., are well worth reading. Further history of this remarkable claim appears in 2 MOORE, INTERNATIONAL ARBITRATIONS, 1071 *et seq.*, and 18 GREEN BAG, 331.

<sup>5</sup> *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149. This is a case in international, not municipal, law. But of course the same result would have followed with the King of England for defendant.

<sup>6</sup> *Munden v. Duke of Brunswick*, 10 Q. B. 656 (1847). "Acts of state," however, will not rise to haunt a sovereign who abdicates or is deposed. They create no personal liability. *Hatch v. Baez*, 7 Hun (N. Y.) 596 (1876).

<sup>7</sup> *The Queen v. McLeod*, 8 Can. Sup. Ct. 1 (1882); *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178.



Many lawyers probably accept this lack of remedy against the state on the assumption that it is a common attribute of sovereignty the world over. That is not so. Few important nations in Europe close their courts to individuals having claims against the administration.<sup>8</sup> Liability is sometimes limited,<sup>9</sup> but this is not the same thing as an absolute denial of remedy. True enough, any right to sue a sovereign must rest on that sovereign's consent. Yet the practical difference is tremendous between the attitude of our law, which grants such consent only rarely, and of the civil law, which gives it pretty much as a matter of course.

Although the writer's text is Professor Maitland's remark that "it is a wholesome sight to see 'the Crown' sued and answering for its torts,"<sup>10</sup> much of the following comment applies equally to contractual remedies also. The whole common-law rule of state immunity is unnecessary. Even if a full remedy were given private claimants the courts would enforce only a restricted liability. That is exactly what has happened in respect of municipal corporations, which wear no magic cloak of regality.

Further, a rigid application of the old rule under modern conditions brings most undesirable results. The hardship inflicted receives emphasis from the fact that states are rapidly assuming the

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<sup>8</sup> See 2 GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*, 161 *et seq.*; also the following cases under the abandoned and captured property acts of our Civil War period: *Brown v. United States*, 5 U. S. Ct. Cl. 571 (1869) (Prussia); *Lobsiger v. Same*, *id.*, 687 (1869) (Switzerland); *Rothschild v. Same*, 6 *id.*, 204 (1870) (France); *Dauphin v. Same*, *id.*, 221 (1870) (France); *Brown v. Same*, *id.*, 171, 193 (1870) (Holland); *Molina v. Same*, *id.*, 269 (1870) (Spain); *DeGivé v. Same*, 7 *id.*, 517 (1871) (Belgium); and *Fichera v. Same*, 9 *id.*, 254 (1873) (Italy).

The early Scotch kings were not irresponsible rulers. J. A. Lovat-Fraser, "The Constitutional Position of the Scottish Monarch Prior to the Union," 17 L. QUART. REV. 252. There is still apparently more freedom of private suit against the Crown in Scotland than in England. *Somerville v. Lord Advocate*, 30 Scot. L. R. 868, 884 (1893). It seems likely that a tort action would not lie, no matter on what ground it was based. *Smith v. Lord Advocate*, 35 Scot. L. R. 117 (1897).

A citizen secures from the courts only legal recognition, not legal enforcement, of his rights against the state. BROWN, *THE AUSTINIAN THEORY OF LAW*, 194; SALMOND, *JURISPRUDENCE*, 3 ed., 202. But he is practically sure of appropriate relief if the decision be in his favor.

<sup>9</sup> See, for instance, the distinction between the acts of special agents and of regular officials in the SPANISH CIVIL CODE, art. 1903; 2 GOODNOW, *op. cit.*, 162.

<sup>10</sup> "The Crown as Corporation," 17 L. QUART. REV. 131, at p. 142. As to the United States, "it is difficult to see on what solid foundation of principle the exemption from liability to suit rests." *Miller, J., in United States v. Lee*, 106 U. S. 196, 206 (1882).

responsibilities forced upon private employers by workmen's compensation acts. It is quite conceivable that if negligence caused a boiler explosion in a government power plant, an employee hurt inside the building would have rights to compensation which he could enforce in court, while a passing pedestrian struck by flying débris might search vainly for a legal remedy.<sup>11</sup>

Perhaps the principal point to be made concerns the state's own financial interest. A persistent claimant, barred from the courts, does not stop there. He goes to the legislature. That body is surpassing generous with other people's money. It is unrestrained by legal rules as to admissibility of evidence or amount of damages. It knows no statute of limitations. It applies no principle of *res judicata*. It is exceedingly unlikely to draw with any precision the line between satisfying a liability and making a gift.<sup>12</sup> Judges may be pardoned an inward smile when they rebuke persons who have the temerity to sue states, telling them that such action insults the sovereign's dignity and that the proper procedure is meekly to beg the legislature for relief. Here, at least, meekness often pays large dividends.

It may seem inconsistent to urge both hardship to the citizen and expense to the state. Not necessarily. Political motives rule the legislature. It is not fitted to be a court of justice. Securing the passage of a bill is very different from pushing a case to judgment. Perfectly sound claims may well be lost in the legislature for lack of proper introduction or effective backing; entirely unsound ones, particularly if they appeal to sympathy, may be log-rolled through. The most meritorious cause of action does not, alas, invariably command the services of the ablest politicians. Public money is

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<sup>11</sup> Judge Smith has ably demonstrated the general lopsided effect of workmen's compensation acts. 27 HARV. L. REV. 235.

<sup>12</sup> George M. Davie, "Suing the State," 18 AM. L. REV. 814; The "Supreme Court of Spoils," 112 OUTLOOK, 616 (March 15, 1916); and Charles Warren's vigorous "Massachusetts as a Philanthropic Robber," 12 HARV. L. REV. 316. In some states constitutional provisions forbid gifts of public money, and everywhere the principle that taxation must be for public purposes only is supposed to be enforced. But the watchdog of the treasury earns more buffets than blessings and finds it almost impossible to perform his duty with entire success. Courts properly dislike interfering with the legislature's appropriations and give them the benefit of every doubt. See the Opinions of the Justices in 175 Mass. 599, 57 N. E. 675 (1900); 186 Mass. 603, 72 N. E. 95 (1904); 190 Mass. 611, 77 N. E. 820 (1906); and 211 Mass. 608, 98 N. E. 338 (1912).



constantly squandered without doing justice. Nothing, perhaps, short of prohibiting the practice will keep plaintive gentlemen from appealing to tender-hearted legislators. But an open road to the courts robs these appeals of their plausibility.

After all, the proof of the pudding is the eating. It is significant that scarcely any modern state denies every semblance of legal remedy to the private claimant. The English petition of right serves well enough to enforce contracts and for the recovery of taxes or other property wrongfully withheld by the Crown. Nearly everywhere in the United States individuals can compel payment of government debts by proceedings of a judicial character. If taxes are illegally extorted, we whip the devil round the stump by suing the collector. Written constitutions protect us from uncompensated seizures of property. The case is not so clear when a tort involves personal injury or damage to property as distinguished from its expropriation. Still, remedies do exist.

If the government carries on industrial enterprises through the medium of legally distinct corporations or boards of trustees, these bodies may be sued for tort.<sup>13</sup>

When the government acts without intermediaries statutes frequently provide for proceedings directly against it. These statutes are of two classes. Those in the first class create or define particular rights and provide remedies for their enforcement. Thus at Panama, where all the realty and most of the personalty are public property, the United States solved the problem of sovereign's liability with a series of workmen's compensation acts. Now that the canal is occasionally open, those injured in person or property while using it have a statutory right of action.<sup>14</sup>

In substance Massachusetts was suable on tort claims arising from its management of the Troy and Greenfield Railroad and the

<sup>13</sup> The leading English case is *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686 (1864). See also W. Harrison Moore, "Liability for Acts of Public Servants," 23 L. QUART. REV. 12; "The Shield of the Crown," 35 CAN. L. T. 897; ROBERTSON, CIVIL PROCEEDINGS BY AND AGAINST THE CROWN.

The British colonies follow the same rule. *Sweeney v. Board of Land & Works*, 4 Vict. L. R. 440 (1878). So do our own states. *Hutchinson v. Western, etc. R. Co.*, 6 Heisk. (Tenn.) 634 (1871). The stock of the Panama Railroad is held in trust for the United States. But it seems never to have been doubted that tort actions will lie against the corporation. *Fitzpatrick v. Panama R. Co.*, 2 Canal Zone Sup. Ct. R. 111 (1913).

<sup>14</sup> Panama Canal Act (Aug. 24, 1912), 37 U. S. STAT. AT LARGE, part 1, 560, 563.

Hoosac Tunnel.<sup>15</sup> By statute New York has long been responsible for negligence in connection with its canals; and Ohio has a similar law.<sup>16</sup>

Canada gives legal remedies for injuries caused by negligence on public works.<sup>17</sup> A like statute has been passed by West Australia.<sup>18</sup> New Zealand makes the Crown pay for damage suffered in connection with certain public works from which revenue is derived.<sup>19</sup> Such laws suggest the decisions of the French administrative courts respecting *travaux publics*.<sup>20</sup>

The second class of legislation does not deal at all with particular rights, but does give private claimants a general judicial remedy against the sovereign. Statutes of this kind are common in the British colonies and exist in at least nine of our States.<sup>21</sup> From the lawyer's point of view they are extremely interesting. Removing the initial problem of *remedy*, they make the courts work out their own principles of *right*. The decisions under them are shaping the whole structure of governmental liability. It would be possible to

<sup>15</sup> *Amstein v. Gardner*, 134 Mass. 4 (1883).

<sup>16</sup> *Reed v. State*, 108 N. Y. 407 (1888), 15 N. E. 735; *Sundstrom v. State*, 213 N. Y. 68, 106 N. E. 924 (1914); *In re Claims against the State*, 8 Ohio L. R. 59, 68 (1910).

<sup>17</sup> CAN. REV. STAT. (1906), c. 140, § 20; 9-10 EDW. VII (1910), c. 19.

<sup>18</sup> *City of York Co. v. The Crown*, 4 W. Austr. R. 63 (1902).

<sup>19</sup> *The Queen v. Williams*, L. R. 9 A. C. 418, 433 (1884) (harbor snag); *Hill v. The King*, 33 N. Z. L. R. 313 (1913); *Gibbons v. The King*, *id.*, 527 (1913) (railways); *The King v. Shand*, 23 N. Z. L. R. 297, 306 (1903) (gravel pit from which ballast was taken for railway).

<sup>20</sup> 2 E. LAFERRIÈRE, *TRAITÉ DE LA JURIDICTION ADMINISTRATIVE*, 1 ed., 176; the following cases before the Conseil d'État are typical: 12 July, 1855, *Bourdet*, D. P., 1856-3-5; 6 May, 1881, *Tysack*, D. P., 1882-3-106; 21 July, 1882, *Turnbull*, D. P., 1884-3-29; 27 June, 1890, *Chedru*, D. P., 1892-3-12 (injuries to ships in ports or docks); 14 Jan., 1910, *Comp. d'Assurances l'Urbaine*, D. P., 1911-3-124 (fire caused by fall of telephone wire); 17 May, 1878, *Bouveret*, D. P., 1878-3-82 (damage from state dynamite factory); 28 Feb., 22 May, 1908, D. P., 1911-5-24 (fire set by steam roller).

<sup>21</sup> Arizona: 1913 CODE CIV. PROCEDURE, part 13, §§ 1791 *et seq.* California: HENNING'S GEN. LAWS (1914), Act 4824, p. 1773. Illinois: 2 ANNOTATED STAT. (Jones & Addington), parts 3417, 3419. Massachusetts: REV. LAWS, c. 201, § 1. New York: CODE CIV. PROCEDURE, § 264. It has been thought, particularly outside New York, that this section creates liabilities as well as a remedy. The wording of the statute and the reasoning of the decisions under it do not sustain this idea. North Carolina: 1 PELL'S REVISAL (1908), § 1537. South Dakota: 2 COMP. LAWS (1913), CODE CIV. PROCEDURE, §§ 25-28, p. 320. Virginia: CODE (Pollard, 1904), § 765; construed in *Higginbotham's Ex'x. v. Commonwealth*, 25 Gratt. 627, 637 (1874), and *Attorney-General v. Turpin*, 3 Hen. & M. 548, 557 (1809). Washington: PIERCE'S WASH. CODE (1912), tit. 453, § 9.



separate the cases into those which do and those which do not involve responsibility for an agent's acts. But the value of this distinction is not apparent. With the extension of public activities has come a decided modification of the older theory that governments are never liable for the misdoings of their servants.<sup>22</sup>

Even where an unqualified statutory remedy has been granted, the law remains clear for non-liability up to a certain point. Language used in different jurisdictions varies, but the underlying idea seems constant. No sovereign or governmental act, however ill-performed or damaging, is a state tort.<sup>23</sup> The tendency — in the United States at least — is to make this rule cover a multitude of sins. Of course it extends to acts of the legislature and of the judiciary, police activities, and acts of war. Miscellaneous instances of its application are found in the construction and maintenance of prisons, hospitals, and educational institutions;<sup>24</sup> care of public roads and parks;<sup>25</sup> protection and propagation

<sup>22</sup> STORY, AGENCY, § 319, is usually cited to support this theory. For the modern doctrine see BISHOP, NON-CONTRACT LAW, § 749.

<sup>23</sup> *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, 24 N. E. 854 (1890); *Enever v. The King*, 3 Commonwealth L. R. (Aus.) 969 (1906); *Baume v. Commonwealth*, 4 Commonwealth L. R. 97 (1906) (quasi-judicial acts of customs officer); 2 E. Laferrière, *op. cit.*, 174, 175; Conseil d'État, 13 Jan. 1899, *Lepreux*, D. P., 1900-3-42.

<sup>24</sup> Prisons: *Davidson v. Walker*, 1 N. S. Wales 196 (1901); *Gibson v. Young*, 21 N. S. Wales L. R. 7 (1900); *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951 (1892); *Schmidt v. State*, 1 Ct. Cl. (Ill.) 76 (1890); *Lewis v. State*, 96 N. Y. 71 (1884); *Clodfelter v. State*, 86 N. Car. 51 (1882); *Moody v. State Prison*, 128 N. Car. 12, 38 S. E. 131 (1901). Compare *Metz v. Soule, etc. Co.*, 40 Ia. 236 (1875). In several of these cases convicts had been injured while engaged on work which produced revenue for the state. One early American case suggests that under certain conditions there may be liability to persons who are neither prisoners nor employees. *Austin v. Foster*, 9 Pick. (Mass.) 341, 346 (1830).

Hospitals: *Riley, admx. v. State*, 2 Ct. Cl. (Ill.) 20 (1906). *Smith v. State*, 169 N. Y. Sup. Ct. (App. Div.) 438, 154 N. Y. Supp. 1003 (1915), concerns an injury to a charity patient at an insane asylum, so a double ground of defense existed. But *Martin v. State*, 120 N. Y. Sup. Ct. (App. Div.) 633, 105 N. Y. Supp. 540 (1907), is probably squarely in point. It does not appear that the person injured here was a patient, and New York charities are liable for torts to strangers. *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406 (1911).

Educational institutions: *Jorgensen v. State*, 2 Ct. Cl. (Ill.) 134 (1911). In *Hole v. Williams*, 10 N. S. Wales 638 (1910), the court seems to blunder all around the easy reason for its decision.

<sup>25</sup> *Johnson v. State*, 1 Ct. Cl. (Ill.) 208 (1899); *Harper v. State*, *id.*, 322 (1904); *Henke v. State*, 2 *id.*, 11 (1906); *Fowler, admr. v. State*, *id.*, 109 (1910); *Secretary of State v. Cockcraft*, 27 Ind. Cas. 723 (1915); *Miller v. McKeon*, 3 Commonwealth L. R. (Aus.) 50 (1906).

of fish and game;<sup>26</sup> operation of vessels in harbor work and fire fighting.<sup>27</sup>

Boards, corporations, and other instrumentalities performing public functions are similarly shielded. Thus agricultural societies are not liable for injuries suffered at fairs given by them, even though admission is charged.<sup>28</sup> The East India Company, a private corporation, was exempt from judicial interference in its exercise of delegated governmental powers.<sup>29</sup> These cases, irrespective of statute, did not go off upon lack of remedy, for the defendants enjoyed no sovereign prerogative.

At the other extreme are instances which leave little room to doubt the existence of liability. Where contract and tort overlap, as in the business of warehousing, judges are particularly ready to handle a negligent government without gloves.<sup>30</sup> Any court, if granted jurisdiction, will make the state pay for wrongs causing un-

<sup>26</sup> *Apfelbacher v. State*, 160 Wis. 565, 152 N. W. 144 (1915).

<sup>27</sup> *Denning v. State*, 123 Cal. 316, 55 Pac. 100 (1899).

<sup>28</sup> *Melvin v. State*, 121 Cal. 16, 53 Pac. 416 (1898); *Minear v. Board of Agriculture*, 259 Ill. 549, 102 N. E. 1082 (1913); *Hern v. Iowa State Agricultural Society*, 91 Ia. 97, 58 N. W. 1092 (1894); *Zoeller v. State Board of Agriculture*, 163 Ky. 446, 173 S. W. 143 (1915); *Berman v. Minnesota State Agricultural Society*, 93 Minn. 125, 100 N. W. 732 (1904); *Morrison v. Fisher*, 160 Wis. 621, 152 N. W. 475 (1915); compare *Lane v. Minnesota State Agricultural Society*, 62 Minn. 175, 64 N. W. 382 (1895). A suit directly against the state failed in *Dale v. State*, 2 Ct. Cl. (Ill.) 368 (1915), and succeeded in *Arnold v. State*, 163 N. Y. 253, 148 N. Y. Supp. 479 (1914).

<sup>29</sup> *Nabob of the Carnatic v. East India Company*, 2 Ves. Jr. 56 (1792); *East India Company v. Kamachee Boye Sahiba*, 7 Wkly. R. 722 (1859). This is well enough as to corporations which really exercise some administrative discretion. But doubt may be felt when a mere carrier of mail is held not liable to the owner of a lost parcel — unless because the government as bailee has exclusive right to the possessory remedies. *Bankers', etc. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 117 Fed. 434 (1902); *United States v. Hamburg-Amerikan, etc. Gesellschaft*, 212 Fed. 40, 43 (1914). Compare *Baltimore, etc. Co. v. Baltimore*, 195 U. S. 375, 382, and *Ackerlind v. United States*, 240 U. S. 531, 536 (1916). Exemption of contractors from tort actions because they are engaged in public work seems entirely too much of a good thing. 29 HARV. L. REV. 323.

<sup>30</sup> *Chapman v. State*, 104 Cal. 690, 38 Pac. 457 (1894); *Brabant & Co. v. King*, [1895] L. R. A. C. 632. Compare *Campbell v. State*, 2 Ct. Cl. (Ill.) 298 (1914) (bailment for hire); and *Gulf Transit Co. v. United States*, 43 U. S. Ct. Cl. 183 (1908) (negligence in respect of dry-dock hired from the government), which is perhaps not quite so clear.

Incidentally, where remedial acts exist, the government is more readily held bound by the terms of general statutes. *Sydney Harbour Trust Commissioners v. Ryan*, 13 Commonwealth L. R. (Aus.) 358 (1911) (employers' liability); *Herkimer Lumber Co. v. State*, 131 N. Y. Supp. 22 (1911) (damages for suing out injunction).



just enrichment — the occupation of private real estate,<sup>31</sup> infringement of a patent,<sup>32</sup> and the like — or for the destruction of property rights necessitated by a public improvement.<sup>33</sup> Two Illinois decisions along this line supply food for thought. Both resulted from the use of a militia rifle range so laid out that bullets, even when discharged with all possible care, crossed a farm and endangered persons thereon. The first plaintiff, who owned the farm, sought to recover for depreciation of his land, loss of a crop which he had been unable to harvest, and sundry other damage. He was awarded something, but it is hard to tell for what loss the compensation is intended. The court argues that the injury was the necessary consequence of properly executing the State's orders, and did not result from negligence of the State's agents, for which there could have been no recovery. It is an instance of informal taking by eminent domain.<sup>34</sup> But the second case cannot be so explained. There a farmhand who had been hit by one of the stray bullets was allowed compensation.<sup>35</sup> Unless rifle practice by the militia in time of peace is not a governmental act, this seems very questionable law. And *quære*, is it not necessarily negligent on somebody's part to fire or cause to be fired shots bound to endanger life and limb?

Between these limits lies more uncertain territory upon which British colonial jurists for some years groped unhappily in the dark.<sup>36</sup> The authoritative case of *Farnell v. Bowman*<sup>37</sup> has done much to resolve their doubts. It came before the Privy Council on demurrer, and a babble of conventional pleading obscures the real facts. Apparently New South Wales did the damage complained of while prosecuting some public work. The plaintiff alleged that trespassing government servants had destroyed his grass, trees, and

<sup>31</sup> *Remington v. State*, 116 App. Div. (N. Y.) 522, 101 N. Y. Supp. 952 (1906); *Porto Rico v. Ramos*, 232 U. S. 627 (1914). See also *Coleman v. State*, 134 N. Y. 564 (1892).

<sup>32</sup> *Marconi's Wireless Telegraph Co. v. Commonwealth*, 16 Commonwealth L. R. (Aus.) 178 (1913); Charles C. Binney, "The Government's Liability for the Use of Patented Inventions," 52 AM. L. REG. 22.

<sup>33</sup> *Attorney-General of Straits Settlement v. Wemyss*, L. R. 13 A. C. 192 (1888).

<sup>34</sup> *Hickox v. State*, 1 Ct. Cl. (Ill.) 81 (1890). *Evans v. Finn*, 4 N. S. Wales 297 (1904), using different language, reaches the same result. See also *McCarty v. State*, 2 Ct. Cl. (Ill.) 100 (1909), and *Johnson v. State*, *id.*, 227 (1914).

<sup>35</sup> *Crawford v. State*, 1 Ct. Cl. (Ill.) 91 (1890).

<sup>36</sup> A. P. Canaway, "Actions against the Commonwealth for Torts," 1 COMMONWEALTH L. REV. (Aus.) 241.

<sup>37</sup> L. R. 12 A. C. 643, 649 (1887); *Eckford v. Walker*, 2 N. S. Wales 369 (1902), *acc.*

fences by lighting fires. Held that he stated a good cause of action. The opinion indicates that so long as a state confines itself to old-fashioned, customary functions, it is subject to no liability for tort; but

"It must be borne in mind that the local governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the king can do no wrong' were applied to Colonial governments in the way now contended for by the appellants, it would work much greater hardship than it does in England."

Old cases against the East India Company concerning the exercise of its "civil capacity" lend historical backing to this distinction.<sup>38</sup> Applying the principle, courts have brought colonial governments to book for negligently operating telegraphs, railways, and trading vessels.<sup>39</sup>

In this country the well-developed rules of municipal liability provide a convenient and illuminating analogy. While these rules are by no means identical everywhere, it is pretty generally agreed that cities and towns may be held for tort in connection with proprietary, commercial, or money-making functions, like the operation

<sup>38</sup> *Moodaly v. Moreton*, 2 Dick. 652 (1785); *Gibson v. East India Company*, 5 Bing. N. C. 262 (1839). These are not mere dry curiosities. When the Crown took over the government of India about the time of the Mutiny it was provided that "The Secretary of State in Council" should be suable wherever the East India Company might have been sued. Thus the present administration is answerable for torts committed in such commercial transactions as the operation of railways. *Mathradas Ramchand v. Secretary of State*, 11 Ind. Cas. 58 (1911); *Ross v. Same*, 19 Ind. Cas. 353, 355 (1913).

In 1873 Sir R. Phillimore believed that a ship used for trading was subject to admiralty proceedings on account of negligent collision, despite the fact that she belonged to a foreign sovereign. *The Charkieh*, 1 Asp. M. C. 581, 598 (1873). And see *United States v. Wilder*, 3 Sumner (U. S. C. C.) 308, 315 (1838). This is probably not law. *The Parlement Belge*, L. R. 5 P. D. 197 (1880); *Mason v. Intercolonial Ry. of Canada*, 197 Mass. 349, 83 N. E. 876 (1908). The king's prerogative covers his property as well as his person. But of course the prerogative may be waived, as by the remedial statutes assumed in the text at this point.

<sup>39</sup> Australia: *Hannah v. Dalgarno*, 3 N. S. Wales 494 (1903); s. c. 1 Commonwealth L. R. 1; *Commonwealth v. Miller*, 10 Commonwealth L. R. 742 (1910). Cape of Good Hope: *Leonard v. Commissioner of Public Works*, [1907] East. Dist. R. 146; *Wynne v. Colonial Government*, [1909] *id.*, 193; *Union Government v. Warneke*, 5 Buchanan's A. C. 166 (1911). New South Wales: *South Coast Road Metal Quarries v. Whitfield*, 14 N. S. Wales 300 (1914).



of sewers, waterworks, and gas plants. As a practical matter tortious injuries are most likely to result from the exercise of such functions. The better-reasoned American cases take this for the typical ground of State liability,<sup>40</sup> which brings us out on much the same lines as *Farnell v. Bowman*. It is hard to imagine any undertaking usually "left to private enterprise" which does not include a money-making element. Financial gain is vital to the continuance of private business.

But the few American authorities are at loggerheads. The Alabama case of *State v. Hill*<sup>41</sup> seems at first blush to conflict with the rule just laid down. It cannot bear analysis. A State receiver was running a railroad. One of the trains killed some horses. The bereaved owner brought action against the State. Recovery was denied on the ground that a sovereign is never liable for the negligence of its servants. The result is right — for other reasons. Plaintiff simply barked up the wrong tree. Alabama did not own the railroad<sup>42</sup> and was not a proper defendant. The receiver should have been sued.<sup>43</sup> The decision might thus be justified. Or it would

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<sup>40</sup> Sewer: *Ballou v. State*, 111 N. Y. 496, 18 N. E. 627 (1888). This might possibly have been dealt with under the canal acts. But it is not so explained. *Litchfield v. Bond*, 186 N. Y. 66, 83, 78 N. E. 719 (1906) (some remarks in the latter case concerning the general question of state liability properly apply only to unauthorized or unconstitutional acts of officials). The court had broad jurisdiction, irrespective of canal problems. LAWS 1870, c. 321; 1876, c. 444; 1883, c. 205, §§ 7, 13. Canals: *Holmes v. State*, 1 Ct. Cl. (Ill.) 324 (1905); *Phillips v. State*, *id.*, 332 [(1905)]. Overruled by *Morrissey v. State*, 2 *id.*, 254 (1914), which is discussed later. Inclined railroad: *Burke v. State*, 119 N. Y. Supp. 1089 (1909). Automobile race at fair: *Arnold v. State*, 163 N. Y. App. Div. 253 (1914), 148 N. Y. Supp. 479.

In France the state may be sued much as if it were an individual for injuries sustained on its private domain. 2 E. Laferrière, *op. cit.*, 179; Trib. des Conf., 24 May 1884, *Linat*, D. P., 1885-3-110 (accident in state forest); Paris, 21 June, 1898, *Des-sauer*, D. P., 1899-2-289, S. C. civ. rej., 12 June, 1901, D. P., 1902-1-372 (*Opéra-Comique* fire).

<sup>41</sup> 54 Ala. 67 (1875).

<sup>42</sup> 42 L. R. A. 35 n. to the contrary is in error. The owner was an ordinary public service corporation. The State, as its creditor, petitioned for and secured appointment of a receiver. *Blake v. Alabama, etc. R. Co.*, Fed. Cas. 1493; *State v. Same*, 54 Ala. 139 (1875).

<sup>43</sup> Another tort claimant did this after federal receivers were appointed. *Davenport v. Alabama, etc. R. Co.*, Fed. Cas. 3588. And such is evidently the modern Alabama practice. *McGhee v. Willis*, 134 Ala. 281, 32 So. 301 (1901). Where receivers claimed to be public officers and so exempt from liability for the negligence of their subordinates, the Ohio court made short work of the defense. *Meara's admr. v. Holbrook*, 20 Ohio St. 137 (1870).

have sufficed to point out that all statutes allowing an individual to sue the State had been repealed, which was fatal even in pending actions.<sup>44</sup> But suppose the case rightly brought and prosecuted. The plaintiff could have recovered only from the corporation's assets and not from the public treasury, for this kind of judgment against a receiver is not personal. The railroad was operated on behalf of its creditors and stockholders. Those who pocket the benefits of operation should bear its burdens. If they could evade responsibility by hiding behind an invulnerable dummy defendant, what a scramble there would be for the sanctuary of receivership!

Next logically comes *Morrissey v. State*,<sup>45</sup> which overrules earlier Illinois decisions already referred to. The plaintiff was hurt by the collapse of a defective canal bridge. The opinion admits that the State may be liable for tort in a "private enterprise." It denies that the maintenance of this canal, although for profit, was such an enterprise. Hence the claim was rejected.

While perhaps not every court would concur, there could be no great quarrel with the result if it were based upon the interpretation of facts. Since adequate means of communication and transportation are vital to public welfare, keeping up a certain specific means may reasonably be considered governmental. The court, however, takes its stand upon a supposed principle of law. The State, it says, is in no sense a corporation; therefore any activity of whatever character under its sole and direct control must necessarily be governmental; if the control is indirect — exercised, for instance, by voting corporate stock — an activity may be commercial. Now, as Professor Maitland amusingly puts it, Blackstone and older respectable authorities "parsonified" the King into a corporation sole.<sup>46</sup> Much more truly may the modern commonwealth be called a corporation aggregate.<sup>47</sup> But grant the premise; suppose that the state is not a corporation. Does that bare fact render it less able to inflict injuries or less properly called to account for them?

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<sup>44</sup> *Ex parte State*, 52 Ala. 231 (1875).

<sup>45</sup> 2 Ct. Cl. (Ill.) 254 (1914).

<sup>46</sup> BL. COMM., bk. 1, ch. 18, p. 469.

<sup>47</sup> F. W. Maitland, "The Crown as Corporation," 17 L. QUART. REV. 131, points out that three of our original States began their colonial existence under corporate charters. See W. Harrison Moore, same title, 20 L. QUART. REV. 351; also 1 COOLEY, TORTS, 3 ed., 208, and the recent case of *Indianapolis v. Indianapolis Water Co.*, 113 N. E. 369, 373 (1916).



This thin-spun technicality will not sustain so weighty a conclusion. Plain common sense rejects such an exaltation of form over substance.

Cited to support the rule are cases dismissing tort actions in respect of agricultural societies, penal institutions, and State universities, of which the first collect admission fees at their fairs, the second make the prisoners do profitable work, and the last charge for tuition. These decisions are irrelevant. Education and the prevention of crime are none the less governmental because so administered as to produce incidental revenue.<sup>48</sup>

This proposed rule is definite and easy to apply. So was the bed of Procrustes. Administrative liability cannot be laid off in convenient lengths with a yardstick. Each varying shade of circumstance calls for a fresh exercise of judgment to determine whether the particular function under consideration is public or private.

The same criticism may be leveled at *Riddoch v. State*,<sup>49</sup> which goes the full length of declaring that no state is subject to any tort liabilities except those explicitly created by statute. The opinion comments on many authorities, but haggles altogether too much over words and delves too little after principles. The unsuccessful plaintiff here had been injured by the breaking of a defective railing in an armory leased for a private athletic exhibition. Under substantially similar facts a municipal corporation was responsible.<sup>50</sup> So the court had to hold that there are different rules of legal right and wrong for municipalities and for the State. Mere assertion of this doctrine seems almost sufficient rebuttal. It is the sort of jugglery that excites popular distrust of the legal profession. It involves the disregard of well-established analogies.<sup>51</sup> Reduced to "short and ugly terms" it means that might makes right — an astounding conclusion to issue from the lips of an American court.

Curiously enough, none of these cases much more than hints at the most plausible argument in their favor. It would seem a sound general principle that public money must not be applied to private

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<sup>48</sup> *Curran v. Boston*, 151 Mass. 505, 509, 24 N. E. 781 (1890).

<sup>49</sup> 68 Wash. 329, 123 Pac. 450 (1912).

<sup>50</sup> *Little v. Holyoke*, 177 Mass. 114, 58 N. E. 170 (1900).

<sup>51</sup> *South Carolina v. United States*, 199 U. S. 437, 463 (1905) (where a State takes over the liquor business, its agents must pay internal revenue tax); *Hopkins v. Clemson College*, 221 U. S. 636, 647 (1910); *Louisiana v. McAdoo*, 234 U. S. 627, 631 (1913); and see adverse comment on the principal case in 74 CENT. L. J. 431.

relief. We have observed the legislative inclination to depart from this principle and indulge in extravagant expressions of sympathy for misfortune. Courts may well, then, be pardoned and even praised if they take a very firm stand against wasteful sentimentalism. True, it is universally recognized that the government's contracts subject it to legal obligations — the reverse holding, indeed, would class the state as an incompetent, like a lunatic or a minor. Yet this in itself fails to vindicate liability for tort. The private contractor almost always gives not mere technical consideration, but a substantial *quid pro quo*. Since fair exchange is no robbery, he should have his action. Non-contractual liability, on the other hand, seems at first blush to mean a dead loss. However harsh the lack of relief, it is not illogical if and so far as damages for the sovereign's torts have to come out of the public treasury. But this last link breaks when the chain is stretched to include commercial transactions. A concrete instance will make the real situation clear:

Public trustees managed for the British government certain harbor improvements at Liverpool. The trustees were required to charge such rates as would cover maintenance, defray interest, and gradually repay the original investment. When repayment was accomplished the rates were to be lowered so as to yield just enough for upkeep. A plaintiff brought an action of tort against the trustees and got judgment. His recovery simply postponed the lowering of the rates. Neither the Crown nor the investors lost a farthing. The shipowners using the docks and wharves paid the damages.<sup>52</sup>

In short, the government, like any other vendor of goods or services, can pass along to the consumer all charges incident to production. Such cost shifting will inevitably take place under a sound system of bookkeeping, which separates the accounts of the state as a sovereign from those of the state as a business man. Sacred funds collected by taxation will not be diverted to meet new or unexpected liabilities. That being the case, it is dog-in-the-manger policy to refuse a right of action in favor of those injured by public commercial dealings.<sup>53</sup>

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<sup>52</sup> *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686, 708 (1864).

<sup>53</sup> Some jurisdictions allow suits against municipalities for torts committed in the exercise of functions which, while not commercial, are of peculiar local benefit. 25 HARV. L. REV. 646. States may discharge similar functions for the advantage of particular localities. Massachusetts maintains a metropolitan park system in and about Boston, meeting its expenses by a special levy on the towns and cities so located as to



Another, but allied, line of argument is worth pursuing. Many commercial activities make the state a business competitor with its own citizens. In business our law has always sought to provide a fair field and no favor. The fear of unfair competition by a sovereign dates back at least to the Roman Empire:

"Theophilus, seeing a vessel laden with merchandise for his wife Theodora, ordered it to be burned. 'I am emperor,' said he, 'and you make me the master of a galley. By what means shall these poor men gain a livelihood if we take their trade out of their hands?' He might have added, Who shall set bounds to us if we monopolize all to ourselves? Who shall oblige us to fulfil our engagements?"<sup>54</sup>

These sentiments have their modern echo. It is shrewdly suspected that our parcel post, driving a sharp bargain with the railroads, has met express companies on better than even terms. The government enjoys tax exemptions. It sometimes ignores or conceals overhead charges. Plans are now and then concocted at Washington to force federal ownership of public utilities by deliberate cutthroat tactics.<sup>55</sup> Honesty and fairness will be advanced if the law subjects state industries to the measure of tort liability which has always been imposed on the private business man. There is no adequate fiscal reason for barring recovery. Every consideration of justice demands that it be allowed.

As a matter of fact, governmental reparation for damage inflicted customarily goes well beyond the class of cases just discussed. Nor is this always by the fast-and-loose methods of legislative favor. It is familiar that the common-law liability of municipal corporations has sometimes been considered too restricted. New England cities and towns, for example, were once upon a time exempt from suit for accidents occasioned by obstructions or defects in their streets. But now legislation has abolished or narrowed the exemption. A similar tendency may be observed in statutes and practice relating to states. If harm results from the improper

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benefit from the parks. Here tort liability would result in making the beneficiaries bear the entire cost of maintenance. Other states may enforce such liability. It seems clear that Massachusetts will not because of the attitude already taken as to municipalities. *Clark v. Waltham*, 128 Mass. 567 (1880).

<sup>54</sup> MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. 20, 17.

<sup>55</sup> The Boston "Herald" for Oct. 2, 1913 — and presumably the newspapers in general — contained an outline of one such plan respecting telephones and telegraphs.

performance of a governmental act which is industrial rather than political, the sovereign very often submits itself to the judgment of the courts as to whether and what compensation should be given. When a British warship during time of peace collides with a private vessel, it has become commonplace to try out the claim and reimburse the claimant if he deserves it. The suit is nominally against the officer in charge of the offending warship, who, needless to say, does not pay the damages himself.<sup>56</sup> Congress specially refers such cases to the Court of Claims.<sup>57</sup> This is presumably a recognition of moral obligation.

If, as the writer believes, states should more generally subject themselves to actions for administrative torts, the problem of framing remedial statutes deserves some notice. Experience already has posted various signboards and warnings. Legislators must consider three main points:

1. The necessity or advisability of creating special tribunals to hear claims of this nature. Apparently there is no magic in such separate courts; even France has not developed an entirely distinct system of administrative law.<sup>58</sup> With us, everyday courts pass constantly upon the responsibility of municipal corporations. The law of state responsibility should run approximately parallel. When the United States Court of Claims was founded, any sort of legal proceeding against the sovereign was *rara avis*. Now the glamor of novelty has worn off and the District Courts enjoy a limited concurrent jurisdiction.<sup>59</sup>

<sup>56</sup> MATSUNAMI, COLLISIONS BETWEEN WARSHIPS AND MERCHANT VESSELS, 260 *et seq.*; H. M. S. Sans Pareil, [1900] L. R. P. D. 267.

<sup>57</sup> Sampson v. United States, 12 U. S. Ct. Cl. 480 (1876); St. Louis, etc. Co. v. Same, 33 *id.*, 251 (1898). See also Walton v. Same, 24 *id.*, 372 (1889) (negligent failure to light beacon), and Commercial Pacific Cable Co. v. Same, 48 *id.*, 461, 471 (1913) (mooring negligently dropped on submarine cable). An Illinois statute gives jurisdiction over claims for damage by the National Guard. Smith v. State, 2 Ct. Cl. (Ill.) 149 (1912).

Somewhat similar French cases before the Conseil d'État concern personal injuries and damage to property negligently caused by military and naval maneuvers: 18 Feb., 1864, *Comp. la Paternelle*, D. P., 1867-3-20; 17 July, 1896, *De Narbonne*, D. P., 1897-3-72; 17 March, 1899, *Commune de Villey-Saint-Etienne*, D. P., 1900-3-64; 26 Jan., 1906, *Arnoult*, D. P., 1907-3-93; 24 May, 1912, *Bathiat*, D. P., 1914-3-73.

<sup>58</sup> Edmund M. Parker, "State and Official Liability," 19 HARV. L. REV. 335, 340. Compare A. V. Dicey, "*Droit Administratif* in Modern French Law," 17 L. QUART. REV. 302.

<sup>59</sup> 1 U. S. COMP. STAT. (1913), § 991 (20).



Some constitutions, however, forbid impleading the State in any court. Such provisions might be excised by amendment, but this is a clumsy, uncertain process. These jurisdictions can probably best get around the difficulty by establishing boards of claims which look and act like courts, yet are technically outside the constitutional prohibition.

2. The method of giving effect to judgments or awards against the state. This of course cannot be accomplished by anything like the common-law execution. It calls for some kind of legislative appropriation. The less red tape the better. With that sentiment any lawyer who has ever tried to collect a bill of costs from the United States will surely agree! The patience of Job might fail under the elaborate ceremonial of recovering illegally assessed taxes from this same defendant. Massachusetts, in pleasant contrast, has a simple, workmanlike procedure. The court certifies the amount found due a claimant; the Governor signs a warrant; and the warrant is satisfied out of any available appropriation.<sup>60</sup> The result is quick payment, secured with little trouble.

3. The form by which the statute shall define the remedy created. If courts invariably saw eye to eye in the matter of interpretation, a grant of jurisdiction as to "all claims against the state" might suffice. But there is great danger that this formula will lead to an implied exception of tort claims. Although *Riddoch v. State* may be wrong, the case reveals a tendency that must be reckoned with. No statute is a good risk which invites cautious judges to hamstring it.

Too specifically worded a law is equally hazardous. Legislative novelties are construed with bone-paring closeness. The New Zealand liability act applies to injuries "in, upon, or in connection with a public work, meaning thereby any railway, tramway, road, bridge, electric telegraph, or other work of a like nature used by . . . or constructed by" the government. A mine is held not to be a "work of a like nature." Hence one run down by a steam lorry connected with a state coal mine has no remedy under the act.<sup>61</sup> But presumably a man negligently injured in a coal mine operated as an adjunct of a railway *could* recover.<sup>62</sup> Canada, too, struggles

<sup>60</sup> REV. LAWS, c. 201, § 3.

<sup>61</sup> *Barton v. The King*, 28 N. Z. L. R. 629 (1909).

<sup>62</sup> *The King v. Shand*, 23 N. Z. L. R. 297, 306 (1903) (excavation from which railway ballast was taken).

with the judicial definition of "public work."<sup>63</sup> There the injury must occur "on" a public work, and this little word introduces new complications. If a tug collides with a merchant vessel while towing loaded barges *away from* a public work, the merchantman's owners cannot sue the Crown.<sup>64</sup> If the boiler of a state dredge explodes when the dredge is in midstream, suit by an injured stoker will not lie.<sup>65</sup> If sparks from a railroad engine set fire to a building *beside* but not *on* the right of way, the government goes scot-free.<sup>66</sup> These cases may be strictly right, yet they must have surprised Parliament. They force arbitrary and unjust distinctions. Amendment can accomplish much. Still, a statute lagging always one stride behind the decisions is hardly desirable.

The happy mean would seem to be a grant of jurisdiction worded to include "all claims against the state, both at law and in equity, sounding in contract or in tort." It is also best to provide explicitly such rights of discovery and other procedural rights as may be deemed advisable for private claimants. Finally, this plan ought in most instances to be supplemented by the statutory creation of certain specific liabilities which do not arise at common law. For example, if military training is to become a prominent feature of our national life, individuals should be allowed to sue the government when they are hurt or their property is damaged during maneuvers.

This is new law. Hardly any important cases were decided before 1885. Even now the scales are fairly free from the "weight of authority." Many American lawyers do not yet realize that the old order may be changing; others have found to their sorrow that courts often show little affection for statutes which trench upon the state's lordly prerogative of wrongdoing. Under every novel set of facts and in every fresh jurisdiction results are painfully uncertain.

<sup>63</sup> *Brown v. The Queen*, 3 Can. Exch. 79 (1892) (fishway in dam not public work); *Larose v. The Queen*, 6 Can. Exch. 425 (1900), aff. 31 Can. Sup. Ct. 206 (rifle range not public work); *Hamburg American Packet Co. v. The King*, 7 Can. Exch. 150 (1901), aff. 33 Can. Sup. Ct. 252 (channel in which improvements have been completed not public work).

<sup>64</sup> *Paul v. The King*, 9 Can. Exch. 245, 270 (1904), aff. 38 Can. Sup. Ct. 126.

<sup>65</sup> Question left open in *Massicotte v. The King*, 11 Can. Exch. 286, 291 (1911); apparently concluded by *Montgomery v. The King*, 15 Can. Exch. 374, 379 (1915).

<sup>66</sup> *Chamberlain v. The King*, 42 Can. Sup. Ct. 350 (1909), overruling *Price v. The King*, 10 Can. Exch. 105, 137 (1906). Same doctrine applied to another situation by *Olmstead v. The King*, 53 Can. Sup. Ct. 450 (1916).



There is a tendency blindly to follow outworn rules. But more extended administrative activity has compelled a keener interest in the problem of administrative responsibility. This interest must soon be reflected by judicial opinion. We may well anticipate rapid and interesting developments within the next few years.

*John M. Maguire.*

BOSTON, MASS.

308

PROMOTERS' LIABILITY: OLD DOMINION v.  
BIGELOW \*

IN the well-known case of the *Old Dominion Copper Mining & Smelting Company v. Bigelow*,<sup>1</sup> the Supreme Judicial Court of Massachusetts adopted in an extreme and literal form the doctrine that the promoter or organizer of a corporation, so long as he owns or controls all of its outstanding stock, stands in a fiduciary relation to the company. While the company is in his control he owes it the same duty not to sell to it his own property or his own services for more than they are worth, that a trustee owes his beneficiary not to obtain a personal advantage at the expense of the trust. This duty exists and is violated even though he intends to remain the owner of all the capital stock and to manage the company indefinitely as his own private enterprise. It exists and is violated even though he intends to subscribe and pay for all the stock himself without offering a share for public subscription, carries out this intention, and subsequently sells the stock as his own stock in the market. The duty exists and is violated even though he intends to make, and does make, to future subscribers the fullest disclosure as to any profit he may have taken. If, indeed, the organizer does retain all the stock; if the promoter takes all the stock himself and subsequently sells it to the public; or if he makes a full disclosure to future subscribers, he escapes liability. He escapes, however, not because he is innocent but because the corporation forgives him. All the shareholders having assented, the corporation condones the wrong. When, however, the corporation cannot be said to have condoned the wrong it is entitled in equity to a remedy for the injury done it by the promoter's breach of fiduciary duty. When, as in the Bigelow case, the promoter, owning or controlling all the capital

\* The author of this article, R. D. Weston, was appointed Master in the matter of two petitions brought by Bigelow in the spring of 1914 for leave to file bills of review on the ground of newly discovered evidence. After he had heard the parties and their evidence and had submitted to counsel his draft report, the petitioner agreed that his petitions might be dismissed, and they were disposed of accordingly in June, 1916.

<sup>1</sup> 203 Mass. 159, 89 N. E. 193 (1909).



stock then outstanding, sells the company his own property for more than it is worth and subsequently, as part of his scheme of promotion, has his company issue more stock to the public without disclosing the amount of profit he has taken, the breach of duty is not condoned by anybody having power to bind the corporation. The promoter has no such power. He cannot as a shareholder or director take any action which will work a condonation of his own wrong. When the subscribers become shareholders, then, for the first time, there are innocent shareholders who have power to bind the company. But they pay for their shares without knowing and, therefore, without forgiving the wrong which the promoter has already done. The wrong does not lie in the promoter's failure to make a frank disclosure to subscribers. It is not done when the public are induced to subscribe. It is done earlier when the promoter takes from the company an unfair price for his property. No wrong is done to the subscribers whom the promoter induces to part with their money by keeping them in the dark. The wrong is done to the company when the promoter does the things which he subsequently fails to disclose. This is the Massachusetts doctrine. Consequently, the corporation can recover full damages, though not a cent of the money recovered will find its way into the pocket of a single subscriber who has been deceived by the promoter, and every dollar recovered may inure to the benefit of shareholders who have never suffered any injury whatsoever at his hands. Consequently, too, the subscribers who are induced to take the company's stock can recover nothing, no matter how grossly they have been misled as to the real value of the company's assets.

The doctrine in this form strikes us as extravagant and fantastic. A fiduciary duty, the breach of which neither does injure nor ever will injure anybody, is inconceivable. It seems very strange that the Massachusetts court, thinking, as it obviously did, that the ignorant subscribers are really deceived by the use which the promoter makes of the corporation, should have elaborated and stoutly maintained a doctrine which deprives the subscribers of their right to redress, instead of shaping the doctrine so that it would afford them an adequate remedy. We are naturally led to inquire how the doctrine was built up. Can anything apparently so artificial rest on a foundation of plain and substantial equity?

The purpose of this article is to show that the Massachusetts

doctrine as finally developed has no such foundation, but involves a complete denial of rights which in equity belong to subscribers, and also involves the doing of great injustice to promoters.

What I call for convenience the Bigelow case was in fact two cases. They were begun in 1902. There were two cases only because there happened to be two transactions in which separate properties had been sold to the company. One case went first to the full bench on demurrer and was decided in favor of the company in 1905.<sup>2</sup> Both were tried together on the merits in 1907, went again to the full bench, and in accordance with its decision,<sup>3</sup> final decrees were entered in 1909.

The decrees charged Bigelow with the "unrighteous profits" which he and one Lewisohn had made out of the company, while they were engaged in promoting it and while they were in control of its board of directors, by selling to the company their own mining properties for much more than their fair market value. The promoters had paid \$1,000,000 for the properties. They had turned them over to the corporation immediately after its organization in 1895 for 130,000 shares of its stock, having a par value of \$25 a share and being worth \$25 a share in the market. The total value of the shares they got was \$3,250,000. But they had been under no obligation to let the company buy their properties for what they themselves had paid for them. They were bound only to turn the properties over to the company for what an independent board of directors would have paid, namely, the fair market value. This was found to be not more than about \$2,000,000. The difference between the market value of the properties and the market value of the stock which the promoters had taken, approximately \$1,200,000, was the sum for which they were held liable to account as of some time in 1895. With interest this amounted in 1909 to over \$2,000,000. The so-called unrighteous profit had in fact been about equally divided between Bigelow and Lewisohn, but Bigelow as one of two joint wrongdoers was held liable for the whole.

If the promoters had done nothing more than sell their own properties to a corporation all of whose stock then issued was owned or controlled by themselves; if they themselves had bought the residue of the company's stock (20,000 shares having a par value of \$500,000) and had resold it to the public, they would have

<sup>2</sup> 188 Mass. 315, 74 N. E. 653.

<sup>3</sup> 203 Mass. 159, 89 N. E. 193.



incurred no liability. It was a part of their scheme, however, to have the company issue the residue of the stock to the public and to make to subscribers no disclosure as to what the promoters had paid for the property or as to the profit which they had taken for themselves, and this scheme had been carried out. The subscribers for the 20,000 shares had bought in ignorance of the promoters' profits and had not assented in any way to the transactions between the promoters and the company.

The following additional facts were found by Mr. Justice Sheldon, before whom the case was tried. They do not all appear in the report, nor were they regarded as material by the court. Bigelow had disposed of all the stock which he had got as the purchase price of the properties some time before the suits were brought; he had remained a director and president of the company till a new board was elected by the stockholders in April, 1902; the new board discovered that the company had a claim against the promoters, a fact that had not been known before even to the officers of the company; and the new board made this discovery seven years after the organization of the company and only a short time before the suits were begun in the autumn of 1902. I mention these facts because they seem to me to have important bearings on the real equities of the case. It was neither alleged nor found that any of the original subscribers still owned their stock when the suits were begun.

The decision of the full bench overruling the demurrer was unanimous. The opinion was written by Loring, J.

When the cases went to the full bench after the hearing on the merits, the court was divided — Loring, Braley, Sheldon, and Rugg, JJ., being of the opinion that the defendant was liable; Knowlton, C. J., Morton and Hammond, JJ., dissenting. Rugg, J. (now C. J.), wrote the opinion for the majority. Knowlton, C. J., wrote a dissenting opinion.

At the same time that the company brought its suits against Bigelow in Massachusetts, it brought like suits against Lewisohn's executors in the United States Circuit Court for the Southern District of New York. The defendants fared much better in the federal courts. They demurred, as Bigelow had demurred in Massachusetts, and their demurrer was sustained first by the Circuit Court,<sup>4</sup>

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<sup>4</sup> *Old Dominion Mining Co. v. Lewisohn*, 136 Fed. 915 (1905).

again by the Circuit Court of Appeals,<sup>5</sup> and finally by the Supreme Court of the United States.<sup>6</sup> Mr. Justice Holmes delivered the opinion of the court, which was unanimous.

The Massachusetts cases went again to the Supreme Court of the United States on writs of error from the final decrees of the Massachusetts court, but on a federal question with which we are not now concerned.<sup>7</sup> The decision affirmed the Massachusetts decrees.

On the facts which I have already stated the Massachusetts court held that Bigelow was liable. If nothing more had appeared the case would have been decided as it was. "There are, however," said the court in the final opinion<sup>8</sup> after the trial on the merits, "certain aspects of the evidence which seem to us to make it [the case] essentially different and materially stronger for the plaintiff." These "aspects of the evidence" do not concern us now, for I am not criticising the decision but the doctrine which the court discussed through twenty pages of the opinion<sup>9</sup> and laid down as applicable to the facts which I have stated. For our present purpose we can discuss the case as if the decision had turned, as the court was prepared to make it turn, wholly on those facts.

The assumption at the root of the Massachusetts doctrine is that, in a case like the Bigelow case, subscribers are deceived as to the real value of the company's assets. I do not say that this is laid down as a proposition of law, but I do say that unless it had been assumed as a fact the doctrine of fiduciary duty to the corporation in such cases would never have been dreamed of. The doctrine would never have been invoked unless the court had thought that the promoter had used the company as an instrument of fraud to deceive the public. The opinions in the earlier cases<sup>10</sup> and the opinion of Mr. Justice Rugg himself make it perfectly clear that the court assumed from first to last that in such cases subscribers are in fact deceived. It was assumed that subscribers have a right to believe that the promoters have taken only so much stock as repre-

<sup>5</sup> 148 Fed. 1020, 79 C. C. A. 534 (1906).

<sup>6</sup> 210 U. S. 206 (1908).

<sup>7</sup> Bigelow v. Old Dominion, 225 U. S. 111 (1911).

<sup>8</sup> 203 Mass. 159, 196.

<sup>9</sup> *Id.*, 175-96.

<sup>10</sup> Hayward v. Leeson, 176 Mass. 310, 57 N. E. 656 (1900); Old Dominion Co. v. Bigelow, 188 Mass. 315, 74 N. E. 653 (1905).

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sents the fair market value of any properties they may have sold to the corporation. It was assumed that subscribers have a right to believe that, if the promoters had charged an excessive price, the corporation, acting under their control, would not invite the public to take stock at par without a full disclosure. The doctrine of fiduciary duty was originally designed to afford protection to subscribers.

It is difficult to see why people who subscribe for stock are deceived by the promoters, when, if the promoters subscribe for the stock themselves and sell it again in the market, the people who buy it are not deceived. It is difficult to see why a subscription is so different from any other kind of purchase. It is difficult to reconcile the proposition that in legal contemplation the subscribers are deceived with familiar and well-established rules in the law of sales. We suspect that the courts were too quick to assume that the big promoters with their corporation on the one side and the small subscribers on the other do not meet on an equal footing and that the latter are likely to be overreached. We suspect that if the first case to arise had been one in which all the stock offered for subscription had been taken by a single rich man, the doctrine of the promoters' fiduciary duty to the corporation would not have seemed so plausible.

Although there may be serious difficulties in the way of maintaining it as a proposition of law, I nevertheless intend to assume, for all the purposes of this discussion, what the Massachusetts court assumed, namely, that when a promoter deals with a corporation as Bigelow dealt with the Old Dominion the subscribers are in fact deceived. That an appropriate and adequate remedy should be provided was, as I have already said, the view originally taken by the court. To provide such a remedy was the purpose and the only purpose which the court had in mind.

Serious misgivings as to the soundness of the Massachusetts doctrine rise in our minds when we examine the opinions of the court with care and reflect upon the consequences of applying the doctrine as the court has laid it down, because we soon discover that its reason was lost sight of and its purpose was not accomplished. To begin with, therefore, I intend to show that in the Bigelow case the doctrine was so applied that its purpose was accomplished only to a small extent, if at all, and that a great many people whom Bigelow

had not wronged, directly or indirectly, profited at his expense. Incidentally, I intend to show that the Massachusetts rule, which makes the market value of the stock wrongfully taken the measure of the promoter's liability to account, also fails to accomplish the purpose of the doctrine of which it forms a part. The rule, to be sure, is perfectly consistent with the doctrine as the Massachusetts court finally shaped it, but cannot be reconciled with its original reason and its original purpose.

For the sake of argument and simplicity of illustration, let us imagine a small corporation with \$15,000 worth of capital divided into shares having a par value of \$1 each. The promoters convey to the corporation properties worth \$8,000, taking for them 13,000 shares. Two thousand shares are afterwards sold to subscribers. This keeps the relative proportions substantially what they were in the Bigelow case.

We can first suppose that the subscribers discover what has been done soon after they have paid their subscriptions and while they and the promoters still hold their stock — the promoters their 13,000 shares and the subscribers their 2,000. The corporation would naturally have its choice of three remedies — to compel (1) rescission, or (2) the return by the promoters of 5,000 shares, or (3) the payment by the promoters of \$5,000. Any one of these remedies would accomplish substantial justice. The remedy of rescission (1) would work like an emetic. The promoters would disgorge all their stock and would get back their property. This would leave the corporation with cash assets of \$2,000. All the stock, 2,000 shares, would be held by the subscribers and would be worth par. The surrender of 5,000 shares (2) by the promoters to the company would not affect the real value of the company's assets. The assets would still consist of property worth \$8,000 and cash paid in by the subscribers \$2,000, or \$10,000 in all. The amount of stock would be reduced and the company's assets would be represented by the 8,000 shares retained by the promoters and the 2,000 shares originally taken by the subscribers. The payment of damages to the amount of \$5,000 (3) would increase the value of the assets to \$15,000, and each and every share would then have behind it one dollar's worth of property and no more. Any of these remedies would work substantial justice between the promoters and the subscribers.

But unless the remedy be administered immediately the conse-



sequences are likely to be very different. With the lapse of time things are likely to happen which reduce the number of remedies which can possibly be applied, and change greatly the actual effect of applying any one of them. Rescission may become improper or impossible for either of two reasons: (1) The condition of the property may have changed; its value may have been reduced so that restoring it to the promoters would not put them *in statu quo*; its value may have been increased so that it is not right to ask the company to restore it for what the promoters received as the purchase price. (2) The promoters may no longer hold the stock or be able to buy it in the market. In the Bigelow case involving the mine itself rescission was impossible for both of these reasons. It was impossible in the other case involving what were known as the "outside properties," for the second reason. Bigelow could not do his part in a rescission without returning all the stock that he had got for the property. He had disposed of all his stock and there was in the market no stock which he could buy. This same reason may likewise make it impossible to order the promoter to restore the part of the stock representing his unrighteous profit. After a time the only remedy left is very likely to be, as in the Bigelow case, an accounting for the value of the stock wrongfully taken.

The form of remedy, however, is comparatively unimportant. The important thing is the effect which the application of any one of the remedies has on the real parties — the promoters who have done the wrong and the subscribers who are the persons, and the only persons, who have been injured. If the remedy be not applied immediately the promoters may have disposed of their stock in the market before their wrongdoing has been discovered, and the subscribers may have sold their stock and taken their loss in ignorance of any claim which the company has against the promoters. Such changes in the situation of the parties were regarded as immaterial by the Massachusetts court, but I think it can be shown to a demonstration that they affected the equities in a most material and substantial way. And when I say the "equities" I am using the word not in a popular sense but in a scientific sense.

When, as in the Bigelow case, the promoters have disposed of all their stock, let us see whither the Massachusetts doctrine carries us. I do not mean to intimate that the court did not face the consequences boldly. They did face them not only boldly, but, as I think,

blindly. They pursued their theory that the promoter was a trustee regardless of the sense in which he might be so regarded and the purpose for which he might be so treated.

We are now assuming that the promoters have sold all their stock before the discovery of the claim against them and before suit is brought. The purchasers have bought with reference to the real value of the company's assets. The present holders of those 13,000 shares have presumably paid for them what they were really worth, or  $66\frac{2}{3}$  cents a share. They may have paid more. They may have paid less. But whatever they paid, the 15,000 shares of stock had behind them assets worth only \$10,000, and  $\frac{2}{3}$  of par was all that the buyers had any right to suppose the stock was worth. We will assume for the present that the original subscribers have retained their stock. The company brings suit and recovers \$5,000 in damages. This makes its assets stand as follows:

|   |              |
|---|--------------|
| Property . . . . .                      | \$8,000      |
| Subscribers' cash . . . . .             | 2,000        |
| Promoters' unrighteous profit . . . . . | <u>5,000</u> |
| Total . . . . .                         | \$15,000     |

The subscribers' stock has been made worth what it ought to be, or \$1 a share. But in order to accomplish the same result directly the promoters would have had to pay the subscribers only  $33\frac{1}{3}$  cents on each of 2,000 shares, or \$666.66 $\frac{2}{3}$  in all. The promoters are in fact required to pay \$5,000, and of this amount \$4,333.33 goes to the stockholders who bought their stock from the promoters themselves and have not suffered in any way by reason of the supposed wrongdoing.

In the Bigelow case  $\frac{1}{10}$  of what Bigelow was ordered to pay, or over eighty-five per cent of \$2,000,000, inured to the benefit of stockholders who derived title from the promoters themselves and had not been injured by them.

It would certainly seem that if the corporation is allowed to recover at all it ought in such a case to recover for the sole benefit of those who have in fact been injured by the wrongdoing of the promoters, and then only so much as is required to make the injured persons whole.

It is plain that the original subscribers are the only persons really injured by the wrongdoing of the promoters. But if seven years,



or any other considerable period of time, elapses, many of the subscribers will have sold their stock and taken their loss. Again, we may assume that the selling price is  $66\frac{2}{3}$  cents a share, representing the value of the company's assets. Purchasers from them buy without knowledge of any claim of the corporation against the promoters, and consequently without any reliance on such a claim. The corporation afterwards discovers the claim and enforces it against the promoters. The purchasers of the original subscribers' shares suddenly find their shares worth par. They have all got  $33\frac{1}{3}$  cents a share which does not belong to them, but which does belong in equity to the original subscribers who sold at a loss in consequence of the fact that the promoters, in pursuance of their original unrighteous scheme, have kept the subscribers in the dark as to the promoters' profits. If all the original subscribers have disposed of their stock before the promoters are found out, then not a single person whom the Massachusetts doctrine was invented to protect obtains any sort of redress by virtue of the company's recovery. It certainly seems as if the corporation should recover, if at all, only as a trustee for original subscribers who may or may not have parted with their stock.

Another difficulty with the decision (traceable apparently to the same conception or misconception of the promoter as a trustee for the corporation who has wrongfully misappropriated shares of stock) is that the market value of the stock wrongfully appropriated was held to be the unrighteous profit for which the promoter must account. Let us see how the Massachusetts rule works in this respect.

It is notorious that the market value of stock may differ widely from the value of the company's assets. In the Bigelow case the market value of the stock happened to be at least par, while the company's assets could not have been sold in the market for an amount equal to anything like the par value of all the stock. If the company had been wound up the assets, including the \$500,000 paid in by the subscribers, would have sold for not more than \$2,550,000, while the par value of its outstanding stock, 150,000 shares at \$25 apiece, was \$3,750,000. This made the shares really worth less than 63 cents on the dollar.

Taking again our small and simple corporation, we may first suppose that the market value of the shares is 50 cents, or  $\frac{1}{2}$  of par,

and then that it is \$2, or twice par, and see the result of applying the Massachusetts rule in each case.

The promoters took 5,000 more shares than they should have taken. The company, we will suppose, recovers the market value of these shares. At 50 cents apiece this is \$2,500. The company's assets then stand thus:

|   |              |
|---|--------------|
| Property . . . . .                      | \$8,000      |
| Subscribers' cash . . . . .             | 2,000        |
| Promoters' unrighteous profit . . . . . | <u>2,500</u> |
| Total . . . . .                         | \$12,500     |

To this total the promoters have contributed \$10,500. The subscribers have contributed \$2,000. The promoters and subscribers ought to own the stock in the proportion of  $10\frac{1}{2}$  to 2. As a matter of fact, they hold it in the proportion of 13 to 2.

In order to make the subscribers whole the promoters should be required to pay \$5,000 regardless of the market value of the stock. Under the Massachusetts rule the subscribers' stock, for which they have paid par, or \$1 a share, is really worth after the promoters have accounted only  $\frac{1\frac{2}{3}}{10}$  of par, or  $83\frac{1}{3}$  cents. Collectively they have lost, notwithstanding the enforcement of the promoters' liability,  $\$333.33\frac{1}{3}$ , or  $\frac{1}{6}$  of all they put in. If the market value of the Old Dominion stock had been only  $\frac{1}{2}$  par and the amount for which the promoters had been forced to account had been ascertained accordingly, the subscribers' loss would have been  $\frac{1}{6}$  of \$500,000, or over \$83,000.

We are next to suppose that the market price of the promoters' unrighteous profit, 5,000 shares, was twice par, or \$2 a share. The company recovers on this basis \$10,000. Its assets then stand thus:

|   |               |
|---|---------------|
| Property . . . . .                      | \$8,000       |
| Subscribers' cash . . . . .             | 2,000         |
| Promoters' unrighteous profit . . . . . | <u>10,000</u> |
| Total . . . . .                         | \$20,000      |

There are 15,000 shares outstanding, and the subscribers' shares have become worth  $\frac{1}{3}$  of \$1, or  $\$1.33\frac{1}{3}$ . The subscribers have gained immensely at the promoters' expense. Instead of being required to account at the market price, the promoters ought to have accounted at the price at which the stock was offered to sub-



scribers. The liability of the promoters should be exactly the amount which will make the total value of the assets, as of the time immediately after the sale by the promoters to the company, exactly what the subscribers had a right to think the value was when they agreed to take stock. If the promoters be permitted to pay less, then they retain a part of their unrighteous profit as against those whom they have deceived. If they are forced to pay more, the subscribers get an unrighteous profit at the expense of the promoters.

I have now pointed out that the proposition which the Massachusetts court laid down in the Bigelow case, namely, that the promoters stood in a fiduciary relation to the corporation, did not commend itself to a large majority of the able judges who heard it argued. I have shown that in some circumstances the Massachusetts doctrine may be applied so as to accomplish its purpose and not produce any strikingly inequitable result. But I have also shown that when it is applied as it was in the Bigelow case the results produced appear to be grossly inequitable. We stand appalled when we think that a court of equity was prepared to strip Bigelow of over \$2,000,000, the circumstances then being such that  $\frac{13}{15}$  of this huge sum would inure to the benefit of stockholders who themselves had never been injured, and whose predecessors in title had never been injured, by Bigelow, and that only a small fraction of it ( $\frac{2}{15}$ ) could by any possibility reach the pockets of the original subscribers, who were the only persons who had ever been deceived or injured by Bigelow's conduct as a promoter.

What I may call "the rule of damages" was a subordinate matter. It happened that the market value of the shares in the Bigelow case was found to be par, which was the price at which they had been sold to subscribers. But if this had not been so — if the market value had been either less or more than the price charged to subscribers — we have seen how this rule would have worked.

We at last come to the vital question: Is the doctrine which the Massachusetts court applied a sound doctrine? It surely is not kind, but is it sound?

The doctrine, as the court applied it, makes the promoter a real trustee or fiduciary not for the subscribers but for the corporation. Consequently, the wrong which he commits is committed not against the subscribers but against the company. If this be

true, then all the conclusions reached by the court follow of necessity.

If the promoter be a real trustee for the company, then the injury which he does to subsequent subscribers is not an injury which he does directly to them, and is not an injury in the nature of common-law deceit, but is an equitable wrong done to the corporation, such as a trustee does to his beneficiary when he sells his own property to himself as trustee at an excessive price. So regarded, the wrong is done to the corporation before the subscribers are taken in either as stockholders or as innocent victims. And if they subsequently assent to the prior transaction between the promoter and the company, this does not mean that no wrong was done. It only means that the beneficiary or corporation, through the action or acquiescence of all its stockholders, forgives the wrong. This was all worked out by the Massachusetts court.<sup>11</sup>

If the promoter be a real trustee for the company, then it also follows that we are not concerned with what disposition the subscribers and promoters may have made of their stock or with any question as to who may be the present shareholders. If a man has abused his power over a corporation to get possession of certain shares of its stock, holds the stock as trustee for the corporation in the ordinary sense, and misappropriates the trust *res*, then, of course, he must account to the company for the whole value. It makes no difference whether the stockholders have or have not been aware that the corporation owned any such asset as an equitable interest in the stock held by the trustee. The company's shares may have been bought and sold in the market for years before the trustee is brought to book, so that the stockholders who benefit by making him account to the company may all be different persons from those who were stockholders when the breach of trust was committed. The corporation directly, and indirectly every person who then happened to be a stockholder, were wronged thereby. The corporation directly, and indirectly every person who happens to be a stockholder when the breach of trust is found out and damages are recovered, get the benefit. But the trustee who has wronged the corporation cannot say that there is anything inequitable in making him restore to the company all that he has wrongfully taken. And it has never been deemed practicable to go further and marshal a

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<sup>11</sup> *Old Dominion v. Bigelow*, 203 Mass. 159, 179-93.



company's assets with reference to claims which former stockholders might advance against the amount recovered. This was also worked out by the Massachusetts court.<sup>12</sup>

Finally, if the promoter be a real trustee for the company, no exception can be taken to the rule of damages which the Massachusetts court laid down.

All the results of which I have been speaking follow if the promoter's relation to the corporation, in a case like the Bigelow case, is what the court say it is. We have to go back a step further and ask whether they are right in saying that he is a real trustee and that he ought to be treated as such. It is submitted that they are clearly wrong, and clearly wrong on their own showing.

The essential, the radical, the fundamental difference between a case such as the court imagined the Bigelow case to be, and a case such as the Bigelow case really was, is this: In the case of a real trustee for the corporation the company is the artificial person directly injured by the trustee's wrongdoing. In the promoter's case the subscribers are the persons directly injured. When a real trustee appropriates to his own use shares of stock which he holds in trust for a corporation, the company is the equitable owner and is the person injured. All the stockholders are injured too, but only indirectly, as they are stockholders of the injured company. The same is true if a person, holding the majority of stock in a corporation and managing it by means of a board of dummy directors, sells the company his property at an unfair price and makes the directors ratify the transaction. This the Massachusetts court regarded as a case on all fours with the Bigelow case. In such a case, however, the corporation is the person directly injured by the breach of fiduciary duty. The minority stockholders are injured only indirectly.

In the promoter's case, if anybody is directly injured then the subscribers are the persons who are directly injured. There is no escape from this as a fact. And if there be no escape from it as a fact, then it ought not to be blinked as a proposition of law. It must be accepted as a proposition of law, and when so accepted the doctrine of the Bigelow case cannot be reconciled with it.

We find the Massachusetts court on the horns of this rather picturesque dilemma. Are the subscribers deceived by the manner in which the promoter uses the company in order to obtain their

<sup>12</sup> 203 Mass. 159, 193, 194.

subscriptions or are they not? If they are not, then the assumption of fact which lay at the root of the whole doctrine was false. If they are, then the doctrine as interpreted and applied takes away from the subscribers, the persons directly injured, the remedy which belongs to them personally and gives it to the corporation which in legal contemplation is a separate and distinct person. I yield nothing to the Massachusetts court in respect to the necessity of treating the corporation as a person separate and distinct from its shareholders.

There can be no doubt that the court believed that in these cases subscribers are deceived, and that it started off with the intention of affording the subscribers a remedy. What aroused the judicial indignation was not that the artificial person, the corporation, was wronged, but that the unenlightened public were induced to pay their money for shares in a company whose assets were not as valuable as they had a right to suppose they were. The subscribers would not put in their money as against the promoter's property if they knew that the property had been overvalued. The promoter intends to mislead them. His scheme is conceived in fraud, and *ipso facto* — in the very nature of the thing — deceives subscribers when carried into effect. In the opinion written by Mr. Justice Rugg we find him using language and quoting with approval the language of other judges so as to leave no doubt that the majority of the court believed that in such cases the subscribers are the innocent victims of a very real sort of fraud. For example, on page 183, he quotes from *Jessell, M. R.*, as follows:

"it is intended to cheat the future shareholders. . . . You can defraud future allottees as well as present allottees."<sup>13</sup>

Again, on page 184, from *In re Leeds and Hanley Theatres of Varieties*:<sup>14</sup>

"When it is said that the promoters stood in a fiduciary position towards the company, that does not mean that they stood in such a relation to these directors and these seven signatories [the persons corresponding to Bigelow's dummy directors and shareholders]. It means that they stood in a fiduciary relation to the future allottees of shares — to the persons who were invited to come in and take up the shares of the company."

<sup>13</sup> *In re British Seamless Paper Box Co.*, 17 Ch. D. 467, 471.

<sup>14</sup> [1902] 2 Ch. 809, 823.



Again, on page 184, he quotes Lord Robertson in *Gluckstein v. Barnes*:<sup>15</sup>

"The people for whom these gentlemen [the promoters] were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain."

Again, on page 184, from *Pietsch v. Milbrath*:<sup>16</sup>

"It [the corporation] is deceived in a legal sense when it is rendered helpless by its managers as to protecting those invited to subscribe for its stock and is then used to aid in defrauding them."

Again, on page 191, from James, L. J., in *In re British Seamless Box Co.*:<sup>17</sup>

"If they [the promoters] were intending, although then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the court would feel no difficulty in saying, as Lord Langdale did in *Society of Practical Knowledge v. Abbott*, 2 Beav. 559, that they intended to commit a fraud."

At pages 189 and 190 Mr. Justice Rugg himself uses these words:

"But the vicious intent looks forward to the procurement of money from the ignorant public by means of original subscriptions, and the execution of this evil intent extends backwards to contaminate the sale and its profit."

And in *Hayward v. Leeson*<sup>18</sup> Mr. Justice Loring, delivering the opinion of the court, had said:

"The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders, . . . if the promoters undertake to make to themselves remuneration for their services as promoters, without making a full disclosure of the fact to future stockholders, their principals, and getting their consent, they are guilty of a fraud."

Such language as we have quoted was not used hastily and in-  
advisedly, but soberly, discreetly, and in the fear of God. It is plain  
that all the judges thought that an injury in the nature of fraud was  
actually done directly to the subscribers. It is inconceivable that

<sup>15</sup> [1900] A. C. 240, 257.

<sup>16</sup> 123 Wis. 647, 656.

<sup>17</sup> 17 Ch. D. 467.

<sup>18</sup> 176 Mass. 310, 320, 57 N. E. 656 (1900).

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the Massachusetts court, or any other court, should have consciously and deliberately intended to deprive them of their remedy. Such a proceeding would violate all our notions of justice and equity.

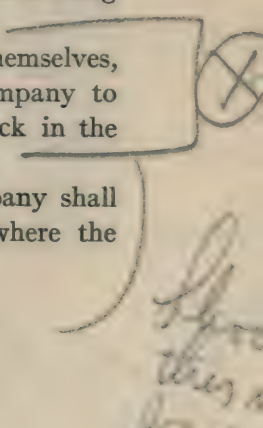
To take away their remedy from subscribers and give it to the corporation is well enough, so long as you can do them substantial justice without doing substantial injustice to the promoter. We have seen that this may be the result of applying the Massachusetts doctrine in some cases. But when you apply it to a case like the Bigelow case, we have seen that you may not be doing justice to a single subscriber and that you are certainly doing great injustice to the promoter. If I have been defrauded by somebody, and a court of equity says that some company in which I once happened to own stock can recover for my protection without any obligation to account to me, it is manifestly absurd. If I have sold my stock, the company's recovery does not help me a bit. If the same court says that, because I have been defrauded, the company, in which I happened to be a stockholder, can recover ten times as much as is required to make me whole, then palpable injustice is done to the wrongdoer. But such are the consequences of the Massachusetts doctrine. Such are the consequences of taking away the remedy from the persons really injured, of treating the corporation as if it were the person really injured, and of swallowing the fiduciary theory, bait, hook, and sinker.

It is curious to see how the acceptance of the doctrine in its literal and rigid form led the court into a quagmire of inconsistencies, irrelevancies, and self-contradictions. They are discovered in the way the court dealt with four classes of cases closely related to the case at bar.

1. Cases where the organizers intend to retain all the stock and to manage the company as a private enterprise without inviting the public to subscribe.

2. Cases where the promoters take all the stock themselves, not intending that stock shall be issued by the company to future stockholders but intending to sell their own stock in the market.

3. Cases where the promoters intend that the company shall issue stock to subscribers as distinguished from cases where the promoters have no such intention.

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4. Cases where the promoters make a full disclosure to future subscribers or allottees.

Let us consider these four classes of cases in their order, and first the cases where the organizers intend to retain all the stock. Of these cases the Massachusetts court said:<sup>19</sup>

"The real ground of the decisions of which *Salomon v. Salomon* [(1897) A. C. 22] is a type, is that the corporation is estopped by the circumstance that all persons with financial concern in the matter have assented with knowledge and thus the lips of everybody are sealed. It is not that no wrong has been done, but that whatever wrong has been done has been condoned."

That is to say, if A. and B. who are carrying on a business as partners determine to incorporate it for the convenience and protection of themselves and their families, and, anticipating the growth of the business, choose to turn the partnership assets over to the corporation for twice their present value, they violate a fiduciary duty to the corporation even though they intend to remain the proprietors of all the stock so long as they live, and to transmit it at their deaths to their wives and children. No one, to be sure, can complain. Nevertheless a wrong is done which the organizers, being the owners of all the stock, forthwith condone. Could anything be more extravagant than the proposition that the corporation is wronged? To such lengths was the Massachusetts court carried in working out the theory of fiduciary duty to the corporation.

But this is not all. If there is anything clearly stated in the opinion of the court, it is that the organizers or promoters who have done the wrong cannot condone it by anything they themselves do.

"It would be a vain thing," said Mr. Justice Rugg, "for the law to say that the promoter is a trustee subject to all the stringent liabilities which inhere in that character, and at the same time say that, at any period during his trusteeship and long before an essential part of it was executed or his general duty as such ended, he could, by changing for a moment the cloak of the promoter for that of the director or stockholder, by his own act alone, absolve himself from all past, present, and future liability in his capacity as promoter."<sup>20</sup>

According to this principle, again and again asserted, the corporation could never be said to forgive the wrong until it was repre-

<sup>19</sup> 203 Mass. 159, 192.

<sup>20</sup> *Id.*, 188.

sented by an independent board of directors, or by stockholders uncontaminated by the original breach of trust duty — until innocent stockholders, with full knowledge of the facts, ratified the transactions between the organizers and the company. The position of the court involves a flat self-contradiction, or compels them to recognize the *Salomon v. Salomon* class of cases as constituting an exception to their general rule.

The same fate befalls the theory of the court as to the cases where the promoters take all the stock in payment for their properties. Then, no matter how excessive the price, the promoters incur no liability. The corporation is wronged, but somehow forgives the wrong or is estopped to complain. But how does it forgive or how is it estopped? No one has assented except the promoters themselves, and they *ex hypothesi* cannot change for a moment the cloak of the promoter for that of the shareholder and give their own consent to their own wrong. Nor can the corporation while acting under the control of the promoters properly be said to do anything which estops it from complaining of the wrong after it has reached a condition where independent action on its part becomes possible. The rule laid down by the court for these cases either involves another contradiction or must be recognized as another exception.

As to the third class of cases, in which the intention of the promoters to have their company issue stock to future subscribers has been treated as a matter of vital importance, it now appears that that intention is and always has been wholly irrelevant. In *Hayward v. Leeson*,<sup>21</sup> in the Bigelow case<sup>22</sup> when the court dealt with it on demurrer, and even in the final opinion of Mr. Justice Rugg,<sup>23</sup> all the talk that we find about "a scheme of corporate organization which contemplates an issue of stock to the unenlightened public" was as the crackling of thorns under a pot. It was, indeed, worse than idle. It was extremely misleading. For, according to the Massachusetts doctrine as finally formulated, the breach of trust is committed when the organizers or promoters sell the company their properties or their services at an excessive price, even though they do not intend to offer a share of stock for public subscription. Therefore neither their intention when they commit the breach of trust in respect to the subsequent issue of more stock, nor the actual

<sup>21</sup> 176 Mass. 310, 57 N. E. 656.

<sup>22</sup> 188 Mass. 315, 74 N. E. 653.

<sup>23</sup> 203 Mass. 159, cf. pp. 179, 186, 189.

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issue of more stock, can possibly be material. Regardless of their intention, the breach of trust is irrevocably committed as soon as they have completed their transaction with the company. The wrong may afterwards be condoned, but condonation implies that the wrong has been done; and, so long as they control the outstanding stock and the board of directors, they cannot condone for the company the wrong which they themselves have done it. Unless stock is in fact issued to future subscribers, there may be no one financially interested in the company who has either a right to complain or any desire to see a suit brought by the company against the promoters. This, however, is an accidental circumstance which does not affect the quality or nature of the wrong. The issue of stock to future subscribers simply brings upon the scene innocent shareholders who either may act for the company in condoning the wrong or may institute proceedings in its name and for its benefit in order to make the promoters account for their unrighteous profits.

Finally we come to the cases where the promoters intend to disclose, and do disclose, all the facts to future subscribers. While the court is of the opinion that the promoters who have sold their properties to the corporation at an overvaluation have done it a wrong, they nevertheless assume in all their opinions that if the subscribers choose to take the stock after disclosure, neither they nor the corporation can complain. And this would be so even though a very small part of the capital stock — say  $\frac{2}{15}$ , as in the Bigelow case — were issued to innocent subscribers. Purchase after disclosure would be equivalent to assent on the part of the subscribers. It is impossible, however, to see why after becoming shareholders they should not say that the promoters had admitted their breach of fiduciary duty and insist that the corporation should sue the promoters to recover. When they buy as subscribers they do not deal with the promoters but with the company, and there is no reason why the company as such should stipulate either expressly or by implication that if the subscribers buy with knowledge of the earlier transactions between the corporation and the promoters, the subscribers must assent to what the promoters have told them. This would be permitting the promoters to use the corporation, still in their control, as a means of extorting forgiveness for their wrongdoing from persons who had not yet become shareholders. Free action on the part of the subscribers after they had become share-

holders would be necessary before it could be said that they had assented to the prior transactions.

And if it could with any propriety be said that subscribers who took the stock after disclosure were estopped to complain, this would not help matters unless they took a majority of all the stock. If they were a small minority in value, we should again encounter the difficulty that the promoters, being still the owners of a majority in value of the stock, could not possibly forgive their own breach of trust. Yet the Massachusetts court virtually admits that they can do this. Here is another contradiction, or a rule which the Massachusetts court must treat as another exception to their general rule of fiduciary duty.

The explanation of all these inconsistencies, irrelevancies, and contradictions is obvious. The gist of the action against the promoter is not a breach of duty to the corporation, but is a breach of duty — call it if you like a fiduciary or equitable duty, or call it the common-law duty not to deceive — which the promoter owes to future subscribers. Hence it is that if an issue of stock to future subscribers is not contemplated, there is no breach of duty at all. Hence it is that where the promoters subscribe and pay for all the stock which the corporation issues, there is no breach of duty to the company. Hence it is that the intention to issue stock to future subscribers has so often been spoken of by the Massachusetts court and by the English courts as essential to raise the duty to deal fairly with the company. Hence it is that a full disclosure to the future subscribers makes it impossible to hold that any wrong was done to the corporation. On the theory that the real wrong is done to the subscribers we do not have to recognize numerous exceptions to any general rule. All the classes of cases we have been discussing fall into place without difficulty or friction, and we have a number of subordinate rules which are all in harmony with one general principle.

It is, therefore, submitted that the Massachusetts doctrine can be supported only as a fiction by virtue of which, in a very limited class of cases, an injury committed directly against the subscribers in the nature of fraud and deceit may be carried back and metamorphosed into a breach of fiduciary duty on the part of the promoter toward the company — as a fiction by virtue of which an anticipatory breach of duty not to deceive the subscribers may be



treated as if it were a present breach of duty owed by the promoter to the company. And the Massachusetts doctrine can be supported only so far as in its application the subscribers, being the persons directly injured, are protected by and through the company which the promoter has used as an instrument of fraud. As the promoter has used the corporation as a means of deceiving the public, so the court, by invoking the fiduciary theory, may use the corporation as a means of righting the wrong. There seems to be a sort of poetic justice in such a proceeding; and it is obvious that in a proper case a single suit brought by the corporation may redress the wrongs suffered by all the subscribers, many of whom, if left to pursue their separate remedies, would probably not secure any redress at all. But the fiduciary theory cannot be employed with any propriety unless it does right the wrong. When the use of the fiction fails to right the wrong so far as the subscribers are concerned, and charges the promoter for an amount out of all proportion to the damages sustained by the subscribers, then the fiction is not being used with wisdom and discretion, but is being grossly abused.

Such a fiction is a dangerous thing to work with. Shadows are too easily mistaken for substances. A fiction cannot be handled with safety unless its true character is recognized and its reason and its purpose are kept constantly in view. If the fictitious character of the doctrine had been recognized by the court when they were asked to apply it in the *Bigelow* case, and if the court had kept in view its reason and its purpose, the corporation would either not have been allowed to recover at all or to recover only as trustee for the original subscribers; and the amount for which the promoters would have been held accountable would have been only the amount required to make the original subscribers whole. By failing to recognize that the trusteeship was a fiction; by declaring that the subscribers were the persons directly injured, and by declaring in almost the same breath that the corporation was the person directly injured; by treating the promoter as a real trustee for the company and not as a *quasi* trustee who might be treated as if he were a real trustee simply for the purpose of affording the subscribers the protection and the remedy to which they were entitled, the Massachusetts court came to grief. They had contrived to defeat the very object which they had set out to attain. They had pursued the

offender so far and through ways so devious that by the time they had caught him they had forgotten what his offense had been and whom he had offended. They stood ready to mulct him in a sum of over \$2,000,000 without knowing whether a single person whom they believed he had cheated would be made whole, and without perceiving that less than a seventh of that amount would have sufficed to atone for all the wrongs of which he had been guilty.

R. D. Weston.

Boston, Mass.

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# HARVARD LAW REVIEW

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RESIGNATION OF PROFESSOR BRANNAN. — It is with great regret that we record the resignation from the Law School faculty of Joseph Doddridge Brannan, Bussey Professor of Law. Professor Brannan's connection with the School began in 1871, when he came here as a student in the first year of Langdell's administration. His first connection with the faculty was in 1898, when he was made a full professor. In 1908 he was appointed to the Bussey chair, which he held until this year. He has conducted many courses, but his greatest contributions have been in the law of Bills and Notes. No one who has known Professor Brannan latterly but thinks that many years of useful service to the law still lie before him. It is a source of pleasure that the work of preparing a new edition of the work on the Negotiable Instruments Law will keep him much among us.

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THE LAW SCHOOL. — This year, the first one begun under Dean Pound's administration, is marked by many changes in the Law School catalogue, caused partly by the resignation of Professor Brannan and partly by the School's expanding policy. The change of greatest interest is represented by the new names in the faculty. Professor Albert Martin Kales is a graduate of Harvard College of the class of 1896, and of the Law School of 1899. He comes now to the faculty from the Law School of Northwestern University and the practice of the law in the city of

Chicago, where his career is common property. He will conduct the courses on Property in the third year and, with Professor Joseph Warren, in the second year, as well as a course not previously given on Contracts and Combinations in Restraint of Trade. Assistant Professor Zechariah Chafee, Jr., is a graduate of the School of the class of 1913 and a past editor of this REVIEW. Since graduation he has been engaged in the practice of the law in Providence, Rhode Island. He will have charge of the third-year course on Equity, of the course on Bills and Notes, and, with Professor Wambaugh, of the course on Insurance. Mr. Arthur D. Hill has been made a full Professor. Professor Hill will conduct, in addition to the course on Evidence, the courses on Criminal Law and on Penal Legislation and Administration. The Ezra Ripley Thayer teaching fellowship is held by Chester Alden McLain, LL.B. 1915.

A chief treat for Law School men this year will be the series of lectures on Professional Ethics by Mr. Justice Francis Joseph Swayze of New Jersey. It is particularly fitting that this subject, to the development of which the late Dean Thayer contributed so largely, should now be systematically treated in the School. Other courses offered for the first time deal with Modern Developments in Procedural Law, with Professor Scott in charge, and with the Jurisdiction and Procedure of Federal Courts, under Professor Frankfurter. There are also certain reassignments of old courses. Dean Pound and Professor Westengard will have the course on Torts. Professor Beale conducts the course on Damages, and gives up Municipal Corporations, which is taken by Professor Frankfurter. Professor Westengard has the course on Admiralty, which Mr. Dutch gives up. Professor Frankfurter has the course on Partnership, and Professor Joseph Warren the course on Quasi-Contracts. A course of lectures on Patent Law is given by Mr. Odin Roberts, LL.B. 1891, of the Boston bar. New York Practice is given by Mr. Allen Reuben Campbell, LL.B. 1902, of the bar of New York City, and a course on Brief Making by Mr. William Goodrich Thompson, LL.B. 1891, of the Boston bar. The Law of Mining and Water Rights and Massachusetts Practice are omitted for this year.

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**THE ADAMSON LAW.** — Any discussion of the so-called Adamson Eight Hour Railroad Labor Law <sup>1</sup> must begin with an investigation of what the

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<sup>1</sup> 64th Congress, H. R. 17700, approved Sept. 3, Sept. 5, 1916. "An act to establish an eight hour day for employes of carriers engaged in interstate commerce, and for other purposes."

Sec. 1. "Beginning January 1, 1917, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning compensation for services of all employes . . . actually engaged in the operation of trains" in interstate and foreign commerce, excepting those employed on railroads less than one hundred miles in length, electric street and interurban railroads.

Sec. 2. A commission of three appointed by the President is to study the effects of the standard workday during a period of from six to nine months and report thereon within thirty days thereafter.

Sec. 3. "Pending the report of the Commission herein provided for and for a period of thirty days thereafter the compensation of railway employes subject to this Act



law means and what it does to the existing facts. Only after such investigation can one discuss with understanding its constitutionality or the other legal problems that it raises.

The law, in spite of its title, is not an eight-hour law. By this is meant that it does not restrict the hours of labor to eight hours a day.<sup>2</sup> Eight hours is indeed to "be deemed a day's work," but there is no provision that men shall not work longer if they and their employers wish, no penalty for overtime, and no higher rate of compensation for time beyond eight hours. When the law comes in question it will have to be sustained, if sustained it is to be, on some other ground than that it is a regulation of the hours of labor.<sup>3</sup>

What the law does do is to regulate the rate of pay. Men are to get for eight hours what they previously got for ten, and for time above eight hours not less than *pro rata*. Even here the meaning of the law and its application to the facts are very difficult.<sup>4</sup> Some of the difficulties seem almost to go beyond the possibility of interpretation by a court, and to require amendment or some legislative declaration of intention. When all is said, however, the act was meant for an experimental<sup>5</sup> wage-

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for a standard eight hour workday shall not be reduced below the present standard day's wage," and for overtime not less than *pro rata*.

Sec. 4. Provides penalties for violation.

<sup>2</sup> This is not meant as a criticism of the act. In the present circumstances, a restriction of railroad hours of labor to eight hours would be impossible. Trains must reach their destination, and cannot be left standing on the prairie. It may some day be possible, by redistribution of division points and so forth, to allow all trainmen to go home when they have worked eight hours. But as things are, to decree an eight-hour workday without a liberal dispensing power somewhere, would disrupt the transportation system of the country.

<sup>3</sup> It has been argued that the act, by increasing the ratio of the labor cost to other costs, will induce efforts for economy in labor cost and so result in shorter hours in practice. But the pressure to reduce the labor cost has already been enormous, and in the cases where the new pressure chiefly is applied, the long slow freight runs, as much depends on the operative agents as on the train dispatchers. See however as to this and generally as to the economics and probable operation of the act, William Z. Ripley, "The Railroad Eight-Hour Law," in *AM. REVIEW OF REVIEWS*, October, 1916.

<sup>4</sup> The act operates by interpreting terms used in labor contracts. (See sec. 1, set out n. 1 above.) Many of the present contracts provide a dual or elective basis for the figuring of wages. Ten hours earn a day's wage, so do one hundred miles. The operative's pay is figured on the basis most advantageous to him. So if an engineer runs, say, 150 miles in, say, 5 hours, he gets three halves of a day's pay for five hours' work. Does the act forbid such contracts? Other men, conductors largely, are paid on a monthly basis. Are such contracts made illegal? In many other cases the same road, on standard runs, will be paying, say, \$3.50 for run A of eight hours, \$4.00 for run B of nine hours, \$4.50 for run C of ten hours. Does the Act mean that run A men get \$3.50, run B men \$4.00 plus one eighth of \$4.00, run C men \$4.50 plus two eighths of \$4.50? An anxious reading of the language of the act with these facts in the background has so far not suggested an answer to these questions.

<sup>5</sup> It is barely possible to argue that the act is constitutional upon this ground alone. Congress can undoubtedly investigate any matter about which it may legislate. Since the relation between any proposed legislation and the commerce which is intrusted to the care of Congress is frequently largely a fact question, investigation becomes necessary in order to delimit Congress' power to legislate. It has therefore been well argued that the inquisitorial power of Congress extends beyond its legislative power, though it must necessarily be limited "to matters reasonably calculated to afford information useful and material in the framing of constitutional legislation." See *Interstate Commerce Commission v. Harriman*, 157 Fed. 432, 438. See however *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 417. If Congress determines that investi-

regulating measure, and if it can be applied as such it should be. The question is therefore the power of Congress to enact such legislation.

Such power, if it exists, of course comes from the Commerce Clause. Whether the relations of an interstate carrier to its employees are subject to federal regulation is a question dependent in each case upon the showing of a direct connection between commerce and the proposed regulation.<sup>6</sup> Thus there have been upheld a limitation upon the number of consecutive hours that an employee may work;<sup>7</sup> restrictions on the mode of paying seamen's wages,<sup>8</sup> and an Employers' Liability Act;<sup>9</sup> but a prohibition upon a railway's discharging an employee because of union membership has been declared too remote.<sup>10</sup> The situation at the passage of the present act seems almost to have proved that as a matter of fact the wage question is now directly and substantially related to the possibility of commerce between States.

But the regulation, besides affecting commerce, must be reasonable, must not deprive persons of property without due process. Here again no line *a priori* can be drawn. Cases must be met as they arise. In the supposed case before us, the same facts that show the direct bearing of regulation of the wage question upon commerce seem to give such regulation a reasonable reference to the welfare of the service.

But there is a way of approach that gets us much nearer to the problem. Congress unquestionably possesses, and now for some years has exercised through the Interstate Commerce Commission, the power to regulate the rate of charge for railroad service between States.<sup>11</sup> Clearly the exercise of this power determines the gross income of the railroads. In an ordinary business, wages are regarded as one of the expenses of production according to which firms in that field regulate their prices and hence their gross incomes. Ability to vary the selling price is a powerful factor in the hands of employers when dealing with employees over rates of wages. It is one of the factors that give employers yielding qualities. Obviously if the power to regulate prices is taken away the situation between employers and employees is changed fundamentally. Henceforth disputes over wages are a simple matter of give and take between them; no means of shifting the loss of one to some third party — the public — exists unless the body that has taken the price-regulating power is a party to the controversy. In brief the settlement of any question involving the distribution of a fund produced by labor and capital requires the presence of the person that says how much that fund shall be.<sup>12</sup> It is a necessary and logical consequence of the assumption by Congress of the regulation of rates that it should now interfere to supervise the division of earnings

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gation is fruitless and experiment is necessary, is it permissible for it to pass a temporary act, though its power to pass a permanent act of the same sort has not been definitely proved?

<sup>6</sup> See Employers' Liability Cases, 207 U. S. 463, 494.

<sup>7</sup> Baltimore & Ohio R. Co. v. Interstate Commerce Commission, 221 U. S. 612.

<sup>8</sup> Patterson v. Bark Eudora, 190 U. S. 169.

<sup>9</sup> Second Employers' Liability Cases, 223 U. S. 1.

<sup>10</sup> Adair v. United States, 208 U. S. 161; Harlan and Holmes, JJ., dissenting.

<sup>11</sup> See, for instance, Interstate Commerce Commission v. Chicago, R. I. & P. Ry. Co., 218 U. S. 88.

<sup>12</sup> See, as to a situation most analagous to this, Arthur Evans Wood, "The Labor Problem in Municipal Utilities," UTILITIES MAGAZINE, Sept. 1916, 17, 27 seq.



among the producing elements, and if interference in that division shows a readjustment of rates to be necessary, to grant such. Only an understanding and regulation of the fair demands of the elements working the railroads can enable Congress to determine what the railroads should receive for their commodity. The power now assumed by Congress is therefore a condition precedent to the fair exercise of the power to regulate rates. It is the rescue of the railroads from their impossible position between the upper and nether millstones — a dilemma long familiar to the public mind.

But Congress has intrusted one millstone to the Interstate Commerce Commission. If it retains the other one itself the grinding may go on. It cannot be questioned that if the combination prevents the roads from earning a fair income, power has been exceeded somewhere.<sup>13</sup> But is it the raising of the wage by Congress, or a supposed refusal to raise rates by the Commission, that is unconstitutional? Presumably the latter. Where safety appliances are prescribed by statute, the assumption apparently has been that they must be applied regardless of cost,<sup>14</sup> and the rates advanced if necessary. So probably of wages. The confiscation indeed does not happen until the last remedy has been exhausted, *i.e.*, until an advance has been refused. Of course, the reliance of the Commission on Congress for existence, and the probability that finally the wage question too will be left in the hands of the Commission, make highly improbable any such clash as that supposed.

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THE CASE OF *THE ZAMORA*. — The decision of the Privy Council in the case of *The Zamora*<sup>1</sup> does not justify the excitement which it caused in contemporary newspapers. It does not hold that Order XXIX, Rule I, of the English Prize Court Rules, which is repugnant to the law of nations as recognised by England and administered in English courts, is invalid because of any dominant quality of the law of nations, but because the Order in question was made without authority.

The case arose from the desire of the English war authorities, at a time of moderate necessity, to use part of the cargo of a neutral ship held by the prize court, pending suit for condemnation as contraband. The King in Council, in contravention of international law,<sup>2</sup> amended the Prize Court Rules so as to require the prize court to allow such action, but the Privy Council refused to countenance the alteration.

The sole question was the authority of the King in Council to enact the law. This might arise from either of two sources, the Royal Prerogative, or Parliamentary delegation. The Prize Court Act, 1894, is the only Parliamentary grant at all applicable to the case. That simply permitted the Executive to regulate the procedure and practice of the court. There

<sup>13</sup> Cf. *Smyth v. Ames*, 169 U. S. 466.

<sup>14</sup> *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628.

<sup>1</sup> 32 T. L. R. 436.

<sup>2</sup> "International law" is used throughout the text to mean the body of rules formulated by the nations of the world to govern their relations *inter se*, as those rules are recognized by an individual sovereign and administered by its courts.

was no authority therefore from this source to make an order changing the rules of substantive law upon which the court based its decisions. Nor could such an order as the one in question issue by virtue of the Prerogative, which, though it has tended to expand of late, has not for centuries been a source of change in the rules of law that courts administer.<sup>3</sup> That it was international law which the Executive here sought to change cannot produce a different result. The order therefore which alone could sustain the contention of the Crown was unauthorized and void; and the Privy Council so found. Unfortunately for popular interpretation, the language of the court is in many passages misleading, apparently invoking some inherent superiority of international law to add sanction to the holding.

There are some *dicta* in several of the older cases,<sup>4</sup> notably by Lord Stowell, that seem to insist that when international law conflicts with a direct enactment of the legislature, the former should be followed by the court. This doctrine has much support from the older text writers,<sup>5</sup> who apparently reach their conclusion by the easy method of confusing wish with power. Such a view is clearly without analytical foundation. The rules formulated by the nations of the world to govern their relations *inter se* live as actual laws, at any rate at present, only through their recognition and adoption by individual municipalities. A prize court is today a municipal court, administering these rules to the extent that it is authorized to do so. Its administration of the rules rests upon such authorization and tacit or expressed recognition of them by the sovereign, and when this recognition ceases in whole or in part, to that extent the court must cease to administer the rules. Modern authority supports this view.<sup>6</sup>

However, though the law as to direct legislative acts is settled, the attitude of the English courts toward Orders in Council is less clear. In many of the older cases and texts a greater emphasis is laid on the dominant quality of international law when the conflict is with an Order in Council than when it is with a direct legislative act.<sup>7</sup> When the Order in question is one resting solely on Prerogative the difference is justified, for, as we have seen above, Prerogative can no more change the rules administered by prize courts than it can any other rules of law. It was with reference to this kind of an order that the court in the case of *The Zamora* used the language that has misled the newspapers. Perhaps a court in war time, making a decision on sound constitutional grounds,

<sup>3</sup> *Ipsa autem rex, non debet esse sub homine, sed sub deo et sub lege, quia lex facit regem.* BRACTON, Bk. I, Ch. 8. See 12 Co. Rep. 63; 12 *id.*, 74.

<sup>4</sup> See *The Maria*, 1 C. Rob. 340; *The Walsingham Packet*, 2 C. Rob. 77; *The Recovery*, 6 C. Rob. 341; *The Fox*, Edw. Adm. 311; *The Lucy*, Edw. Adm. 122; *The Ostsee*, 9 Moore P. C. 150.

<sup>5</sup> 3 PHILLIMORE, INTERNATIONAL LAW, §§ 433-436; 2 HALLECK, INTERNATIONAL LAW, Ch. 32, § 19.

<sup>6</sup> *Mortensen v. Peters*, 14 Scot. L. T. 227. See *The Zamora*, 32 T. L. R. 436, 440; *Regina v. Keyn*, 2 Ex. Div. 63, 160; *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325; *The Amy Warwick*, 2 Sprague 123, 130. WESTLAKE, INTERNATIONAL LAW, Part II, 318; 1 SCOTT, HAGUE PEACE CONFERENCES OF 1899 & 1907, 466 *et seq.*; W. E. Wilkinson, "The Law Administered by Prize Courts," 36 CAN. L. T. 530. But see TAYLOR, INTERNATIONAL PUBLIC LAW, § 32.

<sup>7</sup> See *The Fox*, Edw. Adm. 311; *The Lucy*, Edw. Adm. 122; 3 PHILLIMORE, 654-657.



but still one that pleases neutrals, may be forgiven if it draws a little of the holy sanction of the law of nations to its aid.

The same thing may explain the language of the early cases that we have spoken of. Until well into the last century "Order in Council" meant an Order by the King; the delegation of legislative power to His Majesty in Council is, in anything like its present prevalence, quite modern.<sup>8</sup> Faced with an order strictly by Prerogative, the older courts, like the Privy Council now, refused to follow it, and relied on the Law of Nations or the Law of Nature as one reason for their holding. It cannot be doubted that a modern court, faced with an Order in Council made under real legislative delegation of authority, would follow out the Order.

PRICE MAINTENANCE AT COMMON LAW AND UNDER PROPOSED LEGISLATION.—A movement has long been on foot to secure to manufacturers of trade-marked articles the statutory right to fix by contract the prices at which their products shall pass through the channels of distribution down to the ultimate consumer.<sup>1</sup> The promoters of this legislation contend, and some cases support their view,<sup>2</sup> that such right exists on common law principles.<sup>3</sup> Whatever restraint is laid on competition among distributors by this policy they maintain is not injurious, but beneficial to the public, and necessary under modern methods of business to protect the quality of, and market for, the manufacturer's trade-marked product.<sup>4</sup> At first glance, the manufacturer's alignment with jobber and retailer to secure this legislation seems anomalous, for what profits distributors receive apparently should not concern him.<sup>5</sup> According to traditional economic theory, the smaller the retail price the larger the volume of sales, with correspondingly increased profits to the manufacturer. But practice finds the manufacturer allied with jobber and retailer for reasons psychological and pecuniary. By nature he is prone to support the existing system of distribution against the innovations of price-cutters, and moreover, he may believe that his valuable trade-mark loses on the cheap bargain counter respectability and prestige. To self-interest, however, he ascribes his position. Trade-marked or "identified" goods, it is asserted, are advertised by nation-wide campaigns conducted by their

<sup>8</sup> See MAHLAND, CONSTITUTIONAL HISTORY OF ENGLAND, 387 *et seq.*

<sup>1</sup> Stephens Bill, 64th Congr., 1st Sess. H. R. 13568.

<sup>2</sup> *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745; *Park v. National Wholesale Druggists' Ass'n*, 175 N. Y. 1, 67 N. E. 136; *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144; *Walsh v. Dwight*, 40 App. Div. (N. Y.) 513; *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S. W. 427; *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335. See Report of Committee on Maintenance of Prices, 4th Annual Meeting, Chamber of Commerce of the United States. *Contra*, W. J. Shroder, "Price Restriction on the Re-Sale of Chattels," 25 HARV. L. REV. 59.

<sup>3</sup> See R. G. Brown, "The Right to Refuse to Sell," 25 YALE L. J., 194.

<sup>4</sup> See G. H. Montague, "Should the Manufacturer have the Right to Fix Selling Prices?" 63 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 55. W. H. Ingersoll, "The Answer to Macy's," *PRINTER'S INK*, May 6, 1915. E. S. Rogers, "Predatory Price Cutting as Unfair Trade," 27 HARV. L. REV. 139. Hearings on H. R. 13568, May 30 and June 1, 1916.

<sup>5</sup> F. W. Taussig, "Price-Maintenance," AM. EC. REV., Mar., 1916, p. 170.

makers, and become standard articles universally known by name and price. For a department store to cut to eighty-nine cents the watch that made the dollar famous means that all retailers have to follow suit, whereupon they are killed off one by one or, at least, bring price-reducing pressure on the manufacturer through the jobber, and moreover push other articles in place of the less profitable "leaders." Deterioration in the quality of trade-marked goods is said to result, and with no compensating gain, because the aim of the piratical price-cutter is asserted to be merely to lure the gullible public into a bad bargain on unknown goods.<sup>6</sup>

The opponents of price maintenance, who find their leaders among the large department stores and the chain retail store concerns, contend that an artificial uniformity of prices prevents the operation of forces, such as differences in location, business acumen and adventurousness, and suppresses economic advantages flowing from large scale operations. This agitation they dub an attempt by a vested system to defend itself against the experiments being made to develop a goods-distributing mechanism more in conformity with social needs.<sup>7</sup>

What is the result of judicial attempts to adjudicate these conflicting interests? Diametrically opposed decisions. State courts have reasoned that the common law permits price agreements framed through necessity to enable manufacturers to maintain the standard of their goods and to protect consumers from the deception of unscrupulous traders, even though the cost may be a limitation of competition among distributors.<sup>8</sup> The United States Supreme Court, in the case of *Dr. Miles Medical Co. v. Park & Sons Co.*,<sup>9</sup> decided that a system of price-maintenance contracts, to control the price of a monopolized commodity, was illegal, at common law and under the Sherman Act. There are experts, both in law and economics, who have given intensive study to the subject, and they too take opposing sides.<sup>10</sup> The conclusion is inevitable that a solution one way or the other of this problem by sitting *in banc* is impossible; eclectic experimentation seems to be the way to reach a just social arrangement that will combine the advantages and eliminate the evils of both systems. This means that the problem cannot be solved on the basis of known facts, by an absolute declaration of rights one way or the other, but by an adjusting and harmonizing of manufacturing and distributing elements so that they may work, not as conflicting forces, but as parts of a single social organism.

The chief merit in the Stevens Price Maintenance Bill is its embodiment of this attitude. It aims to secure the right to maintain prices, but it does not raise adequate safeguards against the dangers of the system. A manufacturer may obtain the right by filing with the Federal Trade

<sup>6</sup> See *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 669; 137 Pac. 144, 151. See also, *Ingersoll, Montague, and Rogers*, *supra*, note 4.

<sup>7</sup> See Minority Report of the Committee on Maintenance of Prices, *supra*, note 2.

<sup>8</sup> See note 2, *supra*.

<sup>9</sup> 220 U. S. 373. Attempts have been made to distinguish this case on the ground that the commodity involved was a monopoly and that where that element was lacking price maintenance was legal. See R. G. Brown, note 3, *supra*. A more logical deduction, however, would be that if price maintenance were illegal in the case of a legal monopoly it would be so *a fortiori* in case of an ordinary article.

<sup>10</sup> See Taussig, note 2, *supra*. Hearings on H. R. 13568, May 30 and June 1, 1916.



Commission a list of prices and complying with these conditions: first, the commodity must be available to all on equal terms; second, it must be in competition with other similar articles; and third, there must have been no collusive price-setting with competitors. Of course the Sherman Act provides the last two conditions. Other details provide for practical flexibility.<sup>11</sup> Stiff, unreasonable prices, however, the danger of this price-maintenance system and the bugbear of its opponents, are not guarded against.<sup>12</sup> The assumption that publicity will bring fairness seems unwarrantable. Instead of being a bureau for the burial of price lists, the Commission should have the power to refuse registration to goods unduly dear. Protection to the public is the price manufacturers and distributors should pay for protection to themselves. Under the proposed bill equity would probably refuse specific performance of a filed price-maintenance contract should the price-cutter prove that his vendor was mulcting the public, but the more desirable arbiter of reasonableness, both for the sake of uniformity and for the sake of expertness, is the administrative commission.<sup>13</sup> Under this system a palpably unfair refusal on the score of unreasonable price, monopoly, or collusive price-setting by the Commission would be subject to correction by the courts.<sup>14</sup> Apart from this check the findings of the Commission should be conclusive in any suit to enforce rights under the bill.

Securing the right to maintain prices through contract is by no means the only object sought by the bill. In an obscure way it seeks to apply the doctrine of equitable servitudes to branded articles, that is, to compel all to sell the goods at the set price though they may not have purchased them under a price-fixing contract but had notice of the price restriction — a necessary concomitant of the contractual right if the latter is to be effectual.<sup>15</sup> The common law has always opposed restrictions on chattels, and it is not clear that equity would enforce such on the view that the statute under discussion, by legalizing contractual restrictions on price, has overthrown the common law antipathy.<sup>16</sup> Therefore the bill provides

<sup>11</sup> The bill provides for (1) seasonal disposal sales; (2) procedure in case of winding up business of manufacturer or dealer; (3) disposal of deteriorated goods. In all cases the manufacturer is given the opportunity to repurchase before the set price may be departed from.

<sup>12</sup> See Taussig, *supra*.

<sup>13</sup> *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

<sup>14</sup> For the assumption of rightness of legislative conduct, where the court is uninformed, see *Hadacheck v. Sebastian*, 239 U. S. 394, 413.

<sup>15</sup> The bill is not explicit on this point, which is allotted space in inverse proportion to its importance. Really the constitutionality of the bill turns on this element. However, the only intimation of its inclusion comes in the section relating to the retail price of the articles registered. At the set price must the articles be sold "from whatever source acquired." This strikes one as an attempt to make the weakest link look like no link.

<sup>16</sup> An analogy on this point is sometimes drawn from the right to impose restrictions on articles manufactured under a patent, the argument being that society's interest in the progress of invention overrides the common law antipathy to restraints on personality. This policy overruled, the theory of equitable servitudes is held to apply to chattels. The patent cases, however, rest upon quite a different theory. A patentee has the exclusive rights to make, use, and sell the embodiments of his invention. Since these rights are separable and may be granted independently of one another, *Dorsey Revolving Harvester Co. v. Bradley Mfg. Co.*, 12 Blatchf. (U. S.) 202, 204, he may sell a patented article and grant a limited right of user — for example, a license to use

that the listed articles must be sold at the fixed price, whether acquired under a contract or otherwise.

The result is that Congress by passing the bill would be providing for the regulation of the price of branded goods through all turnovers down to ultimate consumption, though all but the first sale of the goods may have taken place within a state among local dealers. This entails the proposition — once interstate goods always interstate, until withdrawn from the arteries of trade. What is the law? A sale of an article from without a state by an importer or his agent falls within the bounds of interstate commerce;<sup>17</sup> a sale by his vendee pursuing the latter's own business does not.<sup>18</sup> Apparently, therefore, the right contended for by the advocates of set prices is not the subject of federal legislation. But a more fundamental view unfolds itself. The purpose of the making of goods is their consumption, and the manufacturer must then get his goods to consumers. A direct transportation and sale over a state line are undeniably interstate commerce. It would seem that the interpolation of the aid of distributors should not affect the essential unity of the operation. For the more nearly the jobber and retailer in fact approximate agents of the manufacturer, *e. g.*, the manufacturer's recent efforts to aid and instruct the retailer with special advertising devices and special publicity experts, the more truly does the manufacturer sell directly to the consumer.<sup>19</sup>

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with supplies bought from him. Any violation is an infringement of the exclusive right of user retained by the patentee, is a tort, and may be enjoined. *Henry v. Dick Co.*, 224 U. S. 1. On the theory of the cases this ruling does not allow the imposition of equitable servitudes on patented articles, for the patentee retains no property interest, but its use beyond certain limits is forbidden as an encroachment upon an exclusive franchise. See 25 HARV. L. REV. 641; 10 HARV. L. REV. 1. Furthermore, it has been held that a patentee cannot sell and yet retain so much of his exclusive selling privilege as to render a resale at other than his set price an infringement, on the ground that the first sale exhausts the exclusive right to sell under the statute. *Bauer v. O'Donnell*, 229 U. S. 1. The distinction between the interpretation of the words "use" and "sell" in the patent statute is unsound in principle and lends support to those who view these cases as an unconscious application of the doctrine of equitable servitudes to chattels. See 27 HARV. L. REV. 73. This doctrine, it is said, applies only to using, and selling is not using. Equitable servitudes as applied to realty have never comprised restrictions on resale price because vendors of realty are not interested in its resale price as in the case of standard articles of commerce; therefore, because certain restrictions allowed on the latter under the interpretation of a statute happen to be confined to the same type as those applied to realty, it cannot be concluded that they are of the nature of equitable servitudes. The patent cases, consequently, are not authority for the proposition that once the right to contract concerning resale prices is recognized it is so inconsistent with the continuance of the common law policy disallowing restraints on articles of commerce that the doctrine of equitable servitudes may be applied. It should be noted that where the right to contract on resale prices has received judicial sanction, it is held that purchasers with notice cannot be bound by any restrictions. *Garst v. Hall*, 179 Mass. 589, 61 N. E. 219; *Bauer & Cie v. O'Donnell*, 229 U. S. 1; *Bobbs-Merrill v. Straus*, 210 U. S. 339; *Taddy & Co. v. Sterious*, [1904] 1 Ch. 354. See *Fisher Flouring Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144. *Contra*, *N. Y. Bank Note Co. v. Hamilton Bank Note Co.*, 28 N. Y. App. Div. 411; *Murphy v. Christian Press, etc. Co.*, 38 *ibid.*, 426.

<sup>17</sup> *Rearick v. Comm. of Pennsylvania*, 203 U. S. 507.

<sup>18</sup> *Banker Bros. Co. v. Comm. of Pennsylvania*, 222 U. S. 210; *Brown v. Maryland*, 12 Wheat. 419. See *State v. Flanely*, 96 Kan. 372, 382, 152 Pac. 22, 26.

<sup>19</sup> G. H. Montague, "Should the Manufacturer have the Right to Fix Selling Prices?" 63 ANNALS OF AM. ACAD. POL. & SOC. SCI. 55.



THE LEGALITY OF CONTRACTS OF SALE WHICH PROHIBIT THE PURCHASER-RETAILER FROM HANDLING GOODS OF THE WHOLESALER'S COMPETITORS. — At common law a restraint on trade was lawful only if it was both reasonable and partial in its effect.<sup>1</sup> At the close of the nineteenth century the English courts made the reasonableness of the restraint the sole test of its legality.<sup>2</sup> In the United States the Sherman law, at first thought to prohibit even reasonable restraints,<sup>3</sup> was in 1911 construed to be no different from the later common law. Since under either the test of a restraint's legality is its reasonableness in view of all the circumstances of the particular case, it is apparent that no rule can be formulated as to the lawfulness of contracts of sale in which the purchaser agrees to buy from no competitor of the seller's.<sup>4</sup> In recent years, to insert such a provision in their contracts of sale has become the settled policy of many wholesalers. It is, like the price-maintenance proviso with which it is so often found,<sup>5</sup> an attempt by the seller to limit competition (though here a different sort of competition) in the retailing of his goods. It is another phase of the modern wholesaler's endeavor to take into his own hands control of the whole process of distribution, in order to protect himself against inefficient, unscrupulous, or unenthusiastic retailers. Such a contract assures the seller of whole-hearted "pushing" of his goods by the retailer, while at the same time it effectually limits the field in which the wholesaler must meet the competition of his rivals. It is interesting to compare development in this field of distribution with human actions in the case of buying and selling of labor. In the latter, courts have differed as to the right to conscript neutrals; here the wholesalers in their competition among themselves seek to enlist the aid of retailers. Whether this conduct is permissible depends on whether the aims of the wholesalers are founded on the legitimate demands of their business and outweigh the sacrifices the community must make to give them rein. Such contracts have in the past usually been held valid at common law,<sup>6</sup> as well as under the Sherman law.<sup>7</sup>

<sup>1</sup> See MATTHEWS AND ADLER, *RESTRAINT OF TRADE*, 2 ed., 38, 39. The commonest examples of partial restraints are restraints limited in time or in locality. Cf. the cases in note 15.

<sup>2</sup> *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535. See the criticism of this case in MATTHEWS AND ADLER, *supra*. For an Australian view of the change in economic policy indicated by this decision, see B. A. ROSS, "Freedom of Trade," 5 *COMMONW. L. REV.* 241.

<sup>3</sup> See Augustine L. Humes, "The Power of Congress over Combinations," 17 *HARV. L. REV.* 83, 87.

<sup>4</sup> But cf. Roland R. Foulke, "Restraints on Trade," 12 *COL. L. REV.* 87, 132. Mr. Foulke overlooks the fact that a combination is none the less a combination if made up of an individual seller and an individual buyer, than if made up of a group of sellers and a group of buyers.

<sup>5</sup> Many of these cases deal also with the subject of price maintenance. For a consideration of price maintenance at common law and under proposed legislation, see 30 *HARV. L. REV.* 68.

<sup>6</sup> *Brown v. Rounsavell*, 78 Ill. 589 (1875) (sale of machines); *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich. 158, 136 N. W. 1113 (1912) (patterns); *J. W. Ripy & Son v. Art Wall Paper Mills*, 41 Okl. 20, 136 Pac. 1080 (1913) (wall paper); *Joseph Schlitz Brewing Co. v. Travi*, 179 Ill. App. 269 (1913) (beer). But cf. *Purinton v. Hinchcliff*, 219 Ill. 159, 76 N. E. 47 (1905) (bricks).

<sup>7</sup> See *W. T. Rawleigh Medical Co. v. Osborne*, 158 N. W. 566, 568 (Ia.) (1916) (drugs); *Pictorial Review Co. v. New Model Dry Goods Co.*, 185 S. W. 1199 (Mo.

Recently contracts of this type have been assailed<sup>8</sup> as a violation of the state laws against trade restraint, and the attack thus far seems to have been fairly successful.<sup>9</sup> Most of the state statutes follow the Sherman law, but in at least three<sup>10</sup> states statutes have explicitly made contracts of this kind unlawful. The language of the latter is somewhat similar to that of section 3 of the Clayton law.<sup>11</sup> This act, however, prohibits such sales (and leases) only in the event that their effect "may be to substantially lessen competition or tend to create a monopoly in any line of business."<sup>12</sup> Upon the construction of the word "substantially," of course, depends the whole vitality of this section of the Clayton law.

App.) (1916) (patterns). Cf. the curious case of *Continental Wall Paper Co. v. Voigt & Sons Co.*, 212 U. S. 227 (1909) (wall paper).

<sup>8</sup> This assault is undoubtedly due (a) to the tremendous increase in contracts of this nature and (b) to the widespread publicity given to the provisions of the recent Clayton law concerning such contracts. It may be observed that identical contracts of the same wholesaler have been simultaneously attacked in different states more than once.

<sup>9</sup> Massachusetts: REV. L. MASS., 1902, c. 56, § 1, prohibiting such contracts, is absurdly construed to mean nothing, in *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 89 N. E. 189 (1909) (patterns).

North Carolina: N. C. PUB. LAWS, 1911, c. 167, § 1, subsec. a, is enforced, and the contract held void, in *Standard Fashion Co. v. Grant*, 165 N. C. 453, 81 S. E. 606 (1914) (patterns).

South Dakota: LAWS OF 1909, c. 224, was held not to prohibit the contract in *Sullivan v. Rime*, 35 S. D. 75, 150 N. W. 556 (1915) (patterns).

Wisconsin: STAT. WIS., § 1747 e, held not to prohibit the contract, since only a partial restraint was imposed, in *Sullivan v. Rose*, 158 Wis. 414, 149 N. W. 158 (1914) (beer).

Texas: In Texas such contracts are now expressly made illegal by arts. 7796, 7798, and 7807 of TEX. CIV. STAT. Under an earlier and less specific statute a contract of this nature was held illegal. *Simmons v. Terry*, 79 S. W. 1103 (Tex. Civ. App.) (1904) (gloves). Recent cases holding such contracts unlawful are *Segal v. McCall Co.*, 184 S. W. 188 (Tex.) (1916) (patterns); *W. T. Rawleigh Medical Co. v. Fitzpatrick*, 184 S. W. 549 (Tex. Civ. App.) (1916) (drugs); *Pictorial Review Co. v. Pate Bros.*, 185 S. W. 309 (Tex. Civ. App.) (1916) (patterns); *T. W. Rawleigh Medical Co. v. Gunn*, 186 S. W. 385 (Tex. Civ. App.) (1916) (drugs); *Wood v. Texas Ice and Cold Storage Co.*, 171 S. W. 497 (Tex. Civ. App.) (1914) (ice); *Carroll v. Evansville Brewing Ass'n*, 179 S. W. 1099 (Tex. Civ. App.) (1915) (beer). In *Celli v. Galveston Brewing Co.*, 186 S. W. 278 (Tex. Civ. App.) (1916), the court held that the statute was not intended to restrict a landlord in the use of his premises, and that accordingly it did not apply to a brewery which leased its saloon to a "retailer" who contracted to sell the lessor's beer exclusively. It is submitted that whether the contract is or is not a part of a lease or conveyance of realty, is entirely immaterial.

<sup>10</sup> Massachusetts, North Carolina, and Texas.

<sup>11</sup> 38 STAT. 730. This section reads: Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

<sup>12</sup> In the first prosecution under this section, leases of patented machinery with restrictions on purchase from the lessor's competitors, which had been held lawful under the Sherman law, were held to be within the inhibition of this section. *United States v. United Shoe Machinery Co.*, 234 Fed. 127 (1916).



Since a number of specific prohibitions are made, it may be that the courts will construe it as at least an advance upon the Sherman law. To do that, however, they would have to hold that "substantially" in the Clayton law means less than "unreasonably" in their construction of the Sherman law. But, unless that is done, the Clayton law, like its predecessor, will be no more than an enactment of the common law.<sup>13</sup>

The legality of contracts of sale<sup>14</sup> which contain a stipulation that the buyer shall not handle a competitor's goods is, then, to be determined in general<sup>15</sup> by the reasonableness of the restraint thus imposed. That the contracts impose a restraint on trade is clear. That the restraint may be a serious danger to the community is equally clear, for it is easily possible for a wholesaler, by an extensive system of such contracts, to close to all competitors the markets of a community or even of a state.<sup>16</sup> Theoretically new retailers would then set up, but the inertia that would have to be overcome renders that mode of relief a most uncertain one. By this monopoly the public necessarily suffers to at least as great a degree as the wholesaler benefits.<sup>17</sup> Against this consideration must be weighed only the wholesaler's contention that such contracts are necessary in order to insure a proper distribution of his goods. What constitutes a reasonable restraint is, of course, a question of fact for the court in each case; but that many of the contracts with "tying" clauses are an unreasonable restraint and a substantial lessening of competition, seems an unescapable conclusion. What is "reasonableness," however, must inevitably depend upon the economic views of our courts, which are based upon the expressed policy of Congress, and, sometimes to a greater degree, upon the desires and needs of business, expressed or unexpressed.

<sup>13</sup> That contracts of this sort, where the wholesaler and the retailer are in different states, are interstate commerce, and hence to be governed by the Sherman and Clayton laws, is admitted by the Texas courts in the cases in note 9. But they then proceed to apply the law of Texas, upon the theory that part of the contract — the resale of the goods by the retailer — is to be performed wholly in Texas. See especially *Segal v. McCall Co.*, *supra*. It can hardly be doubted that such transactions are interstate commerce, subject to the federal laws, and there is little to support the Texas theory that as regards enforcement they are subject to the state law also. In most cases, in fact, the retailer neither expressly nor impliedly contracts to resell the goods within the state. Even if he did so contract, the application of the state law to other portions of the contract is hardly warranted. Nor does the fact that the prohibited purchase from a competitor may be an intrastate transaction amount to such a warrant. But nevertheless in *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, and *J. W. Ripy & Sons v. Art Wall Paper Mills*, *supra*, also, common law (*i. e.*, state law) was applied to transactions which were really interstate commerce. But *cf.* *J. B. Watkins Medical Co. v. Holloway*, 182 Mo. App. 140, 168 S. W. 290, where the correct view is taken. It should be remembered that Congress has power to regulate purely intrastate business, under certain conditions. See *Gibbons v. Ogden*, 9 Wheat. 1, 204.

<sup>14</sup> It should be noticed that the restraint is valid if attached to a contract of agency, in which the goods are sent to the retailer on consignment. *Cole Motor Car Co. v. Hurst*, 228 Fed. 280 (1915) (motor cars).

<sup>15</sup> Some state courts hold the contracts legal because the restraint which they impose is only a partial one. *J. W. Ripy & Sons Co. v. Art Wall Paper Mills*; *Sullivan v. Rose*, *supra*.

<sup>16</sup> In reading these cases one is struck by the fact that so many of them involve identical contracts of the same wholesaler and also of the same industry. Especially in the pattern business are these contracts in fashion.

<sup>17</sup> Unless such contracts did "substantially lessen competition," they would hardly be made to the extent that they are now, in so many different industries — ice, beer, patterns, wall paper, gloves, drugs, machinery, motor cars, and bricks.

The policy of our government is at present expressed inconsistently as well as incoherently.<sup>18</sup> And that business in general desires the lawfulness of such contracts as these seems doubtful in the extreme.

IS LEGISLATIVE ABOLITION OF THE INJUNCTIVE REMEDY IN LABOR DISPUTES UNCONSTITUTIONAL? — A recent Massachusetts case is a curious commentary on the practical effects of the Newtonian theory of gravitation as applied to government. The defendants, members of a trade union desirous of forcing the plaintiffs, members of a rival organization, to join their number, brought pressure on the latter's employers to compel them to discharge the plaintiffs. A statute provided that no injunction should be granted in any case between employers and employees, or between persons employed and persons seeking employment, unless necessary to prevent irreparable injury to property, and that for this purpose the right to enter into the relation of employer and employee should not be a property right.<sup>1</sup> Disregarding this statute as violative of the Fourteenth Amendment of the Constitution of the United States the court granted the plaintiff's prayer for an injunction. *Bogni v. Perotti*, 203 Mass. 26, 112 N. E. 853.

In the first place not much sympathy can be expressed with the technique of the legislation here in question. It involves two assumptions of a highly questionable character: first, that equity will interfere only when the right threatened is a right of property; second, that what was property can cease to be so by legislative fiat. The suggestion of an intent to outflank the Fourteenth Amendment is not a good character for an act to carry on its face. "No statute is a good risk which invites cautious judges to hamstring it."<sup>2</sup> The plain purpose of the act, however, and the result in fact of all its language is to prevent the use of injunctions in labor difficulties where no violence or injury to tangible property is threatened. The court by its decision must deny the validity of this purpose and result as well as the assumptions of the accompanying language.

The court argues that the right to dispose of one's labor free from the sort of interference here practiced is a property right which the legislature cannot despoil by removing it from the scope of the only effective remedy provided by the law for the specific protection of property. Such action, the court asserts, is to discriminate between this right and

<sup>18</sup> For a lucid enumeration of the five economic policies open to us, see Henry R. Seager, "The New Anti-trust Acts," 30 POL. SCI. Q. 448. The first—*laissez faire*—can be of only academic interest now. The others are, in order, enforced competition, (which the first interpretation of the Sherman law expressed), regulated competition (the Sherman law at present), regulated combination, and government ownership. The Clayton law is apparently based upon a jumbling of the second and the third of these policies.

For a statement of the economic policy back of the Sherman law, see M. S. Hottesheim, "The Sherman Anti-trust Law," 44 AM. L. REV. 827, 852. Cf. B. A. Ross, "Freedom of Trade," *supra*, at 240.

<sup>1</sup> MASS. ACTS 1914, c. 778.

<sup>2</sup> John M. Maguire, "State Liability for Tort," *supra*, p. 36.



other rights of property and to deprive it of equal protection of the laws.

An indispensable preliminary to a solution of this constitutional problem is to visualize a bit of judicial history. When the courts were presented with the question of the legality of labor unions and the methods these organizations might employ to gain their ends, they based their decisions, more or less consciously, upon considerations of social policy.<sup>3</sup> In deciding on the legality of such actions as pursued by the defendants in the principal case, courts have reached different conclusions.<sup>4</sup> The Massachusetts Supreme Court, Mr. Justice Holmes dissenting, pronounced against the legality of the conscription of neutrals.<sup>5</sup> This decision on what is essentially a question of social policy the Massachusetts legislature has attempted to reverse by the statute presented in the principal case, but now the court says that the Constitution of the United States forbids any impairment of this recognized property right by elimination of remedies. It must be stated frankly that the court is using the Constitution to impose its views of social policy on the state.<sup>6</sup> Those state courts that recognized the conscription of neutrals equally decided a question of social policy, but as this view coincided with the legislative, no clash occurred on the battlefield of constitutional law.<sup>7</sup>

But even though this survey shows that we are dealing with a conflict between the social and economic views of two coördinate branches of the government over a problem intrinsically legislative, it is perhaps better to admit that the freedom to contract with regard to labor unrestrained by secondary labor boycotts is now, in view of past decisions, a right of property. Then arises the question whether the legislature had the right to discriminate between this and other forms of property in regard to injunctive remedies.<sup>8</sup> Not only is there a discrimination relative to other

<sup>3</sup> See the great opinion by Shaw, C. J., in *Commonwealth v. Hunt*, 4 Met. (Mass.) 111; also the dissent of Holmes, J., in *Vegelahn v. Guntner*, 167 Mass. 92, 104, 44 N. E. 1077, 1079. In *Plant v. Woods*, 176 Mass. 492, 502, 57 N. E. 1011, 1015, the court said: "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and are therefore malicious and unlawful."

<sup>4</sup> These cases have recognized acts as lawful. *National Protective Ass'n of Steam Fitters and Helpers v. Cumming*, 170 N. Y. 315, 63 N. E. 369. *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127. *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027. *Contra*: *Brennan v. United Hatters of No. Am.*, 73 N. J. Law 729, 65 Atl. 165. *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327.

<sup>5</sup> *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011. In his dissenting opinion Mr. Justice Holmes dwells on the nature of the problem involved and the proper mode of approach to a solution.

<sup>6</sup> The question involved in this case was presented by another Massachusetts case recently decided. *Commonwealth v. Boston & Me. R.*, 222 Mass. 206, 110 N. E. 264. See the suggestive article of Professor Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353-372.

<sup>7</sup> This situation rouses interesting speculation. Suppose that the legislature should declare illegal the compound labor boycott legalized by the courts. It cannot reasonably be imagined that this statute could be attacked as unconstitutional, yet it presents the converse of the principal case. Here the question of property rights cannot be put forward to obscure the legislative nature of the problem.

<sup>8</sup> For treatment of this and similar constitutional questions along the proper line of approach, see: *Muller v. Oregon*, 208 U. S. 412; *Ritchie & Co. v. Wayman*, 244 Ill.

species of property, but also to freedom of contract in other than labor situations. The court should not declare unconstitutional this distinction between remedies for different classes of property, unless the classification is clearly arbitrary or unreasonable.<sup>9</sup> Whether this can be said in the case of the legislation now in question need not be finally decided here. It is sufficient to point out that a decision cannot be reached by trying to piece statute and Constitution together like a jig saw puzzle.<sup>10</sup> There is necessary a thoroughgoing study and appreciation of the facts, as well as of the policy sought to be enforced by the legislative act in question.<sup>11</sup> Only if after such investigation the court is still convinced that the classification is without reasonable basis should it declare the action of the legislature void. The unfortunate method of the statute, and perhaps insufficient pressing in argument of the social data, are undoubtedly responsible for the unsatisfying character of the decision that was rendered.

#### CONSTITUTIONALITY OF A TAX ON INCOME DERIVED FROM EXPORTS.

— A recent case raises the question whether there are not certain sources of income, other than those specifically enumerated in the Federal Income Tax Law of 1913,<sup>1</sup> which are exempt from taxation. A corporation, whose business consisted largely in exportation, sought to recover such proportion of the corporate income tax as was paid on their export trade. They contended that it was an unconstitutional export tax,<sup>2</sup> but it was held that they might not recover. *Peck & Co. v. Lowe*, 55 N. Y. L. J. 981 (U. S. Dist. Ct., S. Dist. N. Y.). It is certainly arguable that a tax on net incomes, derived to a large extent from exporting, is a tax on exports. The question is a new and very close one, and can be approached only by analogy and analysis. It is clear that a tax on the various instrumentalities used in exporting is unconstitutional.<sup>3</sup> An income tax, however, attaches to the proceeds after the actual act of exportation is completed, and so the "instrumentalities" cases are not conclusive in

509, 91 N. E. 695; *Miller v. Wilson*, 236 U. S. 373; *People v. Schweinler Press*, 214 N. Y. 395, 108 N. E. 639; and Mr. Justice Holmes' dissent in *Adair v. United States*, 208 U. S. 161, 190.

<sup>9</sup> *Hadacheck v. Sebastian*, 239 U. S. 394, 413; *Price v. Illinois*, 238 U. S. 446, 452.

<sup>10</sup> For expressions of the line of approach insisted on, see Dean Pound's article, "Liberty of Contract," 18 YALE L. J. 454; the paper by Professor Frankfurter referred to in note 6; the discussion in 28 HARV. L. REV. 790; and an article by Professor Ernst Freund, "Tendencies of Legislative Policy," 27 INTERNAT. J. ETH. 1, 23-24.

<sup>11</sup> There should have been called to the attention of the court for instance the English Trades Disputes Act, 1906, 6 EDW. 7, c. 47, § 3, and the debates that preceded its enactment; also the Australian solution of the problem. See Judge Higgins, "A New Field for Law and Order," 29 HARV. L. REV. 13. Further discussion of value may be found in Gregory, "Government by Injunction," 11 HARV. L. REV. 487; Dunbar, "Government by Injunction," 73 L. QUART. REV. 347; Allen, "Injunctions and Organized Labor," 28 AM. L. REV. 878; Dean, "Government by Injunction," 4 GREEN BAG 540; Stimson, "The Modern Use of Injunctions," 10 POL. SCI. QUART. 189.

<sup>1</sup> 38 STAT. AT L. 166, 172.

<sup>2</sup> U. S. CONST., Art. I, sec. 9.

<sup>3</sup> *Fairbank v. U. S.*, 181 U. S. 283; *U. S. v. Hvoslef*, 237 U. S. 1; *Thames, etc. Ins. Co. v. U. S.*, 237 U. S. 19. But see Goodwin, "U. S. v. Hvoslef," 29 HARV. L. REV. 469, where the doctrine of these cases is harshly criticised.



the present instance. On the other hand, goods are not relieved from the burdens that rest on all property similarly situated merely because they are intended for subsequent exportation.<sup>4</sup> But it does not follow from this that the proceeds of such goods (after the exportation thereof) may be taxed as income. The cases dealing with taxes on gross incomes of corporations engaged in interstate commerce present a close analogy to the present situation. The various states may certainly tax the property of such corporations, along with other property within their territory,<sup>5</sup> but since Congress regulates interstate commerce under the Constitution, it becomes necessary to determine whether these gross income taxes are state taxes on the commerce itself, and hence unconstitutional. In these cases the courts, looking at the substance rather than at the form, have held them unconstitutional.<sup>6</sup> Wherever possible, however, they are sustained as license taxes for the privilege of doing business in corporate form,<sup>7</sup> and, in so construing, the courts desert the rule of substance and go almost entirely on the form of the particular statute — whether or not it declares the imposition of a license or excise tax.<sup>8</sup> Under this construction the Federal Corporate Income Tax of 1909<sup>9</sup> was declared constitutional as an excise.<sup>10</sup> Such a rule of construction is unscientific and unsound,<sup>11</sup> but even under this theory the tax in the present case cannot be upheld as an excise; it must stand or fall as an income tax. It was passed after an amendment<sup>12</sup> to the Constitution, rendered necessary by the decision in the *Pollack Case*,<sup>13</sup> and intended to permit the

<sup>4</sup> *Coe v. Errol*, 116 U. S. 517; *Cornell v. Coyne*, 192 U. S. 418, 427.

<sup>5</sup> *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Western Union, etc. Co. v. Massachusetts*, 125 U. S. 530, 552.

<sup>6</sup> *Philadelphia, etc. Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Galveston, etc. R. Co. v. Texas*, 210 U. S. 217. These cases overrule an earlier case upholding such a tax. See *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284. "It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning." *Philadelphia, etc. Steamship Co. v. Pennsylvania*, *supra*, at p. 336, *per* Mr. Justice Bradley. The application of this to the principal case seems clear.

<sup>7</sup> *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *New York v. Roberts*, 171 U. S. 658.

<sup>8</sup> See 24 HARV. L. REV. 563. "While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation. . . ." *Flint v. Stone Tracy Co.*, 220 U. S. 107, 145, *per* Mr. Justice Day.

<sup>9</sup> 36 STAT. AT L. 112.

<sup>10</sup> *Flint v. Stone Tracy Co.*, *supra*.

<sup>11</sup> "The distinction between a tax 'equal to' one per cent of gross receipts, and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property, and to let the interstate traffic and the receipts from it alone. . . . This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" *Galveston, etc. R. Co. v. Texas*, *supra*, at p. 227, *per* Mr. Justice Holmes. See GRAY, LIMITATIONS OF TAXING POWER, 38.

<sup>12</sup> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U. S. CONST., AMENDMENT 16.

<sup>13</sup> *Pollack v. Farmers Loan, etc. Co.*, 158 U. S. 601. This case decided that income

taxation of incomes as such.<sup>14</sup> And, as an income tax, it is indistinguishable from the *Gross Income Cases* — in substance, by taxing the proceeds of exports it is taxing the exports themselves. The effect of such a tax is either to shift the burden to the consumer, to reduce the volume of exports through a rise in price, or to leave the burden on the exporter — all dependent on the elasticity of the demand for the particular commodity, and the extent to which outside competition is possible.<sup>15</sup> In any case, this indirect effect is reached through the medium of a tax on exports.

Assuming, then, that the tax in *Peck & Co. v. Lowe* is an export tax, still perhaps the Sixteenth Amendment by its broad language abrogates the constitutional prohibition against such a tax, in so far as it is laid on the income derived from exports. If it has such an effect, the case is obviously correct, but as yet no judicial opinion has been handed down on either side;<sup>16</sup> the court in the principal case assumes that it does not have this effect, but expressly refuses to decide the question, reaching its decision by holding that the tax is not an export tax — a result with which we disagree. Since the amendment does not in terms repeal the constitutional prohibition, the repeal, if any, must be by implication. Repeals by implication are not favored, unless the earlier provision is so inconsistent with the later that the two cannot stand together.<sup>17</sup> But there seems to be a clear repeal by the Sixteenth Amendment; if incomes, "from whatever source derived," may be taxed, a prohibition against taxing exports (assuming that such a tax would be an export tax) is utterly inconsistent with the amendatory provision, and is consequently repealed thereby. The principal case may be sustained upon this ground.

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taxes on realty and personalty were direct taxes, and unconstitutional unless apportioned.

<sup>14</sup> The present income tax taxes all persons, and so cannot be considered as an excise tax; it is not applied solely to corporations and the like, as was the tax of 1909. The provision as to corporations is a part of the whole and cannot be separated therefrom, and that whole is clearly a tax on income. In addition, the tax of 1909 specifically declared the imposition of an excise; the present tax is expressly laid on incomes without more qualification as to its purpose.

<sup>15</sup> See BASTABLE, *PUBLIC FINANCE*, 3 ed., 571.

<sup>16</sup> There is great diversity of opinion as to whether the amendment renders the income from state bonds, formerly exempt from federal taxation, open to the income tax. The answer depends upon whether the amendment be construed to open to taxation income from all sources, income from exports among them. See (in accord with such construction): *STATE PAPERS OF GOV. HUGHES*, 1910, quoted in *FOSTER, INCOME TAX*, 2 ed., par. 27; *Opinion of Ex. Sen. Edmunds*, 45 *CONG. RECORD*, 1957. See (*contra* such construction) *Letter of Sen. Root*, *N. Y. WORLD*, 1 March, 1910, quoted in *FOSTER, INCOME TAX*, 2 ed., par. 27.

<sup>17</sup> *U. S. v. Greathouse*, 166 U. S. 601, 605. See 1 *SUTHERLAND, STATUTORY CONSTRUCTION*, 2 ed., par. 247; *SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW*, 97.



## RECENT CASES

**ADVERSE POSSESSION — CONTINUITY — ADVERSE POSSESSION IN CONTEMPT OF COURT.** — In an action of trespass to try title plaintiff recovered judgment, and defendant was perpetually enjoined from trespassing on the land in question. Defendant continued to occupy the land for the period required by the Statute of Limitations. Plaintiff again brings an action of trespass to try title. *Held*, that title was acquired by adverse possession. *Ludtke v. Smith*, 186 S. W. 266 (Texas).

The case is more unique than difficult. It is well settled that the recovery of a judgment in ejectment, defendant remaining in possession, will not interrupt the running of the statute. *Smith v. Trabue*, 1 McLean 87, Fed. Cas. No. 13116; *Jackson v. Haviland*, 13 Johns. (N. Y.) 229; *Smith v. Hornback*, 14 Ky. 232; *Mabury v. Dollarhide*, 98 Mo. 198, 11 S. W. 611. In one case where a decree ordering a conveyance had by statute itself the operation of a conveyance, an opposite result was reached. *Gower v. Quinlan*, 40 Mich. 572. But clearly an injunction, directed simply at the defendant personally, can have no effect on his relation to the land, which is the only thing the Statute of Limitations is concerned with.

**APPEAL AND ERROR — NOMINAL DAMAGES — REFUSAL TO REVERSE.** — The plaintiff sued for a libel actionable *per se* according to a statutory definition, alleging no special damage. The trial court sustained the defendant's demurrer to the declaration. The libel was of such a nature that no punitive damages were involved. *Held*, that, although the trial court erred in sustaining the demurrer, judgment be affirmed since only nominal damages are involved. *Jones v. Register & Leader Co.*, 158 N. W. 571 (Iowa).

It is a well-established rule that the upper court will not reverse an erroneous judgment in order to allow nominal damages. *Harwood v. Lee*, 85 Iowa 622, 52 N. W. 521; *Kelly v. Fahrney*, 97 Fed. 176; *East Moline Co. v. Weir Plow Co.*, 95 Fed. 250. But the dependence of costs upon a reversal makes an affirmance unjust. Moreover, there is a general exception to the stated rule if substantial rights are involved. *Lewis v. Flint, etc. Ry. Co.*, 153 Mich. 638, 23 N. W. 469. See *Heater v. Pearce*, 59 Neb. 583, 587, 81 N. W. 615, 616. It has been so held, for example, in actions for trespass to determine title. *Wing v. Seske*, 109 N. W. 717 (Iowa); *Harriss v. Sneed*, 104 N. C. 369, 10 S. E. 477. A similar decision was rendered in an action which, by establishing rights concerning a continuing nuisance, created an adjudication binding for any later case which might arise. *Harvey v. Mason City, etc. R. Co.*, 129 Iowa 465, 105 N. W. 958. In the principal case a substantial right might well be found in the interest of the plaintiff to have his reputation cleared by some sort of a decision in his favor. Nor would it be necessary to reverse judgment and remand the cause in order to protect the plaintiff. There is plenty of authority allowing the appellate court to render a final judgment itself. *Roberts v. Corbin & Co.*, 28 Iowa 355; *Yeoman v. Lasley*, 40 Ohio St. 339. See *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 715. And such procedure is not prevented by the Iowa code. See 1897 IOWA CODE, § 4139.

**BROKERS — WRONGFUL SALE OF STOCK — RIGHT OF CUSTOMER TO SIMILAR STOCK NOT ACQUIRED FOR THE PURPOSE OF RESTITUTION.** — A stockbroker purchased on credit for the plaintiff 100 shares, and at different times for other customers 180 shares, of a certain stock. He subsequently disposed of all stock of this kind. Later he acquired 100 shares of the same kind of stock. These shares were neither acquired nor held on behalf of any particular stockholders.

Upon his bankruptcy the plaintiff petitions for  $\frac{1}{3}$  of these shares. *Held*, that the plaintiff may recover. *Duel v. Hollins*, 36 Sup. Ct. Rep. 615.

By the weight of authority a customer has a property right in stock purchased on credit for him by a stockbroker. *Richardson v. Shaw*, 209 U. S. 365. See 19 HARV. L. REV. 529. *Contra*, *Covell v. Loud*, 135 Mass. 41. But the stock is considered fungible and the broker is only required to keep for the customer sufficient stock of the same kind. *Caswell v. Putnam*, 120 N. Y. 153, 24 N. E. 287; *Richardson v. Shaw*, *supra*. Where one who holds property subject to the rights of another wrongfully disposes of it and later reacquires it, he of course still holds it subject to those rights. *Williams v. Williams*, 118 Mich. 477, 76 N. W. 1039; *Church v. Ruland*, 64 Pa. St. 432, 444; *Schutt v. Large*, 6 Barb. (N. Y.) 373, 380. Now the same is held where the wrongdoer disposes of fungible property — stock, for example — and later acquires similar property. *In re Brown*, 171 Fed. 254. These decisions are sometimes based on a presumption that the acquisition was for the purpose of restitution. But it is often difficult to justify such presumption. Further, it is hard to see on what principle the law gives legal effect to this intention if it is presumed. A less artificial and more satisfactory explanation would seem to be a constructive trust, imposed by law on the wrongdoer when he is capable of making specific reparation for his wrongful disposal of property. This broader principle would give a right in a case, like the principal case, where circumstances rebut the presumption of an intent to restore.

**CARRIERS — PERSONAL INJURIES TO PASSENGERS — DUTY TO PROTECT FROM ASSAULT.** — The plaintiff, a negro, while waiting in a depot to take passage on a train, was assaulted by the town marshal, who was running all negroes out of town. The station agent, who knew all of the circumstances, made no attempt whatever to interfere. The plaintiff sues the railway. *Held*, that the defendant is not liable. *Fennell v. Atchison, Topeka & Santa Fe R. Co.*, 158 Pac. 14 (Kan.).

The duty of carriers to protect their passengers from assault cannot be questioned. *Seawell v. Carolina Central R. Co.*, 132 N. C. 856, 45 S. E. 850; *Texas, etc. R. Co. v. Jones*, 39 S. W. 124 (Tex. Civ. App. 1897). See *Southern R. Co. v. Hanby*, 183 Ala. 255, 259, 62 So. 871, 873. This applies even to assaults and arrests made by officers of the law if the carrier has notice that the conduct of the officer is wrongful. See 2 HUTCHINSON, CARRIERS, § 987. But since carriers are not insurers of safe passage, it must appear, in order to establish liability, that the assault was foreseeable and could have been prevented. See *Pittsburg, etc. R. Co. v. Hinds*, 53 Pa. 512, 515. See 25 HARV. L. REV. 470. The principal case assumed that a lesser duty is owed to the populace waiting in the station for trains than to those on board trains. See 2 HUTCHINSON, CARRIERS, § 989. But the rule is well settled that persons entering depots for the purpose of taking passage are passengers. *Exton v. Central, etc. R. Co.*, 62 N. J. L. 7, 42 Atl. 487. See 2 WOOD, RAILROADS, § 298.

**CARRIERS — SLEEPING CARS — LIABILITY OF CARRIER FOR PULLMAN EMPLOYEE'S TORT TO TRESPASSER.** — The plaintiff's husband, who was trespassing on a Pullman car, was impelled by the threatening conduct of a Pullman conductor to jump off the train, and sustained fatal injuries. The plaintiff sues the railroad. *Held*, that the railroad is not liable, as the conductor was not its servant. *Louisville & Nashville R. Co. v. Marlin*, 186 S. W. 595 (Tenn.).

It is well settled that Pullman employees are not, except under special arrangements, general servants of the railroad. *Robinson v. Baltimore & Ohio R. Co.*, 237 U. S. 84; *cf. Oliver v. Northern Pacific R. Co.*, 196 Fed. 432. Yet railroads are often held liable to passengers for acts of Pullman employees which touch the railroad's duty. *Pennsylvania Co. v. Roy*, 102 U. S. 451;



*Campbell v. Seaboard Air Line Ry.*, 83 S. C. 448, 65 S. E. 628. The courts uniformly reason that for this purpose the Pullman employees are temporary servants of the railroad. See *Pennsylvania Co. v. Roy*, 102 U. S. 451, 457. This is, at best, a fiction. The true reason for the liability rests in the fact that the carrier's duty of proper conveyance is non-delegable. See *Dwinelle v. New York, etc. R. Co.*, 120 N. Y. 117, 123, 24 N. E. 319, 321; *Barrow S. S. Co. v. Kane*, 88 Fed. 197, 199. A breach of it, therefore, even though committed by the servant of an independent contractor, renders the railroad liable. Some make this duty not only non-delegable, but even absolute in respect of the wilful torts of employees. *Jackson v. Old Colony Street R. Co.*, 206 Mass. 477, 92 N. E. 725. See 6 LABATT, MASTER AND SERVANT, 2 ed., § 2447 ff. But obviously a non-passenger cannot invoke this extraordinary liability, since it rests upon the relationship of carrier to passenger. *Blake v. Kansas City Southern Ry. Co.*, 38 Tex. Civ. App. 337, 85 S. W. 430.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — FOREIGN DECREE AGAINST A NON-RESIDENT. — The plaintiff's wife had divorced a former husband in Nevada, the court there taking jurisdiction by the wife's residence and constructive service on the husband. The plaintiff now sues in New York to annul his marriage on the ground that his wife's previous divorce decree was void. *Held*, that the burden is on the plaintiff to establish that the husband in the former action was a resident of New York when the decree was rendered. *Kaufman v. Kaufman*, 160 N. Y. Supp. 19 (Sup. Ct.).

New York has long contended that divorce proceedings are *in personam*. See *Lynde v. Lynde*, 162 N. Y. 405, 412, 56 N. E. 979, 981. It has therefore refused to give effect to a foreign court's decree of divorce against a non-resident of the foreign state not personally served. *Winston v. Winston*, 165 N. Y. 553, 54 N. Y. Supp. 298. See 15 HARV. L. REV. 66. The Supreme Court, while considering such divorce binding in the foreign state, has held that New York's disregard of such decree was not a violation of the "full faith and credit" clause. *Haddock v. Haddock*, 201 U. S. 562. The majority of the states, however, deeming divorce to be an action *in rem*, hold, if one party be domiciled within the state the other, though non-resident, may be served constructively. *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709; *In re James Estate*, 99 Cal. 374, 33 Pac. 1122; *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841. Some of the New York courts have made an attempt by subtle distinctions to more closely conform to these decisions. *North v. North*, 47 Misc. 180, 93 N. Y. Supp. 512, affirmed 111 App. Div. 921, criticised, *Callin v. Callin*, 69 Misc. 191, 193, 126 N. Y. Supp. 350, 351. And it must be obvious that even the New York decisions, requiring, as they do, domicile of the libellant to create jurisdiction, cannot consider divorce as *in personam* in the true sense of the word. See J. H. Beale, Jr., "Constitutional Protection of Decrees of Divorce," 19 HARV. L. REV. 586, 590. Indeed, the principal case, by giving extraterritorial effect to a decree of divorce rendered against a non-resident defendant served by publication, unless such defendant be a resident of New York, seems to be an acknowledgment of that fact. Certainly any decision which tends to bring the New York law on this subject into conformity with that of the majority of states, must be desirable. But it is difficult to see on what principle the present decisions of the New York courts can possibly be based. But see *Percival v. Percival*, 106 App. Div. 111, 118, 94 N. Y. Supp. 909, 913.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: TAXATION — CONSTITUTIONALITY OF AN INCOME TAX ON A CORPORATION ENGAGED IN EXPORT TRADE. — The plaintiff corporation seeks to recover the tax levied by the Federal Government on that part of its income derived from export trade, asserting the levy to be unconstitutional as a tax on exports. *Held*, that the tax

is not unconstitutional. *Peck & Co. v. Lowe*, 55 N. Y. L. J. 981 (Dist. Ct., S. Dist. N. Y.).

For discussion of this case, see NOTES, p. 77.

CONTRACTS — CONTRACTS IMPLIED IN FACT — CONSTRUCTION OF CONTRACTS — MOVING PICTURE RIGHTS AS PART OF RIGHTS OF DRAMATIZATION. — Plaintiffs, who own the copyright of a dramatization of "Ben Hur," in 1899 granted defendants the sole right of "producing on the stage" or "performing" the play. Royalties were to be computed in a manner wholly inapplicable to any method of producing moving pictures. Defendants have recently threatened to make a photoplay based on the dramatization. Plaintiffs bring a bill in equity to restrain them, and defendants, in turn, counterclaim, asking that the plaintiffs be enjoined from making such a photoplay. *Held*, that both injunctions should be granted. *Harper Bros. v. Klaw*, 232 Fed. 609 (Dist. Ct., S. Dist., N. Y.).

A general grant of dramatization rights has been held to include the right to make moving pictures. *Frohman v. Fitch*, 164 App. Div. 231, 149 N. Y. Supp. 633. But in the principal case the court finds that owing to the agreed method of computing royalties, the grant includes only the right to produce the play on the legitimate stage. It, however, enjoins the plaintiff from using the moving picture rights thus found to be in him, on the ground of a negative covenant implied in the contract. If such covenant exists, it obviously cannot be directly aimed at moving picture production, since the art was in its infancy and hardly in the minds of the parties at the time they made the contract. The implied negative covenant referred to must therefore be a general one, to do nothing detrimental to the value of the dramatization rights granted. But even in the sale of the good will of a business, most courts will allow the vendor to set up a rival establishment, and simply limit him from soliciting the customers of the old business. See 24 HARV. L. REV. 311. Yet it is certainly easier to imply a general negative covenant from a sale of "good will" than from a sale of the sole dramatic rights. Cf. *Cescinsky v. Roulledge & Sons*, [1916] 2 K. B. 325, 328.

CORPORATIONS — CITIZENSHIP AND DOMICILE OF CORPORATIONS — ENEMY CHARACTER: DOMESTIC CORPORATION WITH ALIEN ENEMY SHAREHOLDERS AND DIRECTORS. — An English company, all but one of whose shareholders and all of whose directors were German subjects resident in Germany, brought suit in England on an admitted debt. Defenses were that the agent who authorized the suit had no authority to do so, and that payment to such a company would be illegal as trading with the enemy. *Held*, for the defendant on the ground first stated. On the second point the Lords were in dispute. *Daimler v. Continental Tyre and Rubber Co.*, [1916] 2 A. C. 307 (House of Lords).

It is certain that a corporation takes no character simply from the nationality of its shareholders. *Hastings v. Anacortes Packing Co.*, 29 Wash. 224, 69 Pac. 776; *Queen v. Arnaud*, 16 L. J. Q. B. (N. S.) 50; *Amorduct Mfg. Co. v. Defries & Co.*, 31 T. L. R. 69. The case is therefore one of those that tempt a court to look through corporate entity to the incorporators. Our feeling toward such cases will depend on our belief or lack of it in the objective reality of the corporate identity. Cf. MORAWETZ, CORPORATIONS, 2 ed., § 227 seq., with Laski, "The Personality of Associations," 29 HARV. L. REV. 404. One statement on which lawyers should agree is that the corporate entity should not be disregarded if the result sought can be reached on any other ground. See 20 HARV. L. REV. 223. In the principal case there was no danger that any sums paid to the corporation would reach the German shareholders until after the termination of the war. See *Continental Tyre and Rubber Co. v. Daimler Co.*, [1915] 1 K. B. 893, 905; 28 HARV. L. REV. 629. The injury of enemies after the



war is over has not before now been considered a proper basis for judicial action. Another ground suggested in the judgments is that the corporate entity has itself taken hostile character from the fact that it is probably controlled largely from abroad. It is a commonplace that enemy character depends primarily on residence. *Albrecht v. Sussmann*, 2 Ves. & B. 323. And there are serious theoretic difficulties in finding a corporation resident anywhere except in the state of its incorporation. See BEALE, FOREIGN CORPORATIONS, § 73 *seq.* So it had been provided: "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." PROCLAMATION ON TRADING WITH THE ENEMY, Sept. 9, 1914, par. 3. TRADING WITH THE ENEMY ACT, 1914, par. 1, (2). There is, however, respectable authority to the effect that a corporation takes character from the place of its chief administrative office, wherever it may be incorporated. *Martine v. International Life Ins. Ass'n*, 53 N. Y. 339. See E. Hilton Young, "The Nationality of a Juristic Person," 22 HARV. L. REV. 1, 18. Of course if it has given actual assistance to the enemy, there is good ground for refusing it relief. *Netherlands South African Ry. Co. v. Fisher*, 18 T. L. R. 116. In the case before the court, however, there was no suggestion that the corporation had actually helped the enemy, nor that its head office was anywhere except at London. With enemy shareholders and directors suspended from their powers *pendente bello*, the possibility of control from Germany would be a very slender basis for decision.

EASEMENTS — NATURE AND CLASSES OF EASEMENTS — EASEMENT OF NECESSITY — RIGHT OF ACCESS TO GAS AND OIL. — The plaintiff was lessee of land, under an "agricultural lease" in which no specific reservations or exceptions were made. Later the owner of the land leased the gas and oil under the tract to the defendants. The defendants occupied enough of the surface of the land for the machinery necessary for drilling. The plaintiff seeks an injunction against the occupation of this land. *Held*, that the injunction will not issue. *Kemmerer v. Midland Oil & Drilling Co.*, 229 Fed. 872 (C. C. A., 8th Circ.).

When a lease of land is made without reservation or exception, the lessor parts with his entire right of possession during the term. *Cobb v. Lavalley*, 89 Ill. 331. Consequently he can give no right to a subsequent lessee. But the court in the principal case construes the words "agricultural lease" to imply that only the surface was granted, with the rest of the land excepted. It is elementary that a landowner may by grant divide his land horizontally as well as vertically. *Caldwell v. Fulton*, 31 Pa. St. 475; *Manning v. Frazier*, 96 Ill. 279. On conveying away part of his land, an owner is entitled to a way of necessity over that part if the rest of his holdings cannot be otherwise reached. *Brigham v. Smith*, 4 Gray (Mass.) 297; *Telford v. Jennings Producing Co.*, 203 Fed. 456. Accordingly it has been held that a grantor who retains the oil under his land has a right of access to his holdings. See 7 HARV. L. REV. 47. This right would of course pass to a subsequent grantee or lessee of the land retained. It would seem therefore in the principal case that the defendant should be entitled to occupy the land necessary for the enjoyment of his lease.

HABEAS CORPUS — UNCONSTITUTIONAL PROCEDURE IN TERRITORIAL COURT AS GROUNDS FOR ISSUANCE OF WRIT BY FEDERAL COURT. — In a criminal trial in the Circuit Court of Hawaii the court allowed the prosecution to read to the jury the testimony of a witness given at a former trial, thus violating the prisoner's constitutional right to be confronted with the witnesses against him. The prisoner seeks a writ of *habeas corpus* in the United States District Court. *Held*, that the writ will not issue. *In re James P. Curran*, U. S. Dist. Ct. of Hawaii, April, 1916 (not yet reported).

The "Federal Habeas Corpus Act" provides that the writ shall not issue in

favor of a prisoner unless he is confined in violation of the Constitution, laws, or treaties of the United States. U. S. COMP. STAT., § 753. This broad language has been rather narrowly construed, and it is now well settled that the writ of *habeas corpus* will not perform the functions of a writ of error. See *Henry v. Henkel*, 235 U. S. 219, 229. It will only lie if the proceedings in the committing tribunal are void or show lack of jurisdiction over the parties or the subject matter of the action. *Ex parte Siebold*, 100 U. S. 371; *Ex parte Parks*, 93 U. S. 18. See *Henry v. Henkel*, *supra*. Where the denial of a right guaranteed by the Constitution involves an error of procedure or even vitiates the mode of trial, *habeas corpus* is not the proper remedy. So the denial of the right to have a jury of one's peers and to have compulsory process in order to obtain favorable witnesses will not be reviewed on *habeas corpus*. *Ex Parte Harding*, 120 U. S. 782. Likewise the claim of double jeopardy will not be investigated on *habeas corpus*. *Ex parte Bigelow*, 113 U. S. 328. Accordingly, the principal case seems clearly right.

**HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF WIFE AS TO THIRD PARTIES — HUSBAND'S CREDITORS' RIGHTS IN SEPARATE ESTATE MANAGED BY HUSBAND — PRESUMPTIONS.** — A business, bought with his wife's money, was managed by an insolvent debtor, on a salary as her agent. No evidence as to the disposition of the salary was offered. A prior creditor seeks to charge the business. *Held*, that the profits are chargeable to the extent of his salary. *Fisher v. Poling*, 88 S. E. 851 (W. Va.).

Transactions between an insolvent debtor and his wife have always been subject to exceptional scrutiny. *White v. Benjamin*, 150 N. Y. 258, 265, 44 N. E. 956, 958. Indeed, in such cases a wife must sustain the burden of disproving fraud in conveyances to her. *Pope v. Cantwell*, 206 Fed. 908; *Edelmuth v. Wybrant*, 21 Ky. Law 929, 53 S. W. 528. *Contra*, *Clark Bros. v. Ford*, 126 Ia. 460, 102 N. W. 421. Thus the presumption in the principal case that the husband's salary, being unaccounted for, must be in the business is not in principle an innovation. Indeed, this same court and others have charged the business profits for creditors where the husband's services were gratuitous. *Bogges v. Richards' Adm'r*, 39 W. Va. 567, 20 S. E. 599; *Glidden v. Taylor*, 16 Oh. St. 510. *Contra*, *Shircliffe v. Casebeer*, 122 Ia. 618, 98 N. W. 486; *Wasem v. Rabens*, 45 Ind. App. 221, 90 N. E. 636. However, some courts have given as the basis for such result the assertion that the husband's industry cannot equitably be withheld from his creditors. *Patton's Exr. v. Smith*, 130 Ky. 819, 114 S. W. 315. Such decisions must likewise rest on a presumption, that the business, after all, is that of the husband. *Cf. Robinson v. Brems*, 90 Ill. 351; *Talcott v. Arnold*, 54 N. J. Eq. 570, 35 Atl. 532. In the principal case, the salary itself satisfied the creditors. But it would be of interest to know whether the court, on the principle of these cases of gratuitous labor, would have charged the profits if the salary had not sufficed.

**INJUNCTIONS — LEGISLATIVE ABOLITION OF THE INJUNCTIVE REMEDY IN LABOR DISPUTES UNCONSTITUTIONAL.** — The defendants, members of a trade union desirous of forcing the plaintiffs to join, brought pressure on the latter's employers to compel them to discharge the plaintiffs. A statute provided that no injunction should issue in such case. *Held*, the statute violates the Fourteenth Amendment of the Constitution of the United States, and an injunction will therefore issue. *Bogni v. Perotti*, 203 Mass. 26, 112 N. E. 853.

For discussion of this case, see NOTES, p. 75.

**INSURANCE — MUTUAL BENEFIT INSURANCE — RIGHT OF SOCIETY TO RAISE PREMIUMS.** — Plaintiff took out a certificate of insurance from a fraternal order under a by-law of the association which provided that "monthly pay-



ments . . . should continue the same as long as his membership continued." The contract also incorporated the by-laws which provided for amendment and also for changes in the rate of assessment. Upon the association raising the rates he brings suit for breach of contract. *Held*, that such a raise was in the contemplation of the parties. *Supreme Lodge, Knights of Pythias v. Mims*, Sup. Ct. Off., No. 345.

It has been thought that decisions upon the right of benefit societies to amend its by-laws so as to affect the amount payable upon insurance policies were in hopeless conflict, not only between jurisdictions, but also within them. Some states allow no such amendments. *Wright v. Knights of Maccabees*, 95 N. Y. Supp. 996; *Covenant Mutual Life Ass'n v. Tuttle*, 87 Ill. App. 309; *Pearson v. Knight Templars & M. Indemnity Co.*, 114 Mo. App. 283, 89 S. W. 588. But the principle of the present case — that due to the fraternal nature of the order, the "risk of events," and such sacrifices as the success of the scheme might naturally demand were within the contemplation of the parties — seems to reconcile the decisions among those jurisdictions which do allow some changes. Thus increased assessments, even though they become prohibitive, are within the contemplated risk of events. *Gant v. Mutual Reserve Fund Life Ass'n*, 121 Fed. 403. But placing all members over a given age in a class by themselves and raising their assessments until they support their own insurance is not. *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506, 834. *Straus v. Mutual Reserve Fund Life Ass'n*, 128 N. C. 465, 39 S. E. 55. Whereas a reassignment of all members into classes, though it may raise assessments, is a reasonable sacrifice. *Reynolds v. Supreme Council of the Royal Arcanum*, 192 Mass. 150, 78 N. E. 129.

INTERNATIONAL LAW — ENGLISH PRIZE COURTS — DUTY TO OBEY ORDERS IN COUNCIL. — The *Zamora*, a neutral ship, was seized by a British cruiser as a prize. During condemnation proceedings instituted in the Prize Court because of the contraband character of the cargo (copper), the Court acting under Order XXIX, Rule I, of the Prize Court Rules, applied to the Court for an interlocutory order that a part of the cargo be delivered to the Crown. The Prize Court so decreed and the owner of the vessel appealed to the Privy Council. *Held*, that the decree should not have been made. *The Zamora*, 32 T. L. R. 436 (Privy Council).

For discussion of the principles involved, see NOTES, p. 66.

JUDGMENTS — OPERATION AS BAR TO OTHER ACTIONS — JUDGMENT ON INTERPLEADER BY GARNISHEE AS BAR TO ACTION BY JUDGMENT CREDITOR AGAINST GARNISHEE. — One Gould became entitled to the surrender value of an insurance policy; later a judgment creditor of one Dunlevy, without serving Dunlevy, a non-resident, garnished Gould and the insurance company, alleging that Gould had assigned his interest to Dunlevy. The company interpleaded. Notice was given to Dunlevy but she did not appear. The court found that there was no assignment by Gould to Dunlevy and ordered payment to be made by the company to Gould. This was done. Dunlevy now brings an action in another state against the company for the value of the policy. *Held*, that she may recover. *N. Y. Life Ins. Co. v. Dunlevy*, 36 Sup. Ct. Rep. 613.

Garnishment is, as against the principal debtor, an action *quasi in rem*. Hence no personal judgment or decree can be given against a non-resident debtor who was not personally served. See 2 SHINN, ATTACHMENT AND GARNISHMENT, § 607. Consequently, where without service on the principal debtor judgment is rendered in favor of the garnishee on grounds that the garnishee owes no debt, the principal debtor may nevertheless bring an action against the garnishee. *Ruff v. Ruff*, 85 Pa. St. 333. See *Puffer v. Graves*, 26 N. H. 256. See 2 SHINN, ATTACHMENT AND GARNISHMENT, § 725. A judgment on an inter-

pleader filed by the garnishee can certainly be no more binding on the unserved debtor than a judgment in the garnishment suit. The principal case, therefore, seems clearly right. The result that the company must pay twice is harsh. But the situation is the same in any case where a debtor successively sued on one claim by two claimants in different jurisdictions is unable to serve both in any one jurisdiction. The better course for the debtor in such a case and for the defendant in the principal case would seem to be, not to interplead but to defend each action as it is brought.

**LAW AND FACT — PROVINCES OF COURT AND JURY — COMPETENCY OF WITNESSES DEPENDING ON THE MAIN ISSUE.** — In a prosecution for perjury it was alleged that the defendant previously had brought a suit for divorce in Texas; that he had in that suit sworn, in order to give the court jurisdiction, that he had been resident in Texas for twelve months; and that he had not, in fact, been so resident. The divorce was granted in the prior suit. The wife was offered by the state as witness for the prosecution. The court, after viewing the former divorce decree, permitted the wife to testify. *Held*, that there was no error. *Laird v. State*, 184 S. W. 810 (Texas).

The general rule that preliminary questions of fact are for the judge is no longer questioned. But the authorities are in conflict when the preliminary question of fact is also the main issue. Thus some courts hold that such circumstance should not prevent the court from passing on the question. *State v. Lee*, 127 La. 1077, 54 So. 356; *Hichins v. Eardley*, L. R. 2 P. & D. 248; *Doe v. Davies*, 10 Q. B. 314. Others, however, allow the question of admissibility to go to the jury, with instructions altogether to disregard the evidence if it is proved inadmissible. *Respublica v. Hevise*, 3 Wheeler Cr. Cas. 505 (Pa.); *Stowe v. Querner*, L. R. 5 Ex. 155. There seems to be no reason for departing from the general rule. The decision of the ultimate issue is, after all, still with the jury; and any undue influence, consequent upon the expression of the court's opinion, can be averted by having the jury retire during the determination of the question. The principal case, however, presents a novel problem. In objecting to the testimony of the witness, on the ground that she is his wife, the defendant is inconsistent both with his position in the former divorce suit and with his position as to the main issue in the present trial. As regards the first inconsistency, the law appears to be that a collateral attack on a judgment for want of jurisdiction of a party thereto can only be made by one not a party to the judgment. *Heffron v. Cunningham*, 76 Texas 312, 13 S. W. 259; *cf. Valentine v. McGrath*, 52 Miss. 112. But it would seem as if the defendant's attitude in this trial must also bar his objections. For by proving the preliminary fact, that she is still his wife, he is confessing the main issue, that he committed perjury and the divorce decree was void. The state is saved from an equally anomalous position by the fact that the burden of proof in a preliminary question of fact is upon the objecting party. For all relevant evidence is *prima facie* admissible. See J. B. Thayer, "Presumptions and the Law of Evidence," 3 HARV. L. REV. 141, 144. Thus the state is simply objecting to the defendant's position. It is submitted that the defendant should be prevented from assuming such inconsistent attitudes in the same trial, by something akin to estoppel.

**LIBEL AND SLANDER — DAMAGES — LIABILITY FOR UNAUTHORIZED REPETITION.** — Defendant slandered the plaintiff by words actionable *per se*. The trial judge refused to instruct the jury that in assessing damages unauthorized repetitions by third parties were not to be considered. *Held*, that this was not error. *Southwestern Telegraph and Telephone Co. v. Long*, 183 S. W. 421 (Texas).

It is a well-established rule that the publisher of slander is not liable for its unauthorized repetition. *Dixon v. Smith*, 5 H. & N. 450; *Cates v. Kellogg*, 9 Ind. 506; *Shurtleff v. Baker*, 130 Mass. 293. See *Schoepflin v. Coffey*, 162 N. Y.



12, 17, 56 N. E. 502, 504. But an exception has been made when the repetition is privileged. *Derry v. Handley*, 16 L. T. (N. S.) 263. In the principal case the court makes another exception on the ground that the words are here actionable *per se*. The jury, which can assess general damages, will, as a matter of fact, doubtless take these repetitions into consideration. But by authority, any instruction to that effect is error. *Hastings v. Stetson*, 126 Mass. 329; *Prime v. Eastwood*, 45 Ia. 640. See NEWELL, SLANDER AND LIBEL, 3 ed., § 1079. Now the established general rule rests on an obsolescent principle of causation. See 27 HARV. L. REV. 389. But the fact that the law considers the slander actionable *per se* can certainly not effect such causation. It is therefore difficult to justify this distinction. The decision, however, is desirable in placing a further limitation upon a rule which is without basis of reason. For it is highly foreseeable that slanderous remarks will be repeated, and it is just this repetition which is responsible for the main injury in defamation. See *Davis v. Starrett*, 97 Me. 568, 576, 55 Atl. 516, 519.

**LIBEL AND SLANDER — PUBLICATION — BY OFFICER OF CORPORATION TO AGENT.** — A letter, defamatory of plaintiff, was dictated by an officer of a corporation to his stenographer and sent to a fellow-employee. Each was acting in the prosecution of the business of the corporation. *Held*, that this did not constitute a publication of a libel. *Central of Georgia Ry. Co. v. Jones*, 89 S. E. 429 (Ga.).

It has been held that dictation to a stenographer by an officer of a corporation is not a publication. *Owen v. Ogilvie Pub. Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033. See 12 HARV. L. REV. 355. The principal case applies the same principle to communications between any fellow-employees. These cases argue that, as a corporation is an entity, acting only through agents, a communication by one agent to another is merely a communication by the corporation to itself; that the agents are merely parts of the deliberative machinery of the corporation, as distinguished from their identity as individuals. But such a distinction seems neither desirable nor true to fact. See 27 HARV. L. REV. 284. It seems impossible, as a matter of practice, to dissociate the individual from the employee. Agents do form personal opinions and act upon them. The danger to the community of licensing such communications, which in the case of a large concern might well become widespread, seems to outweigh the consideration that the corporation would otherwise be seriously hampered in the transaction of its business. If the communications are necessary and reasonable, as in the principal case, the defense of privilege is available. *Lawless v. Anglo-Egyptian Cotton & Oil Co.*, L. R. 4 Q. B. 262; *Edmondson v. Birch & Co.*, [1907] 1 K. B. 371, 380.

**MUNICIPAL CORPORATIONS — ABUTTING OWNERS — EASEMENTS.** — Adjoining the plaintiff's property the city erected a public bathhouse with projections upon the sidewalk which violated the city charter and a city ordinance. The plaintiff applies for a mandatory injunction requiring the city to remove the encroachments. *Held*, that the injunction be granted. *Hellinger v. City of New York*, 95 Misc. 394.

It is generally held that an abutter has a property right in the air, light, and access afforded by the street, which cannot be taken without compensation. *Story v. N. Y. etc. R. Co.*, 90 N. Y. 122; *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1, 25 N. E. 496; *De Geofroy v. Merchants, etc. Ry. Co.*, 179 Mo. 698, 79 S. W. 386. See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 123. Encroachments on the sidewalk which materially touch this right will be enjoined, and an ordinance permitting such cannot be supported. *McMillan v. Klaw & Erlanger Const. Co.*, 107 App. Div. 407, 95 N. Y. Supp. 365. In most cases the offenders have been private individuals. It seems however not improper to

enforce the same rule against the city. There are undoubtedly some things that a city may not do within its streets. *Lutterloh v. Mayor, etc. of Cedar Keys*, 15 Fla. 306; *Morrison v. Hinkson*, 87 Ill. 587; *Dubuque v. Maloney*, 9 Iowa 450. When the city is improving roads or building bridges, courts go very far to find its action privileged as an exercise of governmental function. *Callendar v. Marsh*, 1 Pick. (Mass.) 418; *Selden v. City of Jacksonville*, 28 Fla. 558, 10 So. 457; *Sauer v. New York*, 180 N. Y. 27, 72 N. E. 579. But arguments of that sort hardly apply to an encroachment by a public bath.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — ACCRETIONS TO SERVIENT TENEMENT. — The owner of a large tract of land lying between bay and ocean divided it into building lots. He agreed with the buyers of lots that a certain strip running through the center of the tract from bay to ocean should be kept forever open. Extensive accretions formed at the ocean extremity of this open area. *Held*, that the accretions were subject to the restrictions binding the original strip. *Bridgewater v. Ocean City Ass'n*, 96 Atl. 905 (N. J.).

It is a familiar rule of construction of grants that the designation of navigable water as a boundary imports the shifting high-water line thereof. *Mulry v. Norton*, 100 N. Y. 424, 3 N. E. 581. This rule has been likewise applied to a street easement acquired by condemnation proceedings. See 22 HARV. L. REV. 610. The correctness of its application in the principal case can hardly be questioned. The same result, however, might have been reached by regarding the accretions as assimilated by or drowned in the original tract, and therefore subject to its burdens. This conception is amply supported by precedent. For example, the adverse occupancy of shore land for the statutory period carries with it title to accretions, though the latter may have but recently formed. See *Campbell v. The Laclede Gas Light Co.*, 84 Mo. 352, 372. Similarly if the tract is mortgaged, the accretions are subject to the mortgage lien. *Cruikshanks v. Wilmer*, 93 Ky. 19, 18 S. W. 1018. The same is likewise true in the case of dower. *Lombard v. Kinzie*, 73 Ill. 446. The rule is also followed where the land is subject to a lease. *Cobb v. Lavalle*, 89 Ill. 331.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO THE USE OF PROPERTY — EMINENT DOMAIN — COMPENSATION TO OWNER OF BENEFITED LAND WHEN RESTRICTED LAND IS CONDEMNED. — The plaintiff owned lots which were within a tract of restricted building lots, the deeds to which provided that no structure for business purposes should be erected on any of these lots. The defendant railway company acquired lots equitably servient to those of the plaintiff and built its tracks thereon. The plaintiff seeks compensation. *Held*, that the plaintiff may recover. *Flynn v. New York, Westchester & Boston Ry. Co.*, 112 N. E. 913 (N. Y.).

In two similar cases *held*, that the plaintiff may not recover. *Ward v. Cleveland Ry. Co.*, 92 Ohio St. 471, 112 N. E. 507; *Doan v. Cleveland Short Line Ry. Co.*, 92 Ohio St. 461, 112 N. E. 505.

The question whether an equitable servitude is a contract right or a right *in rem* has been a matter chiefly of theoretical dispute. See 21 HARV. L. REV. 139. In the principal cases the question has become of practical importance. By adopting different theories the courts have reached different results. It seems doubtful, however, whether even here different conclusions are necessary. The two Ohio cases hold, going on the contract theory, that a restrictive covenant creates no rights effective as against the powers of eminent domain. The basis of such decision is public policy: otherwise property owners could by contracting among themselves defeat the rule that depreciation in value of neighboring property incidental to a public use does not constitute a "taking" so as to require compensation. See *United States v. Certain Lands*,



etc., 112 Fed. 622, 629. Accepting such basis as sound, it appears that on the property theory there may be the same result. For the creation of such property right rests on contract. Now a possible construction of the contract, and one favored by the rule that a contract must be construed, if possible, to be within public policy, is that the restriction was to cover only private undertakings. Cf. 29 HARV. L. REV. 552. If such interpretation is rejected, the full operation of the contract would, by our premise, conflict with public policy. This may mean that the contract is void. But the contract may be good, and policy still prevent the creation of an equitable property right from it. *Norcross v. James*, 140 Mass. 188, 2 N. E. 946. In either case, there is no property right to award compensation for.

TAXATION — WHERE PROPERTY MAY BE TAXED — INHERITANCE TAX ON NON-RESIDENT PARTNER'S INTEREST IN LOCAL PARTNERSHIP REALTY. — The testator, a resident of New York, was a member of a partnership, which had a branch and owned realty in Pennsylvania. The partnership agreement provided that upon the death of one partner the other should carry on the business, paying to the estate of the deceased partner the value of his interest. On the death of the testator, Pennsylvania attempts to collect an inheritance tax on the testator's interest in the partnership property. The personal representatives of the testator were non-residents. *Held*, that the tax cannot be collected. *In re Arbuckle's Estate*, 97 Atl. 186 (Pa.).

Real property is taxable in the jurisdiction in which it is situated. *People v. Howell*, 106 App. Div. 140, 94 N. Y. Supp. 488. On the other hand, debts of whatever form are taxable at the domicile of the creditor. *Meyer v. Pleasant*, 41 La. Ann. 645, 6 So. 258; *Kirtland v. Hotchkiss*, 100 U. S. 491. Where a testator directs in his will that his realty be sold, such direction works an equitable conversion of the realty which is then taxable as personalty. *In re Smyth*, [1898] 1 Ch. 89; *In re Coleman's Estate*, 159 Pa. St. 231, 28 Atl. 137. *Contra*, *In re Swift's Estate*, 137 N. Y. 77, 32 N. E. 1096; *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350. The special agreement in the principal case would obviously have the same result. The doctrine of equitable conversion is not however essential to the decision of the case. The better view is that individual partners have no right to realty owned by the partnership, but only a right to its proceeds, *i. e.*, a chose in action. *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679. But many jurisdictions allow a partition, if no debts are outstanding. *Molineaux v. Reynolds*, 54 N. J. Eq. 559, 35 Atl. 536. The special agreement in the principal case, however, would nullify the right, if any, to partition, which might otherwise have passed to the representatives of the testator. So on any basis they owned a chose in action, taxable only at their domicile.

TELEGRAPH AND TELEPHONE COMPANIES — DAMAGES FOR ERROR, DELAY, OR NON-DELIVERY — MEASURE OF DAMAGES WHERE TELEGRAM FORMED A COMPLETED CONTRACT. — The plaintiff sent a telegram by the defendant company accepting an offer for the sale of goods in reply to a telegram from the offeror. The defendant negligently failed to deliver the telegram, in consequence of which the offeror failed to fulfill his contract, and the plaintiff was forced to buy goods at an advanced rate. A statute provided that telegraph companies shall be liable for special damages caused by failure to deliver dispatches. 1909 REV. STAT. MO., § 3334. *Held*, that the plaintiff can recover the difference between the contract price and the market price. *Tippin v. Western Union Telegraph Co.*, 185 S. W. 539 (Mo.).

The delivery of the telegram to the defendant company completed the contract with the offeror. *Lungstrass v. German Ins. Co.*, 48 Mo. 201. Its negligence prevented the offeror from carrying out such contract. The injury to the plaintiff thus consists solely in having a reasonable expectation of performance

changed to a right of action at law. Many courts, in telegraph cases of this kind, have allowed recovery on the ground that such injury was legal damage. *Straus v. Western Union Tel. Co.*, 8 Biss. 104; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; *Elam v. Western Union Tel. Co.*, 113 Mo. App. 538, 88 S. W. 115. *Contra, Kenedy Mercantile Co. v. Western Union Tel. Co.*, 167 S. W. 1094 (Texas). That such decision must accord with popular ideas of justice, is evident. Further, it prevents circuity of action, and has as precedent in other fields those cases that allow recovery for breach of contract maliciously induced by a third party. *Bowen v. Hall*, 6 Q. B. D. 333. The statute in the case, while not, as the court contended, determining what constitutes legal damage, affects the situation in determining the extent of the collectible damage. For in a contract action the damages are limited to those within the contemplation of the parties. *Melson v. Western Union Tel. Co.*, 72 Mo. App. 111. But in a tort action, which the statute appears to authorize, the damages will extend to any proximate consequences of the negligence. See WOLF, LIABILITY OF TELEGRAPH COMPANIES, 19, 31.

TENANCY IN COMMON—RIGHTS OF CO-TENANTS AGAINST EACH OTHER — RIGHT OF ONE CO-OWNER OF A COPYRIGHT TO RESTRAIN INFRINGEMENT BY THE OTHER. — A., co-owner with B. of a copyright, exercised the copyright privileges without the consent of B. B. seeks to enjoin him. A statute provides that "copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." 1911 GEO. V, sec. 2, subsec. 1. Held, that B. is entitled to an injunction. *Cescinsky v. Rouledge & Sons, Ltd.*, [1916] 2 K. B. 325.

The words of the statute seem to be decisive of this case. Since the consent of the owner, *i. e.*, of both A. and B., was not obtained, A.'s actions must come within the definition of infringement. But aside from the statute, the decision is supported by analogies from the common law. For in the case of incorporeal hereditaments, the rights of one co-tenant were distinctly limited by the rights of the other. For instance, one co-parcener could not enjoy the right to an advowson to the exclusion of the other, but each took it in turn. COMYN'S DIGEST, tit. Advowson, A; COKE UPON LITTLETON, 164 b, (q). The same was true of a mill or piscary which descended to parceners. See *Powell v. Head*, [1879] 12 Ch. D. 686, 688. See COKE UPON LITTLETON, 165 a. Even in the rights of co-tenants of land the analogy holds. It is true that one tenant-in-common of land is entitled to the possession of the entire property. *Knox v. Silloway*, 10 Me. 201; *Rising v. Stannard*, 17 Mass. 282; *Mumford v. Brown*, 1 Wend. (N. Y.) 53. And he can make a reasonable use of the common property, even if this involves waste. *Dodd v. Watson*, 4 Jones Eq. (N. C.) 48; *McCord v. Oakland Quicksilver Mining Co.*, 64 Cal. 134, 27 Pac. 863. But he cannot commit such waste as is destructive of the estate. *Leatherbury v. McInnis*, 85 Miss. 160, 37 So. 1018. See 2 STORY, EQ. JUR., § 916. The property in the principal case is a monopoly of production. Thus clearly production outside the monopoly is destructive of the fundamental property right of copyright. There is little direct authority, however, on the question of the rights of co-owners of a copyright against each other. One co-owner of a drama cannot, without the consent of the other, license a third person to produce it. *Powell v. Head*, *supra*. But in that case the question of the rights of co-owners *inter se* was expressly left open. And it has been held that the assignees of three of the four co-owners of a copyright may enjoin a stranger from infringing it. *Lauri v. Renad*, [1892] 3 Ch. 402. In the latter case, Kekewich, J., introduces an element of confusion by attempting to distinguish "part ownership" from tenancy in common and joint tenancy. This is a novel idea of ownership which has no basis in authority. But whether or no the rights in an incorporeal hereditament are



divisible as to title, public policy must approve of the language of the court, that such rights are indivisible as to exercise.

**VENDOR AND PURCHASER — VENDOR'S LIEN — AVAILABILITY TO THE BENEFICIARY OF THE CONTRACT OF SALE.** — The vendor conveyed land to the vendee, taking in consideration the vendee's promise to pay the purchase price to the vendor's daughter. *Held*, that the daughter is entitled to a grantor's lien on the land. *Lenox v. Earls*, 185 S. W. 232 (Mo.)

The rationale of the doctrine of the grantor's lien has been variously stated. See 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1250. It has most commonly been spoken of as a constructive trust. *Wilkinson v. May*, 69 Ala. 33. See 1 PERRY, TRUSTS, 6 ed., §§ 231, 232. But the theories on which this doctrine is generally supported have been strongly objected to. *Ahrend v. Odiorne*, 118 Mass. 261. See 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., §§ 1234, 1250. A theory not alluded to in the criticisms cited is that the trust is imposed to prevent fraud. *Ahrens v. Jones*, 169 N. Y. 555, 62 N. E. 666. But there can be no actual fraud in the making of a promise which one intends to keep. It is submitted that the better view is that the lien arises from a "natural judicial conception" that the thing sold should be security for the purchase price. See 3 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1250. The decision of the principal case may very likely be dependent upon which view of the grantor's lien the court has taken. That of a constructive trust may allow the lien to arise in favor of a beneficiary whether or no the beneficiary is given a right at law for the purchase price. *Ahrens v. Jones*, *supra*. If, however, the lien is based on the idea that the thing sold should be security for the purchase price, it follows directly that the lien should benefit the person to whom the purchase price is due. Thus the result in the principal case can be reached only in those jurisdictions which give a sole beneficiary a right at law. The principal case is generally supported by those courts which allow a grantor's lien. *Zwingle v. Wilkinson*, 94 Tenn. 246, 28 S. W. 1096; *Pruitt v. Pruitt*, 91 Ind. 595.

## BOOK REVIEWS

**MODERN LEGAL PHILOSOPHY SERIES: VOLUME VII. MODERN FRENCH LEGAL PHILOSOPHY.** By A. Fouillée, J. Charmont, L. Duguit, and R. Demogue; translated by Mrs. Franklin W. Scott and Joseph P. Chamberlain, with an editorial preface by Arthur W. Spencer and with introductions by John B. Winslow and F. P. Walton. Boston: The Boston Book Company, 1916. pp. lxvi, 578.

The volume is a mosaic. Part I ("A Brief Survey of Philosophy of Law in France") is made up of extracts from Fouillée's *L'Idée Moderne du Droit* and of eight chapters from Charmont's *La Renaissance du Droit Naturel*. Part II ("Some Important Points of View in Contemporary French Legal Philosophy") is made up of other extracts from Fouillée's *L'Idée Moderne du Droit*, from Duguit's *L'État: Le Droit Objectif et la Loi Positive*, and from Part I of Demogue's *Les Notions Fondamentales du Droit Privé*.

These extracts have the unity of time and place. They justify the title of the book. They are modern, they are French, and they are legal philosophy. Local color predominates. A discussion of such a general topic as free scientific research presupposes a system of law, like the French code, as the basis of reality upon which to rear a structure of philosophical speculation. While Demogue discusses security, liberty, and justice in most general terms, he usually has in mind a section of the French civil code, or a decision from one of the

collections of cases. Often our authors frankly confine themselves to a consideration of French legal thought, yet even a superficial reading shows that German influence, whether by way of attraction or repulsion, has been very great and that German ideas have been received, analyzed, and worked out with characteristic French clarity and precision. The form and spirit are of France, but back of it is the power and force of Germany. Stammler's *Naturrecht mit wechselndem Inhalt* is the avowed source of Charmont's discussion of natural law; and even where Duguit differs most sharply from Jellinek, Gierke, and Preuss, he shows their influence and power most frankly. In drawing inspiration from Germany, France has done well. Modern thought would be cramped and dwarfed if Germany had refused a reception to French ideas, or France to German ideas. In their mutual interchange of thought they have chosen better than most of us on this side of the Atlantic. The editors have attempted to show modern French legal thought as it is. If they portray confusion, it is because modern legal thought, French or otherwise, is in confusion. With whatever success Fouillée may prove that the essential characteristics of French legal thought are always the same in its enthusiasm, its optimism, and its love of liberty, we need only compare Duguit's theory of objective law with Charmont's discussion of such theory to see that even if the spirit is everywhere the same, the fundamental assumptions are divergent. As against Charmont's natural law with a variable content we may set Duguit's rule of conduct, permanent in content, but changing in form; and while Duguit identifies this rule with solidarity, Charmont seeks to show that solidarity is incapable of being transformed logically into an obligatory rule; and Demogue says that solidarity is a convenient compromise for various issues, a skilful system of plucking a great many fowl without making them cry out. But this is all the confusion of life: of an active intelligence that questions the very foundations of society, that calls on law to justify itself, and that takes nothing for granted.

These extracts are for the most part characterized by an analysis, the accuracy of which is so hidden by the perfection of the style that it is not discovered until one tries to improve upon it. The clear lucid style is French in its charm and simplicity. Our authors prove the truth of Berolzheimer's proposition that it is a fallacy to suppose that it is not philosophical to write clearly and simply, and that the artificial language of philosophy is useful only to one who wishes to conceal how meager or how unphilosophically simple is his stock of ideas. The translators have caught the beauty of form while giving us an accurate rendition of the thought.

Perhaps Duguit's theory of law and of the state will arouse the greatest interest and perhaps the greatest hostility in American readers. He finds the base of all human phenomena to be the individual mind. Man becomes conscious of the solidarity which unites him to his fellows, both solidarity by similitude and solidarity by division of labor. The rule of conduct which is to govern men is in short to respect every act of individual will, determined by an end of social solidarity; to abstain from every act that would be determined by an end contrary to social solidarity; to coöperate in the realization of social solidarity. In the theory of the state as set forth by Duguit in *L'État: Le Droit Objectif et Loi Positive*, he agrees with Jellinek that guaranty, of which coercion is but one method, is the essential mark of the idea of law, and that the rules of law are not so much rules of coercion as guaranteed norms. He differs from Jellinek when the latter regards the power of commanding without contradiction and of compelling perfect obedience as the criterion which distinguishes the power of the state from every other power. He agrees with Preuss and Gierke that Law and the State are twin sisters, and not parent and child. He differs from them when they accept the dogma of the personality of the state if it is to be a state governed by the law. The result which he seeks to accomplish is avowedly negative. He seeks, not to show what the state



is or what law is, but what they are not. That all doctrines of the personality of the state are either fictions or run in a vicious circle; that a state is only the man or group of men who are naturally stronger than others; that law is obligatory solely because it is a fact; that if a state were a legal person, it could only be despotic; that a self-limitation by the state of its own powers is impossible; that the force of the state is not of itself legitimate but that it becomes so only when it is employed to uphold law, that is, to guarantee coöperation in social solidarity, all will astonish and possibly antagonize the American reader. Probably it was not written to please, but to arouse thought. It may be, as Duguit himself says, that he, too, in spite of all his endeavors, has put pure abstractions in place of facts, and that he, like those whom he criticises, has attempted to bring within an *a priori* conception the highly complex and multiple phenomena of the social world. Charmont has attempted to show the illusions of Duguit. Whether we agree with Charmont or not, we must admit, even if we differ from Duguit's views separately and in combination, that it is easier to refuse to discuss them than it is to answer them in detail.

Demogue attempts to balance the interests of security and justice. He shows the difficulty of protecting the interests of security in a society in which, as he quotes from von Ihering, the law, like a Saturn, who devours his own children, rejuvenates itself only by breaking with its past. He scoffs at solidarity, though he concedes its practical advantages, as a compromise, of not colliding too directly with justice and security, though it is not in accord with them. He finds in security the justification for the tendency of modern life to divide losses, which others would justify by solidarity; but he concedes that in insecurity there is a certain joy of strife and triumph. He regards natural law, the ideal law with a variable content, as very hard to discover even if we are sure it exists; he puts state law, state art, and state religion in the same class; but he concedes that the most important principles must be enforced by the coercive power of the state. While seeking the ideal, law must at all events adapt itself to actual conditions, and it must compromise conflicting interests rather than push any idea to the extreme limit. To him the goal of our juridical efforts is to be a compromise which will bring about a reconciliation of hostile interests, though with the result that the equilibrium thus established is but temporary, and that law is forced to be a very subtle science.

Charmont gives us an outline of the recent development of French legal philosophy, including an account of the renaissance of legal idealism and the theory of natural law with a variable content; and Fouillée discusses the French spirit and idea of law and sets forth his theory of the ideal right. The editorial preface by Arthur W. Spencer gives us an excellent series of short biographies of our authors, of whom most American readers would otherwise know nothing, and a concise statement of the position of each in juristic thought, a statement which is of great value to most of us, and of great interest to all, whether or not we agree entirely with his estimate in each particular case. Another statement helpful, though brief, of the scope of the Legal Philosophy Series in general and of this volume in particular, is found in Dr. Walton's introduction; while the introduction by Chief Justice Winslow shows that some, at least, of the bench understand that our common law is facing a crisis as great as that which the English law faced in the twelfth century, or the Germanic law on the continent faced in the fourteenth to the sixteenth centuries—the crisis which confronts every system of law whose established principles give it no clue to the answers to many questions which life has propounded suddenly.

Besides the survey of modern French juristic thought we can, incidentally, get an appreciation of ourselves. Americanism is, to Fouillée, an exclusive attention to practical results, which has had its hour among the youthful people of a new continent chiefly occupied in earning a livelihood, but which would

be dangerous for England and for Germany as well as for France; and, to Demogue, a formidable machine of war of a nature to destroy security and to threaten justice.

WM. HERBERT PAGE.

INDUSTRIAL CONDITIONS IN SPRINGFIELD, ILLINOIS. By Louise C. Odencrantz and Zenas L. Potter. New York: Russell Sage Foundation. pp. 173.

In the preparation of this report, the authors have sought to present a background of theory "made practical and readily understandable through the concrete illustrations" provided by the facts in a fairly typical city. The entire survey shows the large extent to which most conditions in Springfield are dependent on state legislative and state administrative forces—conditions which are beyond immediate local control. Lack of coöperation and of law enforcement by the various state industrial agencies shows the necessity of creating an Industrial Commission, similar to the Wisconsin commission, with broad powers of administering the law. The survey shows that in the great majority of the varying, detailed, and multitudinous conditions presenting physical hazards it is not practicable to trust to specific laws, though in some instances the report recommends intelligent constructive means of handling particular evils through specific legislation.

This report should be useful in clearing up the "general confusion in the public mind as to the actual principles and real problems" involved in industrial relations, and will be found of value to those desiring a better understanding of labor problems in the average community.

LLOYD H. LANDAU.

THE MUNICIPAL COURT OF CHICAGO. Eighth and Ninth Annual Reports. Chicago. 1916. pp. 164.

This report reveals the work of a very highly specialized judicial organism. In addition to the ordinary criminal and civil branches we find here a Quasi-Criminal Branch, a Domestic Relations Branch, a Morals Court Branch, an Automobile Court Branch, a Small Claims Branch, a Boys' Court Branch. More striking still is the Psychopathic Laboratory, to a discussion of whose work pages 12-33 of the Report are given. The presence of such an organization in the actual body of a city court marks a remarkable step in the treatment of criminal defectives; that the step is in the right direction no one who runs through this Report can doubt. It is, however, a misfortune from a lawyer's point of view that more space could not have been given to a detailed description of the actual relations between Court and Laboratory. We are in some sense agreed that psychopathic laboratories as a part of city courts are valuable; what we need now to know is how they can be run.

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## IS THE RIGHT OF AN ASSIGNEE OF A CHOSE IN ACTION LEGAL OR EQUITABLE?

THE interesting article by my friend, Professor Cook, in a recent number of this REVIEW,<sup>1</sup> on the alienability of *choses* in action leads me to make some suggestions in opposition to his argument that the assignee of a *chose* in action should be regarded as having a legal rather than an equitable right. Perhaps most lawyers would agree with him offhand, but I think generally without appreciating the full implications of their conclusion.

In discussing equitable rights there is always danger of confusion between the essential character of the right and the tribunal in which it is enforced. The fundamental characteristic of an equitable obligation is that it binds primarily a particular person, and binds others only when their relation to that person is such that in conscience they should be subject to his duties. The Court of Chancery has been the tribunal where such duties have ordinarily been enforced. But even in jurisdictions where the distinction between legal and equitable courts is still preserved, courts of law to-day enforce a great variety of equitable rights and duties without thereby changing their essential characteristics. To call such rights legal in antithesis to equitable merely because a court of law enforces them, is a natural tendency but a dangerous one. Of course no such confusion exists in the argument of Professor Cook. His view seems to be that the extent of the powers of the assignee

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<sup>1</sup> 29 HARV. L. REV. 816.



of a *chose* in action involves the conclusion that he has more than that personal right which is typical of equitable ownership and should rather be designated as a legal owner, his ownership being qualified, to be sure, by certain limitations, as legal ownership often is.

Though legal ownership is conceived fundamentally as a right good against all the world, actual instances of such ownership are often much more narrowly limited. The owner of a chattel which has been stolen from him is likely to find his right against the world considerably qualified if the thief is in a place where the principles of market overt prevail. In the law of sales of chattels, the legal title passes to the buyer, without transfer of possession, if the parties so intend; yet in many jurisdictions the seller in possession can destroy the buyer's right by a resale, and even the seller's attaching creditors are often allowed a right superior to that of the buyer. On the other hand, where statutory provision is made for giving effective public notice of an equitable right, the equitable owner may acquire rights good against the world. The recording system thus enables one who has an equitable easement or other equitable right in real estate, based on contract, to protect himself against the world. It follows that one whose title is equitable may have in a particular case much more comprehensive ownership than another person who has a legal title. One who has a recorded contract for the transfer of Blackacre, especially if he has paid the price and the time for conveyance has come, has more comprehensive rights than the grantee under an unrecorded deed of Whiteacre who has not paid the price and whose estate is subject to a vendor's lien. Yet the former has an equitable and the latter a legal title.

Doubtless the reasons which have led to limitations of legal ownership have often been fundamentally the same as those controlling the habitual limitations of equitable ownership. In the case suggested above of a purchaser of a chattel without delivery, the reason why a purchaser in good faith from the seller in possession has been protected by courts of law, is the same reason which has led equity habitually to protect purchasers for value. The limitations set by recording statutes on legal titles have a similar foundation. Nevertheless, the methods by which such results are obtained at law and in equity are fundamentally different. The law achieves the result by imposing limitations on a title which would otherwise

be absolute. Equity achieves the result by extending to others, so far as is conscientious, an obligation which is primarily personal to one. It may be conceded that even this distinction of method is not always observed, and that instances may be found where equitable ownership is treated in a way analogous to legal ownership, but, nevertheless, the fundamental distinction exists.

Whether in a theoretical system of jurisprudence it is worth while to have two roads by which the same result may be achieved is rather beside the point in England and America, for we have the two systems and the roots of the equitable theory of ownership sink too deep to make it possible to tear them up. Moreover, an attempt to do so is likely to cause more confusion and incorrect conclusions than advantage in a body of law which has developed for centuries with the double system.

The history of the law governing the assignment of *choses* in action after the earliest periods is tolerably plain. The assignee possessed by implication a legal authority or power to enforce in the name and stead of the assignor the claim against the debtor. This involved no legal right to the claim itself.<sup>2</sup> He was further regarded in equity as the owner of the claim. If it were not for the first of these rights the assignee would have been obliged to resort to equity in every case to enforce the claim. If it were not for the second principle, his authority to collect might be disregarded or destroyed by the debtor's paying the assignor in spite of notice of the assignment, [by the bankruptcy of the assignor, or in other ways.

About the end of the eighteenth century courts of law recognized the equitable right of the assignee and gave the same protection to him that a court of equity would have done, still recognizing, however, that his ownership was equitable, not legal.<sup>3</sup>

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<sup>2</sup> The assignee has often been called the agent of the assignor, but it has been pointed out that the assignee is acting on his own behalf and not for another. The criticism seems just, but so far as concerns the question here discussed, it is merely verbal. The owner of property, tangible or intangible, may give another the power or authority to reduce the property to possession and, by so doing and not before, to become the owner of it.

<sup>3</sup> In *Winch v. Keeley*, 1 T. R. 619 (1787), Ashhurst, J., said: "It is true that formerly the Courts of law did not take notice of an equity or a trust; for trusts are within the original jurisdiction of a Court of equity; but of late years, it has been found productive of great expense to send the parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the



This condition of affairs continued so long certainly as the assignee was compelled to bring action against the debtor in the name of the assignor. So long as that procedure prevailed, it was hardly possible to argue, and it was not argued, that the assignee was the legal owner of the right. Yet, during this period, all the powers and rights upon which Professor Cook relies as showing a legal title on the part of the assignee were established. Every one of them dates back at least to the early part of the nineteenth century. The truth is that these powers and rights may belong to the assignee whether a court travels on the theory that he has a legal ownership or on the theory that he has a legal power to collect but only equitable ownership. Under such circumstances it is always safer to travel the path which the law has trodden instead of discovering another one which seems equally good for the purpose, unless it is very certain that the new path will enable us to reach not only most of the results which have been reached on the old one, but all, — or at least all which ought to be reached. Professor Cook, himself, calls attention to the fact that the equitable origin of the assignee's rights "must never be lost sight of if we are to understand the present state of our law."<sup>4</sup> The best way never to lose sight of this is to recognize that the assignee's ownership is still equitable; if it were not, there would be no danger for any one but a historian in losing sight of its origin.

But there are at least three classes of cases the proper decision of which seems to turn upon the answer to the inquiry whether the right of the assignee is still equitable as distinguished from legal ownership, namely cases involving:

1. The debtor's right to set off against the assignee claims against the assignor;
2. The effect of latent equities;
3. The effect of a subsequent total assignment on a prior partial assignment.

Professor Cook refers to two of these classes of cases, but postpones discussion of them. Had I not understood that this postponement was for a somewhat indefinite period, I should have delayed the expression of my views.

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plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust why should they not of an equity?"

<sup>4</sup> 29 HARV. L. REV. 831.

1 The debtor is generally allowed to set off against the assignee not only claims existing at the time of the assignment, but those arising subsequently prior to the debtor's notice of the assignment.<sup>5</sup> On the other hand a claim against the assignor acquired after notice of the assignment cannot be set off.<sup>6</sup> There are a number of cases qualifying in one or another kind of case the right of set-off against the assignee, but the decisions need not be examined here, for all that is of importance to the present argument is that certainly everywhere the general rule is admitted that a claim matured at the time of assignment may be set off against the assigned claim. There seems no possible ground on which to support this general rule, except that the legal title to the assigned claim still is in the assignor, and that therefore when sued upon, the claim still is subject to set-off of a claim against him unless it is inequitable for the defendant to assert the right. It is certainly inequitable if the set-off was acquired after notice of the assignment, and it may be urged that it is also inequitable in any case for the defendant to assert his set-off when the real plaintiff in interest, whether the nominal plaintiff or not, is an assignee, unless the assignor is insolvent, since the defendant might collect his claim from the assignor who

<sup>5</sup> *Cavendish v. Geaves*, 24 Beav. 163, 174 (1857); but see *Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181; *Tuscumbia, etc. R. Co. v. Rhodes*, 8 Ala. 206 (1845); *Adams v. Leavens*, 20 Conn. 73 (1849); *Hall v. Hickman*, 2 Del. Ch. 318 (1864); *Guerry v. Perryman*, 6 Ga. 119 (1849); *Gardner v. Risher*, 35 Kan. 93, 10 Pac. 584 (1886); *Adams v. Webster*, 25 La. Ann. 117 (1873); *Hooper v. Brundage*, 22 Me. 460 (1843); *Collins v. Campbell*, 97 Me. 23, 28, 53 Atl. 837 (1902); *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898 (1883); *Hunt v. Shackelford*, 55 Miss. 94 (1877); *Ford v. O'Donnell*, 40 Mo. App. 51 (1890); *Lewis v. Holdrege*, 56 Neb. 379, 76 N. W. 890 (1898); *Sanborn v. Little*, 3 N. H. 539 (1826); *Wood v. Mayor*, 73 N. Y. 556 (1878); *First Nat. Bank v. Bynum*, 84 N. C. 24 (1881); *Metzgar v. Metzgar*, 1 Rawle (Pa.), 227 (1829); *Clement v. Philadelphia*, 137 Pa. 328, 334, 20 Atl. 1000 (1890); *Neal v. Sullivan*, 10 Rich. Eq. (S. C.) 276 (1858). See also *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146 (1915). *Cf. Greene v. Darling*, 5 Mason (U. S. C. C.) 201 (1868). So a particular credit item in a mutual account cannot be separately assigned. *Heiliger v. Ritter*, 78 N. Y. Misc. 264, 138 N. Y. Supp. 212 (1912).

<sup>6</sup> See cases *supra*, also *Campbell v. Equitable Life Assur. Soc.*, 130 Fed. 786 (1904). And the debtor, if he had notice of a proposed assignment of a claim against him, and did not inform the person proposing to take the assignment of an existing right of set-off against the assignor, cannot set it up against the assignee. *King v. Fowler*, 16 Mass. 397 (1820). Cases involving the question of the right of the maker of negotiable paper to set off against a transferee after maturity claims against the payee or indorsee, though often decided as if depending upon the same principle, should be distinguished, since even after maturity the legal title to the note is transferable. As to such cases see: 23 L. R. A. 327, n; 39 L. R. A. (N. S.) 658, n.



really ought to pay it. This limitation, however, of the debtor's right of set-off does not seem to have prevailed.<sup>7</sup> It seems rather to have been thought equitable for the debtor to be allowed to assert the right and thus to compel the assignee then to sue the assignor for reimbursement.

2. The effect of equities of third persons against the assignee seems also to depend upon the legal or equitable character of the assignee's rights. Though it is well settled that an assignee is subject to the equities of the obligor, it is a matter of dispute how far the assignee is subject to equities of third persons against the assignor; as, for instance, where the assignor was himself an assignee of the *chose* in action under an assignment which he had procured by fraud, or where for any reason the assignor held the assigned claim subject to a trust, actual or constructive, in favor of a third person. It would be everywhere agreed that an assignee who takes the assignment with notice of the claim against the assigned right, and still more clearly if he undertakes when the assignment is made to satisfy the claim, holds his right subject to the prior claim;<sup>8</sup> but even though the assignee paid value with no knowledge of any outstanding claim, it is still true that the defrauded original owner or person beneficially entitled to the assignment has an equity prior in time and, therefore, superior to that of the ultimate assignee, if the latter's right is merely equitable. If, however, the latter could be regarded as the owner of a legal right, his right would be superior to the original equity. In fact, the latent or collateral equity against the assignor of an intangible *chose* in action has prevailed over the right of the subsequent purchaser in good faith, in the absence of an estoppel, in England and in a majority of the United States where the question has been raised.<sup>9</sup> In

<sup>7</sup> See cases cited *supra*, n. 5.

<sup>8</sup> *Buffalo Glass Co. v. Assets Realization Co.*, 133 N. Y. App. Div. 775, 117 N. Y. Supp. 1087 (1909).

<sup>9</sup> *Cockell v. Taylor*, 15 Beav. 103 (1851); *Barnard v. Hunter*, 2 Jur. (N. S.) 1213; *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130 (1894); *Pearson v. Luecht*, 199 Ill. 475, 65 N. E. 363 (1902); *Brown v. Equitable Life Assur. Soc.*, 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968 (1899); *Tripp v. Jordan*, 177 Mo. App. 339, 164 S. W. 158 (1913); *Bush v. Lathrop*, 22 N. Y. 535 (1860); *Cutts v. Guild*, 57 N. Y. 229 (1874); *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892); *Central Trust Co. v. West India Improvement Co.*, 169 N. Y. 314, 62 N. E. 387 (1901); *Culmer v. American Grocery Co.*, 21 N. Y. App. Div. 556, 48 N. Y. Supp. 431 (1897); *State v. Hearn*, 109 N. C. 150, 13 S. E. 895 (1891); *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413 (1898); *Downer v.*

some States, however, the courts have followed an early statement of Chancellor Kent,<sup>10</sup> which is now overruled in New York,<sup>11</sup> to the effect that an assignee is not bound by equities in favor of third persons since, though he can make inquiries of the debtor before taking the assignment and thereby acquaint himself with any defences the debtor may have, no such procedure is possible in regard to equities of unknown third persons.<sup>12</sup> A distinction must be taken where the *chose* in action has a tangible form, especially if it is by law assignable. The assignment of an overdue negotiable promissory note though often likened to that of an ordinary *chose* in action does not properly involve such a discussion as is contained in this article. Even after maturity the transfer of such a note by the holder unquestionably transfers a legal title and though the circumstance that the transfer is after maturity puts the taker of the note on inquiry as to any defence the maker may have (since if he had had no defence the instrument would presumably have been paid) yet the fact that the instrument is overdue gives no reason to suppose that there are collateral equities affecting the transferor's title. In such a case, therefore, the *bonâ fide* purchaser of the note is protected.<sup>13</sup> A principle is applicable also to other *choses* in action having tangible form like certificates of stock, policies of insurance, non-negotiable bonds, somewhat similar to that which is

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South Royalton Bank, 39 Vt. 25 (1866). See also *Western Nat. Bank v. Maverick Nat. Bank*, 90 Ga. 339, 16 S. E. 942 (1892); *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644 (1885).

<sup>10</sup> In *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441 (1817). See also *Livingston v. Dean*, 2 Johns. Ch. (N. Y.) 479 (1817).

<sup>11</sup> See New York decisions stated *supra*, note 9.

<sup>12</sup> *First National Bank v. Perris Irrigation District*, 107 Cal. 55, 40 Pac. 45 (1895); *Ohio Life Ins. Co. v. Ross*, 2 Md. Ch. 25 (1848); *Duke v. Clark*, 58 Miss. 465 (1880); *Williams v. Donnelly*, 54 Neb. 193, 74 N. W. 601 (1898); *DeWitt v. VanSickle*, 29 N. J. Eq. 209 (1878); *Mifflin County Nat. Bank's Appeal*, 98 Pa. 150 (1881); *Huber's Assigned Estate*, 21 Pa. Sup. Ct. 612, 615 (1902). In a few of these decisions which relate to mortgages and judgments, it is not clear how far the court intended to lay down broadly a principle covering all non-negotiable *choses* in action.

<sup>13</sup> *Moore v. Moore*, 112 Ind. 149, 13 N. E. 673 (1887); *Eversole v. Maull*, 50 Md. 95 (1878); *Etheridge v. Gallagher*, 55 Miss. 458 (1877); *Lee v. Turner*, 89 Mo. 489, 14 S. W. 505 (1886); *Neuhoff v. O'Reilly*, 93 Mo. 164, 6 S. W. 78 (1887); *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644 (1885); *Kernohan v. Durham*, 48 Ohio St. 1, 26 N. E. 982 (1891); *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463 (1892). See also *Combs v. Hodge*, 21 How. (U. S.) 397 (1858), and the argument in POMEROY, *EQUITY JURIS.*, § 707 *et seq.* But see *Foley v. Smith*, 6 Wall. (U. S.) 492 (1867); *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892).



applied to them when they are made the subject of gift. The owner of the document is regarded as possessing if not a kind of legal ownership to the *chose* in action represented by it, at least a legal ownership of a paper which necessarily accompanies legal ownership, and the lack of which is notice of an infirmity of title. Accordingly a *bonâ fide* purchaser of a certificate of stock,<sup>14</sup> a non-negotiable bond or note,<sup>15</sup> or a policy of insurance,<sup>16</sup> is preferred to one having an equitable right against his assignor. Furthermore, it has been held that a written assignment of a *chose* in action by one who seeks to avoid the assignment later on equitable grounds estops the claimant as against a *bonâ fide* purchaser who bought the *chose* in action on the faith of that writing.<sup>17</sup> An assignor who has no legal title but is a mere bailee of a non-negotiable tangible *chose* in action it need hardly be said can give no right even to a *bonâ fide* purchaser which can stand against the depositor's claim.<sup>18</sup>

3. It is almost, if not quite, universally admitted that a partial assignee has merely an equitable right. If then, the total assignee has a legal right, a subsequent total assignment prevails over a prior partial assignment. This monstrous result has actually been reached on this reasoning, under the Georgia Code, which is held

<sup>14</sup> *Colonial Bank v. Cady*, L. R. 15 A. C. 267 (1890); *Ambrose v. Evans*, 66 Cal. 74, 4 Pac. 960 (1884); *Arnold v. Johnson*, 66 Cal. 402, 5 Pac. 796 (1885); *Otis v. Gardner*, 105 Ill. 436 (1883). But see *Taliaferro v. First Nat. Bank*, 71 Md. 200, 214, 17 Atl. 1036.

<sup>15</sup> *Rimmer v. Webster*, [1902] 2 Ch. 163; *Cowdrey v. Vandenburg*, 101 U. S. 572 (1879); *Adams v. District of Columbia*, 17 Ct. Cl. 351 (1881); *International Bank v. German Bank*, 71 Mo. 183 (1879); *Putnam v. Clark*, 29 N. J. Eq. 412 (1878); *Grocers Bank v. Neet*, 29 N. J. Eq. 449 (1878); *Combes v. Chandler*, 33 Oh. St. 178 (1877); *Taylor v. Gitt*, 10 Barr (Pa.) 428 (1849). But see *Blackman v. Lehman*, 63 Ala. 547 (1879); *Covell v. Tradesman's Bank*, 1 Paige (N. Y.) 131 (1828); *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463 (1892).

<sup>16</sup> *Plummer v. People's Nat. Bank*, 65 Iowa 405, 21 N. W. 699 (1884). But see *Brown v. Equitable Life Assur. Soc.*, 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968 (1899); *Culmer v. American Grocery Co.*, 21 N. Y. App. Div. 556, 48 N. Y. Supp. 431 (1897).

<sup>17</sup> See *Cowdrey v. Vandenburg*, 101 U. S. 572 (1879); *Campbell v. Brackenridge*, 8 Black. (Ind.) 471 (1847); *Thurston v. McLellan*, 34 App. D. C. 294 (1910); *Cochran v. Stewart*, 21 Minn. 435 (1875); *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41 (1873); *Mifflin County Nat. Bank's Appeal*, 98 Pa. 150 (1881); *State Bank v. Hastings*, 15 Wis. 75 (1862). But see *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892); *Central Trust Co. v. West India Improvement Co.*, 169 N. Y. 314, 324, 62 N. E. 387 (1901).

<sup>18</sup> *Blackman v. Lehman*, 63 Ala. 547 (1879); *Midland Railroad Co. v. Hitchcock*, 37 N. J. Eq. 549 (1883). See also *Combs v. Hodge*, 21 How. (U. S.) 397 (1858).

to give the total assignee legal ownership.<sup>19</sup> Whatever may be the necessity of the decision under the Georgia Code, the case would probably not be generally followed even in jurisdictions which allow or require an assignee of an entire claim to sue in his own name.<sup>20</sup>

The result of the three classes of cases just referred to may then be considered under the headings of what the law actually is, and of what it ought to be. As to the first it seems impossible to doubt that the great weight of authority supports results which involve the conclusion that the assignee's right is not legal but equitable; and this conclusion is supported also by decisions relating to the effect of statutes permitting the assignee to enforce his rights in his own name.

The statutes fall into several classes, providing respectively that,

1. An assignee under a written assignment may enforce his rights in his own name or at law. Under such a statute the effect of oral assignments is unchanged.

2. The real party in interest must be plaintiff in any litigation.

3. A *chose* in action is assignable so as to vest title therein in the assignee.

How far a particular statute works a change other than one merely of procedure, is open to argument in each case. It would seem certainly that a mere provision that the real party in interest must bring suit in his own name can effect only a change of procedure. As to statutes in a different form the matter is not so clear. The power of the legislature to make the assignee a legal owner must, of course, be conceded; but generally the change effected by modern statutes has been held procedural only and does not alter the substantial rights of the parties.<sup>21</sup>

<sup>19</sup> *King Bros. & Co. v. Central of Georgia Ry. Co.*, 135 Ga. 225, 69 S. E. 113 (1910). See also *The Elmbank*, 72 Fed. 610 (1896).

<sup>20</sup> In *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870 (1887); 117 N. Y. 320, 22 N. E. 1039 (1889), it was held after elaborate consideration, that a prior partial assignee prevailed over a subsequent assignee of the whole claim who took in good faith and without notice. The same result was reached in *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413 (1898). In *Bridge v. Connecticut Mut. Life Ins. Co.*, 152 Mass. 343, 25 N. E. 612 (1890), a prior partial assignee would apparently have been preferred over a subsequent total assignee had he not been guilty of laches.

<sup>21</sup> *Carozza v. Boxley*, 203 Fed. 673 (1913); *Glen v. Busey*, 5 Mackey (D. C.) 233 (1886); *Leach v. Greene*, 116 Mass. 534 (1875); *Beckwith v. Union Bank*, 9 N. Y. 211 (1853); *Myers v. Davis*, 22 N. Y. 489 (1860); *Fuller v. Steiglitz*, 27 Oh. St. 355, 358, (1875); *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584 (1895); *Watkins v. Angotti*, 65 W. Va. 193, 63 S. E. 969 (1909).



Consequently, whether an assignee can maintain an action in his own name, depends upon the *lex fori*, not the *lex loci contractus*. It is a matter not of right but of remedy.<sup>22</sup> Statements, therefore, which are occasionally found to the effect that complete legal ownership passes to the assignee of a legal *chose* in action,<sup>23</sup> must be regarded as exceptional and, if not clearly required by the terms of a particular statute in question, as opposed to the current of authority.

I am, however, more interested in what the law on the point ought to be than what the actual weight of authority may be; and, therefore, the most serious question is whether the decisions in the three classes of cases, of which I have spoken, are rightly decided.

As to the right of set-off, I think most persons will feel that it would be improper to allow one who had a claim subject to a set-off, to escape the set-off by selling his claim. The only way to prevent it is by subjecting the assignee to the set-off. Certainly I believe the general rule allowing the set-off to be used is a desirable one. In a system of law where the smaller of two mutual debts cancels the other *pro tanto*,<sup>24</sup> it would not be necessary to deny the assignee legal ownership of the assigned claim in order logically to reach this result; but in the common law a cross-claim is not payment or part payment of the original claim,<sup>25</sup> the right of set-off is

<sup>22</sup> *Joseph Dixon Crucible Co. v. Paul*, 167 Fed. 784 (1900); *Richardson v. New York Central R. Co.*, 98 Mass. 85, 92 (1867); *American Lithograph Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909 (1914); *Tully v. Herrin*, 44 Miss. 626 (1870); *Lodge v. Phelps*, 1 Johns. Cas. (N. Y.) 139 (1799); *Northwestern Mut. Life Ins. Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108 (1914).

<sup>23</sup> In *Fitzroy v. Cave*, [1905] 2 K. B. 364, 373, the Court said: "Henceforth in all Courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods." It is unfortunate that the idea expressed in *Walker v. Bradford Old Bank*, 12 Q. B. D. 511, 515 (1884), should not rather prevail, "section 25, sub-s. 6 of the Judicature Act, 1873, does not, in my view, give any new rights, but only affords a new mode of enforcing old rights." See also *Close v. Independent Gravel Co.*, 156 Mo. App. 411, 138 S. W. 81 (1911).

<sup>24</sup> It was an axiom in the later Roman law that set-off took place *ipso jure*. The meaning of this was disputed; one school maintaining that without any act of the parties the set-off took place at the instant of the coexistence of the two debts; the other school holding that such cancellation took place only when asserted by one of the parties. DERNBURG, *COMPENSATION*, 2d ed., 283. The former view finds expression in the FRENCH CIVIL CODE, Art. 1290, and even under the latter view, the assertion of a party, not a decree of court, is all that is necessary for cancellation. See SWISS CODE OF OBLIGATIONS, Art. 122-124. Under the German Code it is necessary that the claims shall have arisen out of the same legal relation. BÜRG. GESETZBUCH, § 273.

<sup>25</sup> In *Searles v. Sadgrave*, 5 El. & Bl. 639 (1855), to an action for money had and received, the defendant pleaded a tender of a certain sum, and the plaintiff made replica-

rather in the nature of a cross-action. Certainly it seems impossible to say, that it is a legal limitation of the claim, and if it is only an equity, it would be cut off by the assignment if the assignee became the legal owner of the claim.

Perhaps the chief reason (other than a blind revolt at the assertion that *choses* in action are not transferable when in fact they are transferred every day) why the view is advocated that the assignee of a *chose* in action acquires legal ownership is because thereby so-called latent equities against the claim would be cut off, and it is thought unfair to subject the assignee to equities which he is unable to discover. On the other hand, it is to be observed that intangible *choses* in action are not primarily intended for merchandising, as chattels are. The rule in regard to latent equities has no importance not only where negotiable paper is concerned, but where *choses* in action having tangible form like policies of insurance, savings bank books, or non-negotiable notes are in question. The delivery of the document will cut off the equity. If, therefore, the parties desire to put an obligation in a merchantable form they can (if they wish) do so, and can do so without making the obligation negotiable. For such property, then, as an intangible *chose* in action, I see little reason to prefer the assignee to a previously defrauded owner of the claim. Where the sale of property is a necessary function of commercial activity, it is socially desirable to protect the new purchaser at the expense of a former innocent victim; but the desirability of this policy seems limited to that class of property.

It is, however, because of its effect on partial assignments that I am chiefly opposed to such a development of the law as shall give the assignee the legal ownership of the claim. The enormous weight of authority is to the effect that a partial assignee has but an equitable right. While this rule persists it is impossible to deny that a subsequent total assignee if his ownership is legal will prevail over a prior partial assignment. I have called such a rule monstrous, and so it seems to me because, in effect, it destroys the value of partial assignments almost completely. To say that an assignee

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tion that a larger entire sum was due from the defendant. To this the defendant rejoined that the plaintiff was indebted to the defendant in a sum equal to the whole of the larger sum except to the amount which had been tendered. On demurrer the rejoinder was held bad.



gets only what his assignor has at the time of the assignment, whether the qualification of the assignor's right is legal or equitable, patent or latent, is one thing; but to say that an assignee shall have only what his assignor shall choose to leave him in the future by making or refraining from making other assignments is totally destructive of the value of assignments if the assignee can do nothing to protect himself. This is the situation in the case in question, if total assignments give the assignee a legal title to the claim, for notice to the debtor will of course afford no protection against the kind of fraud here in question. Partial assignments I believe to be more numerous than total assignments of intangible *choses* in action, and of equal, if not greater, commercial importance.

It may be said that the difficulty could be avoided by holding that the partial assignee also had a legal right. It might be sufficient answer to this to say that the question of legal ownership of the total assignee would then best be deferred until the courts shall recognize that the partial assignee as well as the total assignee has a legal right; but there are objections to that solution even if it were possible. To hold that the partial assignee is the legal owner of a part of the claim as a separate entity is to subject the debtor to an indefinite multiplication of claims against him owned by individual creditors. The courts rightly do not seem prepared to take such a step. To hold that the partial assignee becomes a joint-owner with the assignor, as has been suggested in a recent Texas decision,<sup>26</sup> sounds plausible, but then as each one of joint owners of a contract right has the power of releasing or discharging the whole joint claim by receiving payment or otherwise, the partial assignee and the assignor have each a power very inconvenient for the other. This is not perhaps a necessary rule, but it happens to be the rule of the common law.

On the whole, therefore, it seems to me that the system worked out by the courts during several centuries, coupled with a statutory change in procedure allowing the assignee to sue in his own name, produces the most desirable results and best fits in place with other rules of our legal system.

*Samuel Williston.*

HARVARD LAW SCHOOL.

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<sup>26</sup> *Hughes-Buie Co. v. Mendoza*, 156 S. W. 328 (1913) (Tex. Civ. App.).

## ENGLISH CIVIL LAW

## II

MAN is a creature of impulses and tendencies. Whether the impulses produce the tendencies, or *vice versa*, whether they are unrelated, whether an impulse is merely a rapid tendency, are questions to be discussed by psychologists and physiologists. The jurist is, however, profoundly concerned with these primordial qualities of human nature; and it is a cardinal weakness of the utilitarian or Benthamite school of reformers, that they assume the conduct of the average man to be guided mainly by reason, whereas it is, in fact, mainly guided by the primitive impulses and tendencies to which allusion has been made. Reason is doubtless the supreme quality. Unfortunately there is, as Napoleon remarked of the British infantry, 'very little of it' in the conduct of the average citizen. And, if this be so, even at the present day, still less did reason govern the conduct of humanity in its earlier stages of development, when the foundations of law were laid.

Another element in the position is the fact that almost all primitive instincts are, in themselves, neither bad nor good, but neutral. Their virtue or vice depends entirely on the uses to which they are put.<sup>1</sup> Acquisitiveness, curiosity, imitativeness, concupiscence, credulity, are obvious examples of this truth; and even fear and jealousy, unlovely as they seem to the observer, have undoubtedly had, in the history of the race, both individual and social value.

Neither can it be denied, that of all the instincts of mankind, the egoistic or self-regarding are the most ancient and deep-seated. Even if we do not go so far as to regard all altruistic or social tendencies as derived originally from the egoistic,<sup>2</sup> we must unquestionably admit their relative inferiority in point of strength and age,

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<sup>1</sup> Perhaps the best proof of this truth is to be found in the fact that most gestures of affection are fictitious gestures of hostility, *e. g.*, the kiss is a sham bite, the friendly nudge in the ribs a sham dagger thrust.

<sup>2</sup> *E. g.*, from the maternal instinct, which is, probably, itself derived from the fact that the offspring once formed, physically, a part of the mother.



for the simple reason that primitive instincts are based on physical feeling, and that, though our researches into the history of mankind go pretty far back, we have discovered no trace of an epoch when individuals were clustered together in physically connected groups capable of identical physical feelings. That a primitive group, suddenly attacked by a common calamity, *e. g.*, a famine or an avalanche, might develop a feeling of sympathy from common misfortune, is not to be denied; though the evidence would seem to show that such an event was at least as likely to intensify the egoistic instincts. But even that would be long subsequent to the development of the latter.

Now if there is one thing clearer than another about law, in the sense of the jurist, it is, that it is a social force. Not only does it rest, ultimately, on the approval of the more influential members of the community, but it is manifestly intended to secure objects which those members believe to be desirable in the common interest. At least this is so in every system of law which does not profess to rest simply and solely upon the *manus militaris*; and the latter kind of system is far rarer than is commonly supposed.<sup>3</sup> It is obvious, therefore, that the first purpose, at any rate of every indigenous system of law, is to repress such developments of egoistic instincts as manifestly run counter to common interests, and to encourage those which foster and develop such interests.

Manifestly, that egoistic instinct which is most dangerous to common interests, because clearly, if not checked, destructive of the community, is the unrestrained exercise of predatory desires. In so far as these are directed against the means of sustenance, they are bad enough; but when they extend to the persons of the members of the community, they are absolutely fatal, because they inevitably provoke a revenge which, carried to its natural conclusion, means the extinction of the group. Doubtless the mere recognition of this fact marks a considerable stage in the development of intelligence; and we cannot be quite sure of the process which led primitive man to the conviction that the weakening of his community was a bad thing. All we know is, that the conviction was very early formed — so early, indeed, that it seems to be present in

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<sup>3</sup> The difficulties involved in maintaining such a system, even by overwhelming military force, are well exemplified by the indignities suffered by the Prussian military administration in Belgium during the war.

some of the higher animals, such as orang-outangs and peccaries, who will deliberately avenge the death of a comrade.

Note, however, that the primitive group had no executive machinery for putting down violence, even if we allow that it might be roused occasionally to common action by some specially atrocious deed which manifestly struck at the life of the community, *e. g.*, betrayal to a hostile group or insult to the tribal gods. This is probably the origin of that popular process known as the 'hue and cry', which later developments have refined into the *posse comitatus* of the modern sheriff.<sup>4</sup> For the most part, however, the violence merely directed against individuals is left to the homeopathic treatment of the blood feud — how established, we know not, but quite evidently based on a sound knowledge of human nature. Why the infliction of suffering should be an assuagement of suffering undergone by the agent, is one of the mysteries of human nature. The fact that it is so, in unrefined human nature, can hardly be questioned by students of social history.<sup>5</sup>

From the blood feud springs, by palpable filiation, the litigatory process, *i. e.*, the older type of civil action, in which the complainant tries to make good his claim against the defendant according to the rules of the game, the court (whether consisting of village elders or a royal official) merely standing by to see fair play. The prize of victory is older than the civilized lawsuit, and has persisted into that stage. It is the *wergild* or blood-fine, now rationalized (somewhat imperfectly) into 'damages', and supposed to be based on the material loss suffered by the plaintiff; but the very confusion between 'damages' and 'damage' will suggest that there are still traces of the old idea of consoling the plaintiff by the suffering of the defendant.<sup>6</sup> Later, of course, comes the inquisition process, in which the King or State, now firmly established, conducts an investigation on his or its own account, and, according to his or its views of the wrongdoer's conduct, awards punishment for the good of the latter's soul or as a warning to others. At first this type of

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<sup>4</sup> A reference to this venerable institution is clearly contained in that very modern statute, the Sheriffs Act, 1887 (s. 8. The 'cry of the country').

<sup>5</sup> The references to the blood feud in early codes are numerous. One of the best known is that of the Twelve Tables ('*si membrum rupit, ni cum eo pacit, talio esto*').

<sup>6</sup> The intermediate stage is the 'penal action,' well known in classical Roman law, and still faintly surviving in England. 'Vindictive damages' are, perhaps, also a survival of the same ideal.



process is confined to acts which threaten the safety of the community — *i. e.*, it is an alternative of the rough communal action above described. But later on, as in the English 'equity' jurisdiction, it may be placed at the disposal of the private litigant.

One of the most curious facts of English legal history is that, parallel with this application of the inquisition process to civil actions, there was a profound reaction, due, of course, largely to the jury system, toward the litigatory type of process in the original domain of the inquisition — *viz.*, criminal prosecutions. Of the gain to humanity of this reaction, there can be no question. Blood-thirsty as was the English criminal law in the eighteenth century, its administration was rose water compared with the unspeakable horrors of contemporary Continental systems. It can hardly be doubted that this modification of the inquisitorial character of criminal process also facilitated greatly the supersession of the old 'appeal of felony' by the more civilized procedure of indictment;<sup>7</sup> and it would be interesting to compare in detail the corresponding movement, before alluded to,<sup>8</sup> in Continental criminal systems, which admitted the *partie civile* to a formal partnership with the State in the conduct of prosecutions. At first sight it looks as though the root idea in both policies were the same, *viz.*, the enlisting of the primitive desire of individual vengeance on the side of the common interest; but the difference in the methods is not without significance.

And if we look a little deeper into the characteristics of English law, we shall probably realize that the very success of the executive government in England in repressing disorder and 'self-help' seems to have arrested the development of what may be called 'community action' through law. For, whilst the long agony of the wars of religion on the Continent was at last ended only by that deification of the State which produced the absolutism of the eighteenth century,<sup>9</sup> the comparatively mild experiences of England in

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<sup>7</sup> Of course there were other and more specific inducements — *e. g.*, the provision of the statute of 1529, which enabled the prosecutor in robbery or larceny to recover his goods after conviction of the thief (SHORT HISTORY OF ENGLISH LAW, pp. 156-57).

<sup>8</sup> 30 HARV. L. REV. 9.

<sup>9</sup> Perhaps, as v. Bar appears to hint, the 'reception' of the Roman law may have had something to do with the change. But as v. Bar himself points out, the Roman conception was itself due to the bellicose history of the Roman City State (HISTORY OF CONTINENTAL CRIMINAL LAW (Am. translation), pp. 17, 203).

the Wars of the Roses and the Civil War left the average Englishman still unaware of that abstract 'sovereign' which the speculations of Bodin and Montesquieu, and the despair caused by social anarchy, were generating on the Continent. In spite of Hobbes and his *Leviathan*, the average Englishman remained cold to the notion of an abstract, all-powerful, passionless Commonwealth, and preferred to speak and think of a King who was, no doubt, by far the most powerful person in the land, with a vast machinery of Parliament and Courts of Justice acting in his name, whose help it was especially valuable to have on one's side, but still, on the whole, a perfectly concrete and intelligible person, with human weaknesses and limitations. It may have been want of imagination, incapacity for idealism, any other 'innate' defect you like in the Englishman's character; but it seems at least to have left him a singularly practical and self-reliant person, who, in that eighteenth century when the Continent was absorbed in dynastic and territorial wars, was quietly gathering to himself a world-wide empire, which the mismanagement of a handful of 'State' officials at Whitehall did its best, happily with only partial success, to destroy.

And, of course, it is idle to suppose that a people with the record of the English in the eighteenth century was without ideals. The world had, on the whole, gone very well with the Englishman; and this fact, added, doubtless, to his insular position, had generated in him a bold spirit of self-confidence which not only led him to compare himself favourably with foreigners, but caused him to resent fiercely any interference with his freedom of action. He had a deep respect for law, but from a strictly individual standpoint, as a shield which would at once protect him against the encroachments of others upon his freedom, whether those others were government officials or private persons, and yet leave him at liberty to carry on his own pursuits, regardless, to a large extent, of the welfare of others, which is, of course, only another aspect of the same desire. Only when he had himself voluntarily undertaken liabilities, was he willing to recognize them; in that case his common sense taught him that, without mutuality, he could expect no similar recognition from others. Hence the completeness of the English Law of Contract; hence also the limitations of the English Law of Torts and English Family law. Hence also the unique freedom of testation in English Law.



But there can be little doubt that another and very strong reason for the Englishman's respect for his law is the fact that he regards it, and very rightly, as his own production. The writer trusts that he has given due consideration to the arguments of those who maintain the authoritarian view of law, as a rule of conduct imposed from above rather than worked out from below; and particularly he has not failed to study one of the latest and ablest presentations of the authoritarian theory in the work of the late Royall Professor.<sup>10</sup> But still, he is prepared to maintain that, so far as English Civil Law is concerned, the facts are against the authoritarian view, with small and inconsiderable exceptions. Not to labour again the explanation as to the function of judicial precedents given in the preceding article,<sup>11</sup> the writer may be permitted to state that the chief example relied upon by Professor Gray<sup>12</sup> in support of his contention that the function of the judges is not (as in the orthodox view) declaratory, but creative, seems to him a little disingenuous. In form, no doubt, the court in *Pells v. Brown* merely decided that that peculiar kind of future limitation known as an executory interest could not be destroyed by a common recovery, when it was intended to work in defeasance of a fee simple. And equally, no doubt, it is unlikely that testators who were not lawyers had ever considered the question in that form. But there is evidence that, long before *Pells v. Brown*, was decided, executory devises of the kind occurring in that case had been in familiar use; and though, immediately after the passing of the Statute of Uses<sup>13</sup> the Common Law Courts (which had not before had an opportunity of pronouncing upon them) had expressed an opinion adverse to their validity, that opinion had, somehow, been clearly overcome. The question in *Pells v. Brown* was then, substantially, whether by allowing the fiction of a common recovery to be extended to a purpose for which it was not introduced,<sup>14</sup> a well-established practice should be, in effect, invalidated. Professor Gray appears also to have considered

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<sup>10</sup> NATURE AND SOURCES OF THE LAW. By John Chipman Gray (Columbia University Lectures), 1909.

<sup>11</sup> 30 HARV. L. REV. 17-19.

<sup>12</sup> *Op. cit.*, pp. 223-26.

<sup>13</sup> Prior of Smithfield's Case, Dyer, 33 a (1536).

<sup>14</sup> In fact the introduction of the common recovery as a bar of an estate tail seems itself to show even the impotence of an Act of Parliament in the face of well-established custom.

with less attention than it deserves the important fact that the English Parliament, by virtue of its representative character, succeeded rapidly, even in the earliest days of its existence, in establishing, in the name of the 'good customs of the realm,' a decided check on judicial activity, though that activity had been in familiar exercise for more than a century.

But if the writer is unable to accept Professor Gray's view of the origin of law, at any rate of English law, he is the more anxious to express his indebtedness to the late Royall Professor for the admirable explanation of the nature of the State, which, whatever be the origin of law, always plays, in civilized communities, a profoundly important part in its administration. The expression 'State machinery' is familiar enough; but few writers, at least few juristic writers, have, so clearly and briefly as the late Royall Professor,<sup>15</sup> brought out the essentially 'inhuman' character of that organization. Man has an ideal or mystical side to his nature, which causes him, like Israel of old, to worship the work of his own hands; and the tendency is not confined to physical productions — it would be far less dangerous if it were. Thus the notion of the 'Sovereign State,' like the irresistible powers of steam and electricity, may become a profound source of danger to the community which has allowed it to be seized by unscrupulous hands; and so the Austinian view of the State, as the source of all law, is not only contrary to obvious historical facts, but dangerous to the last degree. We know, of course, that the State is the source of a great deal of law, or, to speak more exactly, that a great deal of law is the product of those individuals who have, for the time being, got hold of the State machinery. But some of us are by no means convinced of the superiority of that law to the law made by the community itself, and count it a danger to the community whose theory of the State places no limits upon the creation of State law.

It is, therefore, as the writer regards it, no unmixed evil that English law is so chary of invoking the conception of the State, and displays such a limited capacity for feigning, or, if the expression be preferred, recognizing, personality. Doubtless there are incon-

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<sup>15</sup> *Op. cit.*, Ch. III. The influence of traditional language on thought seems, however, to be illustrated even in the argument of Professor Gray, who, after describing the State as 'merely a device,' speaks, almost in the same breath, of 'the men and women who compose it' (p. 67).



veniences attending this poverty of imagination, as was made evident in the difficulties raised in the prosecution which led to the passing of the Official Secrets Act, 1889, a statute that contains one of the earliest instances in English law of the use of the word 'State' to signify the totality of the nation.<sup>16</sup> Even here, as the Act contains no definition of the term,<sup>17</sup> we are not compelled to conclude that Parliament gave its sanction to the somewhat anthropomorphic tendencies of modern writers, who insist<sup>18</sup> on seeing in the 'State' a juristic personality which is all the more dangerous that, in theory at least, the British Empire is a 'unitary State,' in which a monstrous omnipotence, known as 'sovereignty,' not only resides, but resides under the control of a comparatively limited number of individuals. Such a theory, though it undoubtedly has its uses when the community is fighting for its life against an external attack, is full of danger in normal times, when it is apt to be exploited by unscrupulous individuals. Better an avowedly catastrophic remedy, like the Roman Dictator.

It is a less disputable and more purely juristic objection to English law, that it does in some cases clumsily what it might do exactly, and that it scandalously neglects minor reforms which it might easily accomplish but for pure inertia. A striking example of the former defect is the procedure technically known as the 'action of seduction.' It is possible to argue, that the difficulty of deciding from which side the temptation proceeded in any given case is an insuperable objection to allowing the action at all; though, if the damages were strictly limited to the pecuniary loss suffered by the woman, that argument would appear to be difficult to maintain. But to allow, as English law does, the action to be brought, yet to make its success depend upon wholly irrelevant circumstances — worse still, to place the assumed victim of the wrong at the mercy of the nominal plaintiff so far as the fruits of victory are concerned — is surely an excess of clumsiness of which any English lawyer must feel ashamed. The anomalies of the action are duly set out in the

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<sup>16</sup> S. 1 (1) (b) 'in the interest of the State.' Of course, the term is familiar in other senses, *e. g.*, 'His Majesty's Principal Secretaries of State,' and even (though less common) as a community occupying a definite area, *e. g.*, 'State of New South Wales.'

<sup>17</sup> Neither does the amending Act of 1911.

<sup>18</sup> *E. g.*, in Professor Jethro Brown's lucid excursus (THE AUSTINIAN THEORY OF LAW, pp. 254-70).

Digest;<sup>19</sup> but, to state them in compact form, it may be said that an employer whose female servant has been heartlessly betrayed has it in his own unfettered power to decide whether or not the seducer shall be compelled to pay damages, and, having decided in the affirmative, to pocket the damages without allowing the woman to receive a farthing; further, that, where the employer has himself been the seducer, the action will not lie at all, unless it can be proved (or at least inferred) that the employment was merely a blind; and, finally, that the death of the employer, after the seduction but before the pregnancy is declared, is equally fatal to the action. The blame for these grotesque absurdities does not, at least primarily, lie upon the shoulders of the judiciary, who have made the best of a clumsy machinery; but it is difficult to decide whether mere callousness, or hypocrisy, or pure ignorance, is most responsible for their continuance. A similar criticism applies, though to a less degree, to the uncertainty which still surrounds the very practical question, whether a civil action can be brought to recover damages for a tort which is also a felony, before the defendant has been tried for the felony.<sup>20</sup> This uncertainty was felt as a grievance two centuries and a half ago; and the 'Barebones' Parliament of 1653 framed a proposal to abolish it. But it has continued serenely ever since.

It has been a charge often levied against English law that, while it resorts freely to the coarse argument of physical force, and the somewhat base argument of pecuniary mulct, it makes little or no attempt to employ the more genial sanction of reward. But this criticism appears to be ill founded. It is true that the more obvious and palpable forms of reward are somewhat sparingly used, and that, with the steady discouragement meted out in recent generations to 'penal actions,' there might even appear to be a reaction against this method. But it can hardly be overlooked that one highly important branch of English law, *viz.*, the Law of Property, now operates very powerfully to stimulate industry by means of rewards. It may be, as was suggested above, that the original object of this branch of the law was to discourage violence; and the writer is certainly not prepared to maintain that the notion of property cannot establish itself without legal sanction. No one who has

<sup>19</sup> Bk. II, Pt. III, Sect. V, Tit. I.

<sup>20</sup> DIGEST, § 741. A slight advance toward clearing up the doubt has been made by the recent decision in *Smith v. Selwyn*, [1914] 3 K. B. 98.



studied the ways of children or animals can fail to see that there is a deep psychological basis for proprietary ideas. But it is quite obvious that this psychological tendency has been powerfully stimulated, both by statutory enactment and by judicial decision, in English law, with the deliberate object of producing exertions which it is deemed desirable, on public grounds, to encourage. The whole theory of feudalism, which extended far beyond the obvious sphere of land tenure, was based upon the idea of making people do very difficult work by an ingenious system of 'payment by results'; and the maxim: *boni judicis est ampliare jurisdictionem*, is merely an application of the system to public offices. Again, in spite of the clearly realized dangers of allowing *choses* in action to be treated as property, there has been a steady development, both by statute and decision, of the orbit of property in English law, of which the doctrines of 'good will' and 'passing off'<sup>21</sup> are conspicuous modern examples. It is more than probable that, of the millions of people who daily resort to the popular attractions of the 'picture-shows,' only a few score realize that, but for certain modern changes in copyright law, these fascinating exhibitions would be impossible, at any rate on the existing scale; but the fact is so. The attempt, not altogether successful, to extend the protection afforded by the Statutes of Labourers to the interference with contractual<sup>22</sup> or even merely business relationships,<sup>23</sup> is at least evidence of the willingness of English courts to widen the notion of property.

The writer does not, of course, claim that the safeguards proffered by the Law of Property can be regarded as the sole, or even as the chief stimulus of the acquisitive instincts of mankind, still less that such a stimulus is, in any given system, always desirable or wholesome in its effects. The first impulse to industry undoubtedly was of a much more direct character, being, in all probability, simply fear of hunger. And even when primitive conditions have passed away, the glittering display of wealth afforded by any great centre of population — what Bagehot, in his inimitable way, called 'the bait' — is a stimulus which must make a wider appeal than any legal protection of wealth, because its appeal is to the senses, whilst that of the Law of Property is mainly to the reason. Another almost equally

<sup>21</sup> DIGEST, Bk. III, Sect. XIII, Tit. VI, §§ 1675-80.

<sup>22</sup> DIGEST, Bk. II, Pt. II, Sect. V, Tit. IV, § 963.

<sup>23</sup> *Ibid.*, § 964; Sect. III, Tit. IV, § 894.

powerful stimulus is, of course, the principle of competition, the recognition of the almost universal desire *se faire valoir*, which is a regulated and modified form of primitive predatory instincts. Still, the regular and skilful manner in which these instincts have been buttressed and rendered effective by the development of the English Law of Property, must undoubtedly be regarded as a striking and successful application of the sanction of reward.

There is one special branch of the Law of Property which, by reason of its effects and the more than doubtful justification usually put forward for its maintenance, deserves a few words. There is to be observed in the works of modern defenders of the *status quo* a certain coyness in dealing with the laws which sanction inheritance and testamentary succession. Mr. Mallock, for example, in his well-known work, *A Critical Examination of Socialism*, glides very lightly over the subject,<sup>24</sup> though it is, as John Stuart Mill long ago pointed out, not one which any scientific individualist, as distinct from a mere political controversialist, need fear to handle. But the older apologists who sought a justification for the system found it in what is, undoubtedly, one philosophical justification of the Law of Property, *viz.*, the stimulus which it affords to industrial energy. The writer is more than doubtful whether this justification was ever in real accordance with the facts, even in the days when the family played a larger part in the organization of the community than it now does. He is inclined to think that the practical difficulty of preventing disputes which would inevitably arise upon a recurrence of the dead man's possessions to a common stock, played at least as large a part in the law of inheritance as the desire to provide for the family *sacra*, or even the desire to make provision for the family liabilities. And, at any rate, in countries which have adopted unlimited liberty of testation, this argument cannot be said to carry very much weight; for though, doubtless, the threat to 'cut off with a shilling' a recalcitrant son, or the hint of 'remembering in his will' a dutiful servant, may be of value to a rich man in securing obedience or service, it may well be questioned whether power of that kind does not do more harm than good to the community.

But, in fact, in the present individualistic state of society, there is little warrant for assuming that a desire to benefit offspring or other

<sup>24</sup> London, Murray, 1908. See especially chs. X, XIII (220-26), XIV (244) — 'his family after his death were to be turned into the street, beggars' (Why 'beggars'?).



legatees constitutes any appreciable stimulus to industry. The average industrious man is industrious, partly because he believes that his industry will bring him either material comfort or social consideration, partly because he has been taught to believe that industry is virtuous — about the meaning of 'virtue' he does not stop to consider — and partly because, to his temperament, industry means that stimulation of the nervous system which is the secret of happiness, physical and mental. Of course, these motives vary in proportionate influence in different individuals; and it is not suggested that altruistic elements are not to be found in at least one of them. All that is maintained is, that the desire of benefiting his posterity is not a leading motive in the industry of the average industrious man.

If this view appears to be cynical, it is possible to put it to the simplest of tests. There never has been a time in the history of English law when a man could not give away in his lifetime what he could dispose of by his will. On the contrary, until comparatively modern times (and to some extent even now) there has been much property which a man could give away in his lifetime but could not dispose of by his will. In recent times there has even been added a powerful financial inducement, in the shape of Death Duties, to an owner of property to give it away in his lifetime. To some slight extent, no doubt, this additional inducement has had effect, though, be it observed, chiefly amongst those whose property has not been acquired by their own industry, and on whom, therefore, the stimulus of the Law of Property can have had little or no direct effect. But, for the most part, even the desire of escaping the hated Death Duties, though it has produced various attempts at evasion, has not induced the most efficacious step of all, *viz.*, the distribution of property in its owner's lifetime; and we are left to choose between the alternatives of attributing this result to an unwillingness to defraud the Exchequer of its anticipated revenue, or to an unwillingness to accelerate the happiness of those for whose benefit the accumulation of wealth was, *ex hypothesi*, intended.

It looks as though the philosophical jurist must find a new justification for the Law of Succession.

May the writer, in conclusion, venture, without incurring the reproach addressed to those who trespass beyond their proper province, to hint at what he conceives to be the true function of a legal

system, and to estimate, in untechnical language, the extent to which English law fulfils that function?

We are taught that the most precious thing in the universe is that mysterious principle which we call 'life,' and that the preservation and multiplication of life is, or should be, the chief object of the guides (official or unofficial) of mankind. Even the melancholy theory of Malthus did not, seemingly, deny this truth; it merely despaired of the efforts of humanity to give effect to it on more than a limited scale. And, in any case, the achievements of industrial science have long since laid the bogey which Malthus raised.

But if this doctrine be true of individuals, why should it not also be true of communities? Doubtless there are communities (to say nothing of States<sup>25</sup>) whose existence appears to be of somewhat doubtful augury for the welfare of mankind; but, if we believe that every individual, at least until he has given irrefragable proof to the contrary, is worthy of life, are we not much more bound to believe this true of an entity which has been brought into existence by mutual needs and services?

We are also told by physiologists that the essential condition of physical life is the accordance of the object with its environment. Is there any reason to doubt that the same condition applies to the life of a community, which is, of course, a spiritual life, for a community can have no physical existence apart from that of its members?

Let us pursue the matter a little further, always remembering the dangers which attend the argument from analogy.

In spite of the wave of pragmatism which is, with somewhat disastrous results, passing over the world, most persons whose opinions are of value admit, or assume, that, while the influence of mankind on its environment is rapidly growing, there yet remain certain unalterable conditions subject to which all human activity must work; and it cannot be for nothing that these conditions have received, in practically all the tongues of western civilization, the name of 'laws.' Doubtless, as Professor Gray forcibly urges in the work before referred to,<sup>26</sup> there are important differences between these 'laws' and the laws with which a jurist is primarily

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<sup>25</sup> It is essential to the writer's argument that the distinction between the community and the artificial organization known as 'the State' should be borne in mind (see above, pp. 112-116).

<sup>26</sup> *NATURE AND SOURCES OF THE LAW*, p. 213.



concerned; but those differences do not alter the fact that jurists, like all other people, have to reckon with them, unless, perhaps, we take the narrow view that a jurist is concerned only with the form of laws and not with their contents. What is the use or the interest of an elaborate *hortus siccus* of mere legal formulæ, apart from the influence on human conduct which these represent? For, as Montesquieu says, laws are 'the necessary relations derived from the nature of things.'

Unfortunately, however, these unalterable conditions are not easy to discover, especially those affecting human intercourse. While it is not going too far to say, that the progress of ascertaining them as they affect inorganic and even organic, but non-human, phenomena, has been, especially of late years, astounding, it must be confessed that infinitely less success has attended the researches of the students of human nature, and especially of human nature as it manifests itself in common life. And it is not difficult to see why. For, with all the marvellous complexity which characterizes the world of inanimate nature, and the world of plant and brute life, man presents the further baffling complexities raised by the existence of reason and will. We may say, if we like, that these qualities are also present, to some degree, in the brute creation; just as we may say that the communal, or at least the gregarious instinct or faculty, is also present there. But the fact remains that the difference of degree, in these respects, between mankind and the brutes, is so great as to amount to a difference of kind. After all, if we go back to the primitive protoplasm, differences cease to exist, or, at any rate, to be distinguishable.

In face of the problems raised by this infinite complexity, there is but one refuge from despair, *viz.*, the belief in a fixed rule and order which, if we could but discover it, would solve them. This is the foundation of faith: there is no chance, only ignorance. All the wisest and greatest of mankind have believed this — theologians, moralists, lawyers, naturalists; but only the last, by reason of the comparative simplicity of their material, have gone far to demonstrate it. Something has, however, been done by those students who grapple with the infinitely more difficult problems of human conduct; and in the religious, the moral, and the legal systems of the world we see the results. It is, of course, a commonplace of anthropology, that these three branches of human endeavour have spe-

cialized off from a common stock within comparatively recent times, even in western civilization; it is almost equally clear, that the separation of the physical and the moral sciences has taken place within a period which we may fairly call historical. And it is one of the peculiar marks of modernity in English law that, on the whole, it shows a remarkable tendency to restrict itself to its own special sphere, avoiding appeals to the emotions, which are the typical methods of religion, and to the reason, which are the subtle weapons of morality.

Having, then, to deal with what is, perhaps, the most intractable of all media, the human will, the builders of English law have never forgotten that this medium is one of the most direct and, therefore, one of the most precious manifestations of life, neither to be stamped out as necessarily anarchical, nor to be stored up and used like one of the blind forces of inanimate nature. Only when it manifests itself in ways obviously fatal to the life of the community, does the community, acting on the primary law of self-defence, interfere to crush the individual will; only where the object to be gained, in itself essential to the welfare of the community, cannot be achieved by spontaneous effort, does the community harness the individual will to the chariot of State. English law takes life itself as the guide to life, and treats the individual as a man, not as a machine. It is this deep respect for individual liberty within widely drawn bounds that is the dominant note of English law; and it is justified by the vigour, the achievements, above all the internal harmony, of those communities which, the world over, have adopted its principles. It is difficult to imagine any more cogent proof that English law is in accord with the truth of things.

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## SOME PHASES OF THE LAW OF MARRIAGE

IN the vast field of Comparative Law there is no subject which so profoundly affects the welfare of society as that of marriage, nor has any other institution been so powerfully influenced by superstition, religion, philosophy, and politics.

Eastern legislators regarded matrimony as a means of securing salvation in the world to come; Cæsar and Augustus encouraged it to increase the power of the Roman Empire; crafty statesmen have ever sought by means of royal alliances to extend their borders or conserve their territory, while it is one of the glories of modern jurisprudence that in the regulation of marriage its chief aim has been to improve the physical and mental development of mankind. All these varied purposes are reflected in the laws, and it is interesting, and not without present utility, to trace their origin, growth, and effect, noting points of similarity and of difference, of progress and of decadence.

## I

Age, intelligence, and consent, to the Western mind the three great essentials of marriage, are considered of small importance by vast millions in the East. To the Hindoo the taking of a wife at a very early age is an imperative duty, for all hope of happiness after death depends upon the birth of a son.<sup>1</sup> "By a son," says Menu, "a man discharges his debt to his own progenitors," and "obtains victory over all people; by a son's son he enjoys immortality; and afterwards, by the son of that grandson he reaches the solar abode."<sup>2</sup> In the anxiety to secure these great rewards betrothal had its origin,<sup>3</sup> By this means the parents anticipate the future of their children even in infancy. It is the binding tie,<sup>4</sup> and the second ceremony of "con-

<sup>1</sup> Pour les Hindous c'était et c'est encore la plus importante affaire de la vie, la seule espérance de salut après la mort. I GIBELIN, DROIT CIVIL DES HINDOUS, 22.

<sup>2</sup> 2 COLEBROOKE, DIGEST OF HINDOO LAW, Book V, chap. 1, arts. X-XI.

<sup>3</sup> Jamais, chez aucun peuple, le mariage ne fut établi sur des bases faites pour inspirer plus de sollicitude et d'intérêt. Évidemment c'est là que doit se trouver l'origine des fiançailles. I GIBELIN, 22.

<sup>4</sup> C'est le premier acte qui lie définitivement les contractants. I GIBELIN, 21. In China also, if the betrothal is regular, it is held to be a marriage, even though it be not consummated. ALABASTER, NOTES AND COMMENTARIES ON CHINESE CRIMINAL LAW, 174.

ducting to the house," which takes place at puberty, merely marks the advent of the period for the husband to claim his bride.

This blight of child marriages affects the Chinese also, and arises from similar causes.<sup>5</sup> They believe that the spirits of the departed wander restlessly about unless a son performs the burial rites and offers up the fixed periodical sacrifices at the tomb. This dire fate they seek to avoid by early unions.<sup>6</sup>

Fear of torment after death urged the Persians to the same course. Their prophet-legislator, Zoroaster, proclaimed that it was a calamity to die unmarried because children were so many degrees in the progress to eternal joy, and the good works of those left behind assisted the parents in crossing the bridge Tchineval, over which all souls must pass to reach their heavenly home. This doctrine seems all-compelling, but he supplemented it by the offer of earthly rewards to those who reared numerous families,<sup>7</sup> thus establishing a precedent which has been followed by other nations in later days.

The marriage of daughters was regarded by all ancestor worshippers as a matter of less vital importance than that of sons. The latter were charged to visit the tombs of their ancestors and care for them as temples of gods, while the daughters were only expected to weep for them as mortals.<sup>8</sup> Some influence was necessary to compel the disposal of girls at an early age, and all the Hindoo lawgivers denounced the father who did not cause his daughter to wed when she could become a mother. Menu declared such a man "reprehensible";<sup>9</sup> Yama that he was "as guilty as the person who procured abortion"; and Vrihaspati that he was "a criminal who ought to be punished."<sup>10</sup> Zoroaster went further, and asserted that if a girl who had attained the age of eighteen died a virgin, the torments of the infernal regions awaited her until the general resurrection.<sup>11</sup>

These early and almost universal marriages have been the chief

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<sup>5</sup> L'idée qu'on se fait de la vie future de l'influence heureuse qu'elle peut recevoir du culte des descendants pour les ancêtres, est une des raisons qui font désirer aux Chinois une nombreuse postérité. TISSOT, *LE MARIAGE, LA SÉPARATION ET LE DIVORCE*, 39.

<sup>6</sup> DOUGLAS, *CHINA*, chap. 3.

<sup>7</sup> PASTORET, *ZOROASTRE, CONFUCIUS ET MAHOMET COMPARÉS*, 424.

<sup>8</sup> PLUTARQUE, *QUESTIONS ROMAINES*, § 14.

<sup>9</sup> 2 COLEBROOKE, *DIGEST OF HINDOO LAW*, Book IV, chap. 1, art. XIV.

<sup>10</sup> 1 GIBELIN, 29, 30.

<sup>11</sup> PASTORET, 419.



cause of the stagnation of the East.<sup>12</sup> When the resources of Persia failed to keep pace with the excessive birth rate there came famine<sup>13</sup> and practical extinction, and the populations of both India and China have increased so rapidly that every energy must be devoted to the struggle for a bare existence. Gradually there has been a loss of intellectual power and virility, for, as Bagehot points out, "there is only a certain *quantum* of power in each individual, and when it goes in one way it is spent and cannot go in another."<sup>14</sup> With exceptional fertility came sluggishness of mind,<sup>15</sup> and not until gross superstition is rooted out and marriage becomes wisely regulated can the Hindoos and Chinese hope to renew their ancient greatness.<sup>16</sup>

The Japanese were also under the influence of Eastern cults, but their strong desire for earthly power tempered their religious zeal and saved them from disaster. Devotion to ancestral worship never interfered with their passionate love of country. They encouraged early marriages more as a duty to the State than for religious reasons, adopting the ethical precept of Confucius that "a father lives without honor if his children neglect the obligation of marriage which nature and society alike impose upon them, and the son fails in his duties if he does not leave children to perpetuate his race."<sup>17</sup> This was still the guiding principle in the seventeenth century when Iyeyas instructed the governing class to impress upon the people that at the age of sixteen all men and women ought to be married, "as matrimony is a great law of nature."<sup>18</sup> To an ambitious people, gifted with keen perception, it became evident that national strength and future expansion depended upon the procreation of a physically virile race. They realized that this was retarded by marriage in early youth, and the popular desire for the prevention of the union of children at length found expression in their code which raised the marriageable age to seventeen for males and fifteen for

<sup>12</sup> There are whole countries, too, such as India, in which a right solution of the marriage question seems to lie at the foundation of the happiness of the community.

<sup>13</sup> 11 INTERNATIONAL CYCLOPEDIA 532.

<sup>14</sup> BAGEHOT, PHYSICS AND POLITICS, chap. 5, part II.

<sup>15</sup> SPENCER, SYNTHETIC PHILOSOPHY, PRINCIPLES OF BIOLOGY, § 366.

<sup>16</sup> Gibelin (vol. 1, p. 41) adduces strong reasons for his assertion that many laws which have been credited to the Romans had their origin in India, which has also given to architecture one of the seven wonders of the world.

<sup>17</sup> PASTORET, 419.

<sup>18</sup> The laws of Iyeyas, as translated in DICKSON, JAPAN, 254.

females.<sup>19</sup> While wedlock is permitted at these ages it is not encouraged, and the period at which it is considered advisable to marry is three or four years higher both in men and women than the limit set by the legislators.

Of all the ancient civilizations, however, the Jews have always stood as a class apart in their efforts to promote the physical and mental development of their race. This has saved them from extinction and enabled them to resist through all the centuries the battering of powerful, persistent, and relentless enemies. Although the Old Testament nowhere states the age at which Hebrews may marry, it contains every indication that it never took place in early life. Isaac and his son Esau were both forty before they took unto themselves wives, and Jacob served long and faithfully for Leah and Rebecca. These cases were no doubt extreme, and the Talmud approves the opinion of Judah, son of Tamai, that "at five years of age a child should study the Bible, at ten he should study the Mishna, at fifteen he should study the Gemara, and at eighteen he should get married." <sup>20</sup>

Mahomet, who hated the Jews, cursing and cajoling them in turn, adopted many of the laws of Moses, particularly as to marriage and divorce;<sup>21</sup> but the Koran, like the Old Testament, is silent as to the age at which marriage may be contracted. This has left each of the many Mohammedan sects free to set its own limit. The generally accepted age is fifteen, which Sale declares is supported by a tradition of the Prophet. Abu Hanifal, the founder of the Hanifites or followers of reason as opposed to tradition, thought eighteen the proper age.<sup>22</sup> In Turkey girls may marry at fourteen and boys upon the attainment of puberty, while among the Algerian Arabs a father has the right to give in marriage a child under the age of puberty and to compel union with whomsoever he chooses, provided the intended consort is not an "idiot, slave, infidel, leper, giant, negro, or eunuch." <sup>23</sup>

The highest standard of maturity to be found in early law was

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<sup>19</sup> CIVIL CODE OF JAPAN, art. 765.

<sup>20</sup> THE TALMUD, "THE FATHERS," chap. 5, par. 21.

<sup>21</sup> SALE, TRANSLATION OF THE KORAN, Preliminary Discourse, § VI.

<sup>22</sup> SALE, TRANSLATION OF THE KORAN, note on chap. 4.

<sup>23</sup> Discountenanced by their French rulers, and now seldom exercised. Special Report of U. S. Dept. of Commerce and Labor, 1909, on statutory regulations governing marriage and divorce in certain foreign countries, part I, p. 359.



that fixed by the Incas, a race which worked out all its social problems without external influence. With them females were not held to have attained a marriageable age until they were eighteen, and males not until they were four and twenty.<sup>24</sup>

The Greeks in the regulation of families, as in other matters, aimed at perfection, and their great desire was to establish a race such as their sculptors patterned in marble. Plutarch says that in the days of Lycurgus the brides were never of small and tender years, and when some foreign lady remarked to the wife of Leonidas that the women of Lacedæmon were the only ones in the world who could rule men, she was met with the ready answer, "with good reason, for we are the only women who bring forth men."<sup>25</sup> Their philosophers, longing for the ideal, preached a higher standard than it was possible for frail human nature to attain. Plato was of opinion that women should not marry until they were twenty, and men only when they were twenty-five, and he urged that anyone entering wedlock below these ages should be considered to have done an unholy and unrighteous thing.<sup>26</sup> Aristotle differed from him widely. He would allow women to marry at the age of eighteen, but their husbands should be men of at least seven and thirty, for the reason that "where men and women are accustomed to marry young, the people are small and weak; more of the young matrons die, and the bodily frames of their consorts are stunted in their growth."<sup>27</sup> While these philosophic ideas were Utopian, they must have exercised a potent influence and helped in the formation of that noble race which, small in numbers but rich in quality, achieved results glorious and imperishable.

With the advent of Roman dominion an era of legislation was inaugurated which proved her richest legacy to posterity. Her great jurisconsults were guided by the law of nature, which is defined in the Institutes as "that law which nature teaches to all animals. Hence comes that yoking together of male and female which we term matrimony."<sup>28</sup> It followed from this in the logical Roman mind that union must be permitted as soon as nature allowed. The leaders of the School of the Proculians were in favor of a particular

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<sup>24</sup> PRESCOTT, CONQUEST OF PERU, Book I, chap. 3.

<sup>25</sup> PLUTARCH, LIFE OF LYCURGUS.

<sup>26</sup> PLATO, REPUBLIC, Book V.

<sup>27</sup> ARISTOTLE, POLITICS, Book VII, chap. 16.

<sup>28</sup> DIGEST, I. 1. 1. 3.

age being determined upon as that of puberty; the Sabinians wished to let it be regulated by nature. Justinian decided in favor of the Proculians and fixed the ages at which physical maturity should be assumed at fourteen for males and twelve for females.<sup>29</sup> Had this low standard been coupled with the superstitious incentive which hurried the peoples of the East into matrimony the result would have been a like increase of population. Superstitious the Romans were, in high degree, but their thoughts were centered far more on the joys of this world than of the next. They loved luxurious living, and the responsibility entailed in the care of large families would have interfered with personal pleasure. Another reason also served to retard too rapid a growth of population. They were constantly engaged in strife. Civil discords and foreign wars weakened them, and in destroying others they were themselves destroyed. Montesquieu points out that, incessantly in action, engaged in conquest and in the most violent attempts, they wore out like a weapon kept constantly in use.<sup>30</sup> It actually became necessary, for reasons of state, to incite the people to marriage, and it is significant that the emperors appealed, not to their hopes of heaven, but to their desire for official honors and earthly gain. Cæsar offered rewards to those who had many children and Augustus imposed penalties upon the unmarried. Assembling the knights to explain the purposes of his laws, *Julia et Papia Poppæa*, he thus addressed them:—

“While sickness and war snatch so many citizens, what must become of the state if marriages are no longer contracted? The city does not consist of houses, of porticos, of public places, but of inhabitants. You do not see men like those mentioned in fable springing out of the earth to take care of your affairs. . . . My only view is the perpetuity of the republic. I have increased the penalties of those who have disobeyed; and with respect to rewards, they are such as I do not know whether virtue has ever received greater. For less will a thousand men expose life itself; and yet will not these engage you to take a wife and provide for children.”<sup>31</sup>

Under succeeding emperors these penalties were gradually relaxed and the rewards decreased. The influence of Stoic philosophy, voluptuousness, almost unlimited right of divorce, and, in strange

<sup>29</sup> INSTITUTES, Lib. I, tit. XXII.

<sup>30</sup> SPIRIT OF THE LAWS, Book XXIII, chap. 20

<sup>31</sup> *Ibid.*, chap. 21, citing Dio., Lib. LVI.



contrast, the advocacy of continence by those who embraced Christianity, all retarded natural increase. Thus from very dearth of men to resist the barbarian hordes, Rome fell.

Her place was soon occupied by the Catholic Church, whose sway became wider and more powerful than that of the great Empire had ever been, and the regulation of matrimony was one of its particular cares. Following the Roman law as to the age of maturity, the Council of Trent decreed that males could marry at fourteen and females at the age of twelve. Through the canon law this became the law of England and of all countries over which the Church exercised ecclesiastical jurisdiction. The religious ceremonies with which the nuptial tie was surrounded insured the supervision and influence of the priests and presented an almost insuperable obstacle to the union of children who were unfit. Early marriages of the physically mature, however, were looked upon with favor. They increased the number of the faithful and overcame all temptation to a riotous youth. Louis XIV, impelled by religious fervor, strove to encourage large families by his Edict of 1666, which granted pensions to those who had ten children, and much larger to those who had twelve, and the Canadian province of Quebec in recent years, for the same reason, has rewarded the parents of large families.<sup>32</sup>

In England the idealists perceived the danger to physical development arising out of early unions, and Sir Thomas More in his "Utopia" permits matrimony to women at eighteen and to men not before two and twenty.<sup>33</sup> Gradually a natural repugnance to the alliance of children has found expression in legislation, and even in many Catholic countries the standard of the canon law has been raised.<sup>34</sup> It is still conserved in Great Britain and all her colonies

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<sup>32</sup> Every father or mother of a family, born or naturalized and domiciled in this province, who has twelve children living, born in lawful wedlock, is entitled to one hundred acres of public lands, to be selected by him, subject to the conditions of concession and settlement required by the law respecting Crown Lands. *STAT. OF QUEBEC*, 1890, chap. 26.

<sup>33</sup> *MORE, UTOPIA*. Book II, [chap. 7].

<sup>34</sup> The statistics which follow, and the notes thereon, except where otherwise indicated, are from special reports on marriage and divorce obtained by the U. S. Dept. of Commerce and Labor, Bureau of the Census, issued in 1909; supplemented in the case of Argentine, Brazil, Chile, Mexico, Spain, Luxemburg, Portugal, Greece, and Holland by a British Parliamentary Return of 1894, part II, containing reports on the marriage laws in these countries and especially the ages at which marriages may be contracted.

(except those oriental and the Canadian province of Ontario)<sup>35</sup>; by seventeen states of the Union, influenced by English law; and by the Argentine Republic, Mexico, Spain, and Portugal. Greece, following the Byzantine code, has the same limit, while Chile merely exacts that the parties be of the age of puberty. All other nations and states have set a higher standard. In New Hampshire the proposed consorts must be fourteen and thirteen; in Austria and the province of Ontario, fourteen and fourteen; in Kansas and Missouri, fifteen and twelve; Brazil, Iowa, North Carolina, Texas, Utah, and the District of Columbia, sixteen and fourteen; Alabama, Arkansas, and Georgia, seventeen and fourteen; Servia,<sup>36</sup> seventeen and fifteen; France, Italy, Belgium, Luxemburg, Roumania, California, North Dakota, South Dakota, Minnesota, New Mexico, Oregon, Oklahoma, and Wisconsin, eighteen and fifteen; Holland, Hungary,<sup>37</sup> Peru,<sup>38</sup> Russia,<sup>39</sup> Switzerland, Arizona, Delaware, Indiana, Illinois, Michigan, Montana, Nebraska, Nevada, Ohio, West Virginia, and Wyoming, eighteen and sixteen; New York and Idaho, eighteen and eighteen; Denmark and Norway,<sup>40</sup> twenty and sixteen; Bulgaria,<sup>41</sup> twenty and eighteen; Germany,<sup>42</sup> twenty-one and sixteen; Sweden and Finland, twenty-one and seventeen; and Washington, twenty-one and eighteen, in all cases the lower age being that for women.

It is interesting to note that while all authorities agree that maturity is hastened or retarded by climatic conditions, and is

<sup>35</sup> Except when marriage at a younger age is necessary to prevent the illegitimacy of offspring. *STAT. OF ONTARIO*, 60 VIC., chap. 14, § 68.

<sup>36</sup> By dispensation of a Bishop a man of fifteen or woman of thirteen may marry.

<sup>37</sup> Dispensation from this requirement can be obtained from the Minister of Justice. In Croatia and Slavonia the age is as in the Austrian code. Females may, however, be permitted to marry after reaching the age of twelve upon dispensation from the Bishop or Pope, but the parties to such a marriage must be separated until both have attained the age required by the state.

<sup>38</sup> *R. DE GRASSERIE, CODE CIVILE PERUVIEN*, 86.

<sup>39</sup> Natives of Trans-Caucasia may marry at the completion of fifteen for males and thirteen for females.

<sup>40</sup> These provisions are often interpreted as having reference to the age of puberty, and as this age varies with different persons, the law is not always followed literally, particularly as regards the marriageable age of women.

<sup>41</sup> The Mohammedans in Bulgaria, forming thirteen per cent of the population, are governed in matrimonial matters by the rules of their religion.

<sup>42</sup> In exceptional cases a man may be declared of age as early as the completion of his eighteenth year, and a dispensation may be granted to a woman who has not attained her sixteenth year.



earliest in the tropics, this fact has been ignored in some notable instances. In the Canadian province of Quebec, which stretches to the arctic regions and should therefore have the highest standard, girls of twelve and boys of fourteen are declared capable of matrimony, while in the more southern province of Ontario girls are not eligible until they attain the age of fourteen.<sup>43</sup> The same disregard of this physiological principle exists in some of the States, for in Vermont, which lies upon the northern boundary, girls may marry two years, and boys three years, earlier than those resident in Alabama, bordering on the Gulf of Mexico. In Sweden also the age limit is lower in the north than in the south, and Laplanders may marry earlier than any other persons within the realm.<sup>44</sup>

The changes in the age limit of France, however, have been based entirely upon climatic influence. Toullier says:

"The law of the 20th September, 1792, had increased the old standard of twelve and fourteen by one year both for boys and girls, but the reform did not stop there. The Council of State was of opinion that the rule of the Roman and canon laws, originally established for Italy, was unsuited to our northern climate, and adopted the Prussian standard. Following the Prussian code (title of marriage No. 37) men could not marry before completing their eighteenth year, nor girls before fourteen. Even this was thought insufficient, and by article 144 of the code (Napoleon) it was increased by one year for girls, those of less than fifteen <sup>45</sup> being declared incompetent to contract marriage."<sup>46</sup>

Bonaparte held the opinion, which he vigorously but unsuccessfully pressed upon the Council of State, that owing to the difference of climate and customs an exception should be made in the case of French girls born in the Indies and that these should be permitted to marry at an earlier age.<sup>46</sup>

In many of the countries which still cling to the canon law standard of twelve and fourteen years the safeguard of ecclesiastical ceremony is no longer obligatory, and civil marriages are permitted without any increase in the limit of age. Why should a feeling of conservatism keep upon the statute books a law sanctioning that

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<sup>43</sup> QUEBEC CIVIL CODE, art. 115; STAT. OF ONTARIO, 60 VIC., chap. 14, § 68.

<sup>44</sup> U. S. Report on Marriage and Divorce, 1909, part I, p. 387.

<sup>45</sup> Since increased.

<sup>46</sup> 1 TOULLIER, LE DROIT CIVIL FRANÇAIS, 421.

which is opposed to the general conscience and to the results of scientific investigation? Dr. Reeve declares that the average age of puberty in the United States, as appears from Emmet's tables, made up of 2330 cases, is 14.23 years. These he believes to be the only American statistics, but he notes their correspondence with those of the four largest cities of France, which give 14.26 as the average.<sup>47</sup> This must also be approximately that of England.

The absurdity of conferring capacity by law upon a class where there is average physical incapacity is apparent, and wherever the limit of the old Roman law still prevails we may hope for a change to one more in harmony with the spirit and needs of the age.

We have dealt with those considered "o'er young to wed." Is there a period at which legislators deem men and women too old for matrimony? The Jewish patriarchs had certainly no limitation, but Montesquieu says that it was contrary to the Roman law, at one period, for a man of sixty to marry a woman of fifty. He continues:

"As they had given great privileges to married men, the law would not suffer them to enter into useless marriages. For the same reason the Calvinian *senatus consultum* declared the marriage of a woman above fifty with a man less than sixty to be unequal, so that a woman of fifty years of age could not marry without incurring the penalty of these laws. Tiberius added to the rigor of the Papian law and prohibited men of sixty from marrying women under fifty, so that a man of sixty could not marry in any case whatsoever without incurring the penalty."<sup>48</sup>

But Claudius abrogated this law made under Tiberius, and in the later period Roman citizens were never considered too old to marry. The only restrictions in modern law are those of Servia, where men of over sixty and women of over fifty may only be married by special license of the supreme ecclesiastical authorities;<sup>49</sup> and in Russia, where the marriage of persons over eighty years of age is forbidden.<sup>50</sup>

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<sup>47</sup> Dr. Reeve, in 4 PEPPER'S SYSTEM OF MEDICINE 185. This average is likely to increase with compulsory education, and Spencer points out the connection between high cerebral development and prolonged delay of sexual maturity. PRINCIPLES OF BIOLOGY, § 346.

<sup>48</sup> SPIRIT OF THE LAWS, Book XXIII, chap. 21.

<sup>49</sup> British Report on Foreign Marriages, 1894, part II, p. 128.

<sup>50</sup> U. S. Report on Marriage and Divorce, 1909, part I, p. 383.



## II

## CONSENT

As in all other contracts, consent is a requisite of legal marriage in every country. In China, however, the approval of the bride and groom is never sought. They are merely the objects of a nuptial agreement entered into by "match-makers" or "go-betweens," who represent the parents.<sup>51</sup> The only *consensus* required is that of these outside agents, with the restriction that no arrangement must be concluded until the families interested have assured themselves as to the physical fitness of the parties, astrologers have pronounced their horoscopes as favorable, and the relatives of the bride have signified their approval in writing. The consent of the father alone, or, if he be dead, that of the mother, is sufficient.<sup>52</sup> It is considered a grave breach of etiquette for young men and maidens to associate with each other, and authorities declare that in the vast majority of cases the bridegroom never sees his bride until the nuptial night. Many girls prefer going into Buddhist or Taoist nunneries, or even committing suicide, to trusting their future to men of whom they can know nothing but from the interested reports of the "go-betweens."<sup>53</sup> It is little wonder also that under such circumstances consent is occasionally obtained by fraud. Alabaster records the tragic case of Mrs. Wang where "an old reprobate," knowing that the girl's parents would refuse him, sent a good-looking young fellow to represent him in the preliminary stages, thereby obtaining signature to the contract, and possession of his bride. He ill-treated her and she subsequently strangled him. The tribunal considered her as unmarried and she escaped the dire penalty attached to such an offense against a consort, the case being treated as simple unjustifiable homicide of a man by whom she had been injured.<sup>54</sup>

Amongst the Hindoos, while the law requires the formal consent

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<sup>51</sup> This is also the custom in Formosa, where marriage is arranged by the parents, through "go-betweens," without regard to the feelings and preferences of the intended consorts. U. S. Report on Marriage and Divorce, 1909, part I, p. 378.

<sup>52</sup> ALABASTER, 172 *et seq.*

<sup>53</sup> DOUGLAS, CHINA, chap. 3. He cites Archdeacon Gray as authority for the statement that in 1873 eight young girls, residing near Canton, who had been affianced, drowned themselves in order to avoid marriage.

<sup>54</sup> ALABASTER, 175.

of the future consort,<sup>55</sup> in practice this is unthought of. Those who do not oppose the choice of their father are presumed to give a tacit consent. If the father is dead, or incapable, the right of disposal devolves upon the paternal grandfather, the brother, a kinsman on the father's side, or the mother, in the order named.<sup>56</sup> The betrothal or binding ceremony may take place in infancy, provided the parties are of an age to understand what they are doing, a period supposed to be attained at their seventh year.<sup>57</sup> If one of the two intended consorts refuses to marry, no compelling force may be exercised.<sup>58</sup> Opposition on the part of the girl is hardly conceivable, for she remains the only person in the world doomed to a state of perpetual tutelage.<sup>59</sup> "Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in old age; a woman is never fit for independence," says Menu.<sup>60</sup>

The age of seven for betrothal was also the period adopted by the Romans, not with the object of securing celestial benefit from an early marriage, but in order to assure an heir to carry on the worldly succession. The Roman betrothal differed materially from that of the Hindoos. It was only a promise to marry at some future time (*sponsalia sunt mentio et repromissio nuptiarum futurarum*).<sup>61</sup> Either party could renounce the engagement before the second ceremony, which could take place only after the age of puberty.<sup>62</sup> Under early Roman law, when the *paterfamilias* held uncontrolled power over his family, even that of life and death, the consent of children was unnecessary.<sup>63</sup> A father, if not himself under power, could select a wife for his son, or give his daughter in marriage, and they must submit. Late in the imperial period this privilege of dictation enjoyed by the head of the family had declined into a conditional veto. The consent of the contracting parties became

<sup>55</sup> 2 DIGEST OF HINDOO LAW, Book IV, chap. 4, art. CLXIV.

<sup>56</sup> *Ibid.*, Book V, chap. 3, art. CXXXV.

<sup>57</sup> 1 GIBELIN, 20.

<sup>58</sup> *Ibid.*, 62.

<sup>59</sup> MAINE, ANCIENT LAW, 14 ed., 153.

<sup>60</sup> 2 DIGEST OF HINDOO LAW, Book IV, chap. 1, art. V.

<sup>61</sup> DIGEST, XXIII. 1. 1.

<sup>62</sup> Betrothals were broken by announcing the wish in these words "*condizione tua non ulor*," and forfeiting the *arrhae*, i. e., things given as earnest or security that the promise should be kept, if any had been given. SANDARS, INSTITUTES OF JUSTINIAN, 8 ed., 36.

<sup>63</sup> MAINE, ANCIENT LAW, 14 ed., 138.



essential, but the *paterfamilias* still remained a formidable obstacle. His assent was necessary no matter what the age of those under his power.<sup>64</sup> The son who was under the grandfather's control, must obtain his father's consent also, but this did not apply to daughters, who required only the consent of the person exercising authority over them.

This rigor of the *patria potestas* was later ameliorated in many ways. Emancipation gave freedom of choice to the son who was of age, and there were other avenues of escape. If the parties married without his consent, provided the *paterfamilias* knew of it and did not oppose, his approval was presumed;<sup>65</sup> or if he was absent for three years, either voluntarily or as a captive of war, this conferred upon his children the right to contract a marriage of which he could not afterwards disapprove.<sup>66</sup> Moreover if the father was unwilling that his daughter should take a husband, or delayed his consent, she could exercise her free will in the matter on attaining the age of twenty-five years, provided the man of her choice was free-born.<sup>67</sup>

By such modifications the power of the father over the persons of such of his children as were adolescent became so reduced that it was almost nominal in the latter days of the empire. It disappeared quickly and completely from the usages of advancing communities,<sup>68</sup> and the tendency of almost all modern legislation has been to lower the period at which full capacity is held to be attained. A wonderful advance in general education, coupled with the marvelous industrial growth which offers both greatly increased wages for home making and opportunities for independent enterprises, have quickened maturity. There has come to youth perhaps too great a confidence in its power to manage its affairs at an earlier age, particularly those matrimonial, and this resentment of restraint has impressed itself upon the laws, although some countries have shown stout resistance.<sup>69</sup> The age of capacity to marry without consent

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<sup>64</sup> Tamen filiifamilias et consensum habeant parentum, quorum in potestate sunt. COD., V. 4. 25.

<sup>65</sup> SANDARS, INSTITUTES OF JUSTINIAN, 8 ed., 33.

<sup>66</sup> DIGEST, XXIII. 2. 9. 10.

<sup>67</sup> 1 GIBELIN, 29.

<sup>68</sup> MAINE, ANCIENT LAW, 14 ed., 135.

<sup>69</sup> The statistics following are from the official reports of the United States and Great Britain, previously cited.

of parents is fixed in Denmark at twenty-five; in Italy at the same age for males and four years less for females; in Austria and Hungary at twenty-four; in Spain at twenty-three; in Germany, Servia, Brazil, Mexico, Portugal, England, Ireland, Wales,<sup>70</sup> and all the British colonies (except the Orient and two Canadian provinces)<sup>71</sup> at twenty-one, and in Switzerland at twenty. In the Argentine Republic the limit is twenty-two, but if a man is eighteen or a woman fifteen consent cannot be withheld from mere caprice; there must be some special reason which the law will recognize. Bad conduct or immorality, want of means to maintain a home, and inability of acquiring them are among the causes which give rise to a right of denial.<sup>72</sup>

As was to be anticipated, it is in the United States that we find the greatest innovation. In the case of males the common law age of twenty-one has been generally adhered to, the States of North Carolina and Georgia, where restraint ceases at eighteen, and Tennessee, where it ends at sixteen, being exceptions. It is the ages at which females may exercise their own judgment that prove startling. Some States fix it at twenty-one; others — forming a large majority — at eighteen; Maryland and Tennessee at sixteen.<sup>73</sup> The American girl stands in a class apart. Parental indulgence and almost unlimited social freedom, approved by friendly legislation, have caused the sex to become mistresses of their fate at the earliest ages recognized by modern law. It is a daring experiment, and the risk seems great. The two Canadian provinces of Ontario and New Brunswick, both neighboring on the United States, have been affected by this legislation and reduced the age of unrestricted choice from twenty-one to eighteen years for both sexes.<sup>74</sup>

Japan, on the contrary, has recoiled from the tendency of her great Pacific neighbor and adopted an extended period of control as best suited to her trend of development, believing that the fostering of veneration for parents, respect for their counsel, and sub-

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<sup>70</sup> In Scotland consent of parents or guardians is in no case required. U. S. Report on Marriage and Divorce, 1909, part I, p. 371.

<sup>71</sup> Ontario and New Brunswick.

<sup>72</sup> British Report on Foreign Marriages, 1894, part II, p. 2.

<sup>73</sup> U. S. Report on Marriage and Divorce, 1909, part I, p. 188.

<sup>74</sup> *Ibid.*, 350, and REV. STAT. OF ONTARIO, 1897, chap. 162, § 15, subsec. 1.



mission to their authority forms the only sound basis of loyal citizenship and devotion to the State. Their Civil Code <sup>75</sup> requires that "for contracting a marriage a child must have the consent of his parents, being in the same house. This, however, does not apply if the man has completed his thirtieth year, or the woman her twenty-fifth year. If one of the parents is unknown, is dead, has quit the house, or is unable to express his intention, the consent of the other parent is sufficient. If both parents are unknown, are dead, have quit the house, or are unable to express their intention, a junior must obtain the consent of his guardian and of the family council."

France also lays great stress upon the judgment of parents. All persons who have attained majority but have not completed their thirtieth year must ask for the consent of their father and mother as an essential preliminary to matrimony. If either refuse, the interested party must serve a notice of the intended marriage upon the dissenting parent or parents, and thirty days after this notification the parties may marry despite all objection.<sup>76</sup> In Holland, also, all who have not attained the age of thirty must ask for the consent of parents. If this be refused or withheld, and the parties are of age, they may invoke the mediation of the judge of the canton where the parents are domiciled, who shall, within three weeks of the request, summon both parties before him and advise them in their best interests. If the father, or failing the father, the mother, does not attend, the celebration of the marriage may be proceeded with. If, after attending, the parents persist in their refusal, the marriage may be celebrated without their consent, after a delay of three months has expired.<sup>77</sup> In Spain daughters who have attained their majority are forbidden to leave the paternal roof until they have attained their twenty-fifth year, except with the permission of their father or mother. Sons who have attained majority must ask the consent of their parents, and in case it is not granted they must not marry for three months. They may then apply for permission from the courts of law, which are not compelled to give reasons in case of refusal. If consent is not obtained, and a marriage is contracted without permission, it is binding, subject to the regulation that it will entail absolute separation of goods, that neither party can receive anything from the other by legacy or gift, and that each

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<sup>75</sup> Art. 772.

<sup>76</sup> CODE NAPOLÉON, art. 151, as amended, 1896.

<sup>77</sup> DUTCH CIVIL CODE, arts. 98-104.

party will retain absolutely the administration of his or her own property, though with the obligation to contribute proportionately to the maintenance of the household.<sup>78</sup> In Russia<sup>79</sup> children require the consent of their parents without regard to age, and in most parts of the empire there is no appeal in case this is withheld. Marriage without such consent is not invalid, but the guilty person is liable to a penalty of from four to eight months' imprisonment, on petition of the parent, and to the loss of the right of inheritance in the property of the parent.

Reasons of state give rise to various classes of cases where special consent is required before marriage.

In Austria all illegitimate children under age must obtain the sanction of the authorities, while in all the great nations of Europe where conscription prevails the consent of superiors to the marriage of soldiers and officers is obligatory.<sup>80</sup> Belgian officers on active service, or officers of the reserve, in receipt of pensions, up to and of the rank of captain, must prove that they are in receipt of an income of six hundred florins exclusive of their army allowance before their request will be considered.<sup>81</sup> Germany imposes a criminal penalty on all members of the peace establishment (*Friedensstand*) who marry without the requisite official permission, and they are liable to confinement in a fortress for a period not exceeding three months.<sup>82</sup>

The consent to be obtained by members of royal families is most stringent of all. Their personal preferences and desires, during the whole period of their lives, are subordinate to the interests of the State, whose tacit or express approval is necessary before any marriage can be legally solemnized.<sup>83</sup> In this regard, at least, even the lowliest will not envy the mighty of the earth.

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<sup>78</sup> British Report on Foreign Marriages, 1894, part II, p. 137.

<sup>79</sup> U. S. Report on Marriage and Divorce, 1909, part I, p. 382.

<sup>80</sup> British Report on Foreign Marriages, 1894, part II, p. 15.

<sup>81</sup> *Ibid.*, 26.

<sup>82</sup> IMPERIAL MILITARY PENAL CODE, June 20, 1872, § 150.

<sup>83</sup> In Great Britain by the Royal Marriage Act (12 GEO. III, c. 11) no descendant of George II (other than the issue of princesses married, or who may marry into foreign families) may contract a valid marriage without the consent of the king or queen, given under the Great Seal, declared in council, and entered in the privy council books. But at the age of twenty-five they may marry without such consent, after twelve months' notice to the privy council, if in the meantime the two houses of Parliament have not disapproved of such marriage.



Democracy is inclining to the other extreme. It is loosening shackles and seems disposed to grant entire freedom of personal choice at too early an age. Marriage in youth produces on a woman the same injurious effects as on an inferior creature — an arrest of growth and an enfeeblement of constitution both of parent and offspring,<sup>84</sup> and when it becomes generally recognized that early marriages are just as harmful to the individual and to the community as child labor, we may hope for the establishment of higher standards of physical and mental maturity. It is the noble mission of medical science to strengthen and preserve the weak; that of the legislator to stay the evil at its source, and to say that, in so far as law can effect it, future generations shall be of sound mind and body, imbued with all the qualities which make for national greatness.

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<sup>84</sup> SPENCER, PRINCIPLES OF BIOLOGY, § 365.

## SURETYSHIP AT "LAW MERCHANT"

DOES the "law merchant" include any of the doctrines of suretyship, and can any incident of suretyship attach to a negotiable instrument?

In its report to the Conference of Commissioners on Uniform State Laws at the Washington meeting in 1914, the Committee on Uniformity of Judicial Decisions in Cases Arising Under Uniform Laws discusses at some length the failure of courts to make uniform application of the provisions of the Uniform Negotiable Instruments Act.<sup>1</sup> It finds that this failure has been due principally to lack of knowledge of the "law merchant," quotes from a number of decisions giving judicial sanction to the purpose of the uniform statute, and summarizes:

"With all due respect to the learning of the lawyers and the judges of our country candor calls upon us, in the performance of the duty of writing this report, to call attention to the evidence furnished by these decisions of cases under the Uniform Negotiable Instruments Law, that many of the counsel therein and many of the judges in their opinions are more imbued with the spirit of the common law than with the spirit of the 'Law Merchant.' The word 'surety' is not to be found even once in the uniform statute under consideration, yet counsel, in their briefs and arguments, as well as judges in their opinions, speak constantly of certain parties to the cases as being sureties. It is a common law term, unknown to the 'Law Merchant.' This carrying over into the field of the 'Law Merchant' the use of terms of the common law shows that the lawyers and judges have not learned to think in terms of the 'Law Merchant' when dealing with questions under the 'Law Merchant,' but think and therefore reason as if they were still dealing with questions under the common law. It is this obliteration or ignoring of the distinction between two different systems that leads the judges in many of these cases, including some above cited, to speak of 'the common law of negotiable instruments,' meaning the 'Law Merchant.' We do not speak of the common law of equity, nor of the common law of admiralty. The 'Law Merchant,' like equity, is not a part of the common law; it is a

<sup>1</sup> 1 AM. BAR ASS'N. J. 24-49.



separate system of law. As Bigelow says in 'The Law of Bills, Notes and Cheques' p. 5:

"The mischief lies in the mistaken notion implied, that the "Law Merchant" is a sort of poor relation of the common law, subject to it wherever its own language is not plain. Such instances, in other words, overlook the fact that the "Law Merchant" is an independent parallel system of law, like equity or admiralty. The "Law Merchant" is not even a modification of the common law; it occupies a field over which the common law does not and never did extend."

". . . These are but stray samples of the evidence furnished by an examination of early statutes and early cases on bills and notes in the states of our union, that show an ignorance of the principles of the 'Law Merchant' out of which some have not yet entirely emerged. To secure uniformity in decisions under the Uniform Negotiable Instruments Act there must be more intimate knowledge of the 'Law Merchant.'"<sup>2</sup>

The foregoing views the conference, approving the report, made its own. This insistence upon a uniformity which shall confine itself strictly to the language of the Uniform Act, and which by its operation will eliminate suretyship from the "law merchant" as expressed in the uniform statute, obtains some additional emphasis from the address of President Charles Thaddeus Terry of the conference at its 1915 meeting,<sup>3</sup> and from a prize essay by Mr. Jacob Sicherman of the Buffalo Law School, reprinted by request of the conference in a recent issue of the *American Bar Association Journal*.<sup>4</sup> Such insistence seems to proceed upon the triple hypothesis that suretyship was unknown to the "law merchant," that the Uniform Act, codifying the "law merchant," likewise excludes it, and that whether it be found in the "law merchant" or not, the Uniform Act excludes and abrogates it by failing to include it. To consider, with due respect to the conference and to the eminent text-writer its committee quotes, what soundness these views possess, is the object of this discussion.

Upon these views the first and most obvious commentary is suggested by the reference to the "law merchant" as in all respects separate from and unmodified by the common law. That the custom of merchants, within its limited field, was at one time independ-

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<sup>2</sup> 1 AM. BAR ASS'N. J. 41-43.

<sup>3</sup> 40 REPORTS OF THE AMERICAN BAR ASSOCIATION, 919-48.

<sup>4</sup> "Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation," 2 AM. BAR ASS'N. J. 60-79.

ent of, or even to some extent coördinate with the common law may or may not be true. It is distinct from the latter at least to this extent, that the custom of merchants, devised by the cosmopolitan traders of the Middle Ages, was in both inception and growth less local in scope than the common law, and has always been administered, for the sake of that uniformity in commercial transactions at which the Uniform Act itself aims, generally and not locally. But to say that it ever did or now does constitute a separate system corresponding to admiralty or equity is to go farther than even Chancellor Kent <sup>5</sup> and others who have viewed the "law merchant" as lying outside the common law have ever gone. Such statement, if made in earnest, rests upon a misconception of the principles of the "law merchant" fully as profound as that of the courts to whose "ignorance" and lack of uniformity the conference cites us. On the contrary, the "law merchant," long before the first suggestion of a Uniform Negotiable Instruments Act, had been incorporated into and become part of the great body of common-law rights and remedies. Even Blackstone so defines it:

"The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.

"To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants, or *lex mercatoria*: which, however different from the general rules of the common law, is yet engrafted into it, and made a part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions; for it is a maxim of law, that '*cuiuslibet in sua arte credendum est.*'" <sup>6</sup>

In another portion of his work there appears a discussion of negotiable instruments and of the "rules of common law" in connection therewith<sup>7</sup>, an error on Blackstone's part almost as deplorable as that of the courts who have been criticised for discussing the "common law of negotiable instruments." No more than any other law of custom has the "law merchant" ever arisen to the dignity of procedure, process, or tribunal of its own; and, in the present state of the law at least, a court of law merchant would be an anomaly as great as a "common law of equity" or a "common law of admiralty."<sup>8</sup> In short, it is inaccurate to say that the cus-

<sup>5</sup> 3 KENT, COMM. 2.

<sup>6</sup> 1 BL., COMM. 74-75.

<sup>7</sup> 2 *Id.*, 467-70.

<sup>8</sup> See the quotation from the conference report, *ante*.



tom of merchants, however controlling in commercial transactions, is a separate system of law, or that the common law does not extend to it, exactly as it would be inaccurate to say of any other set of customs, become law through long observation and usage, that it is separate from or unmodified by the legal system into which it has been incorporated and of which it has become a part.

There is nothing, then, in the relation of the "law merchant" to the other parts of our legal system, to deny suretyship a place in it. A more fatal flaw in the objection to such suretyship, however, is the fact that the effect of the Uniform Negotiable Instruments Act has not been to remove suretyship from the law of negotiable instruments, nor even to correct an erroneous judicial impression, based upon "ignorance of the principles of the law merchant," that suretyship ever had a place in such law. In this connection it is unnecessary to examine the decisions holding that certain parties to negotiable instruments are "sureties"<sup>9</sup> or "in effect sureties,"<sup>10</sup> or the cases equally numerous holding that certain parties may be proved sureties by evidence *aliunde*, even if the instrument itself does not indicate such relation.<sup>11</sup> Nor is it necessary to trace any adoption or transference of the relation from one "legal system" into another. The courts' use of the term in connection with commercial paper being admitted, the question is whether or not such use has any basis in logic. To examine contracts of suretyship and negotiable instruments and, testing them by their resemblances, determine as nearly as possible on first principles whether or not any incidents of the one might in the natural course of things be expected to attach to the other, is the more rational method of approaching this question.

To do this, we need a major premise. What is a contract of surety-

<sup>9</sup> For example: *Deering v. Lord Winchelsea*, 2 B. & P. 270 (1800); *Good v. Martin*, 95 U. S. 90 (1877); *Guild v. Butler*, 127 Mass. 386 (1879); *Flour City Nat. Bank v. McKay*, 86 Hun 15, 33 N. Y. Supp. 365 (1895); *Morehead v. Bank*, 130 Ky. 414, 419, 113 S. W. 501, 23 L. R. A. (N. S.) 141 (1908).

<sup>10</sup> *Lock Haven State Bank v. Smith*, 85 Hun 200, 32 N. Y. Supp. 999 (1895); *Byers v. Coal Co.*, 106 Mass. 131 (1870); *Gunnis v. Weigley*, 114 Pa. St. 191, 6 Atl. 465 (1886).

<sup>11</sup> *Denton v. Peters*, L. R. 5 Q. B. 475 (1870); *Good v. Martin*, *supra*; *Patch v. Washburn*, 16 Gray (Mass.) 82 (1860); *Pursifull v. Banking Co.*, 97 Ky. 154, 30 S. W. 203 (1895); *Oriental Financial Corporation v. Overend*, L. R. 7 Ch. 142 (1876), *aff'd* L. R. 7 H. L. 348 (1874); *Bailey v. Edwards*, 4 B. & S. 761 (1864); *Coulter v. Richmond*, 59 N. Y. 478 (1875).

ship, and what are its primary characteristics? The answer appears, roughly stated, in the Statute of Frauds: ". . . a promise to answer for the debt, default, or miscarriage of another," though this definition is perhaps too general, as including also guaranty. Lord Selborne, after classifying by itself technical suretyship — *i.e.*, the agreement to constitute for a particular purpose the designated relation of principal and surety — defines suretyship in the general sense as the relation which arises where, without any such technical contract of suretyship, there is a primary and secondary liability of two persons for the same debt, the debt being, as between the two, that of one only and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.<sup>12</sup> In other words, a surety is a party who will have to pay or perform if the party who really ought to pay or perform fails to do so, yet whose obligation so to perform is as to the obligee immediate and primary, not dependent upon any exhaustion of remedy against the principal debtor.

Obligations similar to this one, it needs no searching examination to see, are imposed by certain contracts very frequently made with reference to commercial paper. Such is the obligation of the "anomalous" or "irregular" indorser — the signer not otherwise a party, who puts his name on the back of the instrument before delivery. Such also is that of the "accommodation" party, who signs as maker, acceptor, drawer, or indorser, not as a recipient of value, but merely to lend credit to and for the "accommodation" of the party to whom the consideration actually runs. Obviously the undertaking of both the anomalous and the accommodation party is to pay the instrument if the party actually responsible does not, this obligation being as to the holder absolute, in that the latter is not required first to exhaust his remedy against the party actually responsible, yet as between the credit-lender and the actual recipient of value strictly the latter's obligation. Even the ordinary indorser's contract has in it something of this element, and like that of the accommodation or anomalous party suggests to the mind, by

<sup>12</sup> *Duncan, Fox & Co. v. North & South Wales Bank*, 6 App. Cas. 1, 11 (1880). De Colyar adopts this definition of suretyship (or "guarantees") generally. *LAW OF GUARANTEES AND OF PRINCIPAL AND SURETY*, 3 ed., 65-161; 12 *ENCY. BRIT.*, 11 ed., 652. Mr. Chief Justice Cooley, in *Smith v. Shelden*, 35 Mich. 42, 47 (1876), uses almost identical language.



its very nature, the notion of suretyship. As the Supreme Court of Georgia has remarked, there is an element of suretyship in every unqualified indorsement of a negotiable instrument.<sup>13</sup> In view, however, of the holding of Judge Collin, that the indorsement in due course is an independent contract, entered into not to secure the payee but to obtain a transfer of the instrument, and to which no "secondary" liability such as that of a surety can attach,<sup>14</sup> the ordinary indorser's obligations need not concern us here.

These resemblances, as study of decisions shows, are the real basis of judicial application to both the anomalous and the accommodation party's obligations at "law merchant" of the doctrines of suretyship. Thus Mr. Chief Justice Shaw says of the liability of the anomalous indorser:

"He is not liable as indorser, for the note is not negotiated or title to it made through his indorsement, nor as guarantor, because there is no separate or distinct consideration; but he means to give security and validity to the note by his credit and promise to pay it if the promisor does not, and that upon the original consideration, and therefore he is a promisor and surety. . . . This is the legal import and effect of such a note, independent of any extrinsic evidence."<sup>15</sup>

By a similar process of reasoning Mr. Chief Justice Gray, in the conspicuous case of *Guild v. Butler*,<sup>16</sup> views the liability of an accommodation party as that of a surety; while in *Duncan, Fox & Co. v. North & South Wales Bank*,<sup>17</sup> the capsheaf of a shock of decisions on the subject, Lord Selborne applies directly to accommodation parties his definition of suretyship, and holds that the resemblance between the relationships justifies giving to accommodation parties the equities of sureties, in so far as those equities do not interfere with the necessities of commercial intercourse.

This recognition of fundamental resemblance the courts have consistently followed up by imposing upon accommodation parties liabilities, and granting them rights, similar to those of sureties. For example, the accommodation party like the surety having agreed to pay the debt, like the surety he is absolutely and "prima-

<sup>13</sup> *Tanner v. Gude*, 100 Ga. 157, 27 S. E. 938 (1896).

<sup>14</sup> *Blanchard v. Blanchard*, 201 N. Y. 134, 94 N. E. 630 (1911).

<sup>15</sup> *Chaffee v. Jones*, 19 Pick. (Mass.) 260, 263 (1837).

<sup>16</sup> 127 Mass. 386 (1879).

<sup>17</sup> 6 App. Cas. 1 (1880).

rily" liable to the payee or holder in due course, even though as between him and the party accommodated he may be only "secondarily" liable. Hence the holder is not required first to exhaust remedies against the accommodated party, but may proceed against all signers, whether for value or for accommodation, jointly. Since the latter signs not as a recipient of value but as a lender of credit, like the surety he is entitled to the benefit of the implied contract of indemnity between him and the party to whom his credit is loaned. Finally, since he is in no respect a beneficiary of the contract represented by the instrument, like the surety he is favored in equity, and not only subrogated to any rights acquired by the holder against the beneficiary, but also released by any act of a holder with knowledge of his accommodation character, and especially of a payee where the question arises between the original parties to the instrument, releasing or impairing his remedy against the real maker.

These rules of law require repetition, not because they are not so universally accepted as to be elementary, but to show the extent to which the resemblances between the contract of suretyship and that of the accommodation party hold good. It is in the matter of the equities incident to both contracts that the courts most consistently follow up these resemblances. The rule as to release of the surety is not part of the "common law of suretyship," any more than that as to release of the credit-lender is part of the "common law of negotiable instruments." Both rules, like subrogation and other doctrines governing tripartite relations like these, had their origin in equity, and were not originally part of the common law of either suretyship or negotiable paper. They rest upon the broad equitable principle, sufficiently axiomatic to require no justification here, that one in possession of full knowledge of all facts surrounding a transaction, and of the means of protecting all parties to it, is bound to apply such means to the other parties' protection as well as his own, and by virtue of such application acquires for the others the same rights as he does for himself.

The relation between holder (especially original payee), maker, and accommodation party may therefore be said to have an analogue in that between obligee, principal, and surety. Certainly, on first principles again, the analogy goes far enough, and the situations of the parties are sufficiently similar, to warrant the conclusion that the equities which release or protect the accommodation party



ought to be the same as those which release or protect the surety. Courts have therefore avoided the necessity of creating a new terminology, by placing the limited class within the general class which it most strongly resembles, and referring to the accommodation party as a surety. Indeed, this interchange of terms is probably the only basis for the impression that they have attempted to create a blend of "legal systems," or to ingraft upon the law of negotiable instruments all the legal theories of suretyship. That impression, while perhaps natural, is erroneous. To yield to it would be to make the whole law of accommodation paper depend upon questions of terminology.

Moreover, a closer scrutiny of judicial decisions will dissipate it. As we have noted, the enforcement, with respect to accommodation paper, of the equities of suretyship, is justified by the obvious resemblances between the respective situations of the accommodation party and the surety. The effect of denying to the former these equities must then be to make him absolutely liable to a holder with full knowledge of his accommodation character, regardless of the relations between the holder and the party who received value, or of the situation with respect to the last-named party in which the negligent or wrongful act of the holder may have left him. The repugnance to every equitable principle of such absolute and unprotected liability needs no exposition; and courts construing the "law merchant" have not hesitated to apply the equities suggested by the surety's analogous situation, and protect the lender of credit accordingly. Nor, in view of the peculiarities of the latter's contract, can such application be considered as ill-reasoned as the criticism of it would indicate. In fact, it must in all seriousness and with due respect to both critic and criticised be said that these judicial decisions, declaring the equities of concrete facts rather than conclusions from abstract premises, endure examination much better than do most of the strictures laid upon them. As the old-fashioned dominie said of Holy Writ, they "shed great light upon the things which commentators have written about them."

The foregoing conclusions do not overlook the fact that in a proper case at "law merchant" the anomalous or accommodation party may be held otherwise than as a surety, or that the peculiarities of commercial paper may disentitle such party to some of the privileges of suretyship. That the "law merchant" so far recog-

nized the resemblances between the contract of a surety and that of an accommodation party as to adopt from equity for the latter's benefit the same doctrines of which the former might take advantage — this, at least, we are justified in saying. The succeeding question is, What effect has the Uniform Negotiable Instruments Act, now the law of forty-seven American jurisdictions, upon this phase of the credit-lender's liability?

If we accept literally the suggestion that the Uniform Act "codified the 'Law Merchant,'" <sup>18</sup> obviously under the act the accommodation party is as much entitled to the equities of suretyship as ever he was. The fact that courts construing the Act have, rightly or wrongly, withheld some of these equities suggests at the start that there must be some error in, or at least some judicial misunderstanding of, that suggestion.

Section 29 of the Uniform Act defines an accommodation party and his liability as follows:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."<sup>19</sup>

As to irregular indorsements, the Act provides (Section 64):

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules:

"(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"(2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"(3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."<sup>20</sup>

Section 192 defines "primary" and "secondary" liability as follows:

<sup>18</sup> See the quotations embodied in the conference report, 1 AM. BAR ASS'N. J. 26-36.

<sup>19</sup> AMERICAN UNIFORM COMMERCIAL ACTS, p. 145. (The official edition, prepared and recommended by the Conference of Commissioners on Uniform State Laws.)

<sup>20</sup> *Id.*, 152-53.



"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."<sup>21</sup>

And following are the provisions (sections 119 and 120 of the Act) for discharge of negotiable instruments:

"A negotiable instrument is discharged:

"(1) By payment in due course by or in behalf of the principal debtor;

"(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

"(3) By the intentional cancellation thereof by the holder;

"(4) By any other act which will discharge a simple contract for the payment of money;

"(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

"A person secondarily liable on the instrument is discharged:

"(1) By any act which discharges the instrument;

"(2) By the intentional cancellation of his signature by the holder;

"(3) By the discharge of a prior party;

"(4) By a valid tender of payment made by a prior party;

"(5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

"(6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."<sup>22</sup>

The first effect of these provisions, without going into the reasons for it, has been to make the accommodation maker or acceptor liable to pay at maturity without notice of dishonor and protest, or any other formality necessary to charge an indorser in due course;<sup>23</sup> and the accommodation indorser liable in all cases as an indorser "at 'law merchant,'" entitled to the benefit of all these same formalities.<sup>24</sup> In other words, one has become "primarily" and the other "secondarily" liable, in the Uniform Act sense of those terms.

Using this holding as one premise, and the fact that extension of

<sup>21</sup> AMERICAN UNIFORM COMMERCIAL ACTS, p. 183.

<sup>22</sup> *Id.*, 165.

<sup>23</sup> *Hunter v. Harris*, 63 Ore. 505, 127 Pac. 786 (1912); *Lumbermen's Nat. Bank v. Campbell*, 61 Ore. 123, 121 Pac. 427 (1912); *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426 (1907).

<sup>24</sup> *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421 (1907).

time of payment is included in Section 120 of the Act and omitted from Section 119 as the other, many courts have held that an accommodation maker is not released under the Uniform Act, as he was at "law merchant," by an extension of time by the holder to the real maker.<sup>26</sup> Probably the most conspicuous of these cases is *Union Trust Co. v. McGinty*,<sup>26</sup> one of the mainstays of the conference's argument aforesaid,<sup>27</sup> and cited by Mr. Sicherman as the "best expression" of the purpose and effect of the Uniform Act.<sup>28</sup> Mr. Chief Justice Rugg's remark in that case as to the Uniform Act's failure to mention suretyship<sup>29</sup> is likewise the most conspicuous of the similar judicial utterances which have formed the basis of the conference's conclusion that the Act has removed suretyship from the law of negotiable instruments, whether the "law merchant" recognized suretyship or not.

If the Chief Justice's statement were more than *dictum*, unnecessary to the judgment the court reached, perhaps we might concede that he hints at such conclusion. As the facts stand, however, his language has received an interpretation altogether too broad. To say that the effect of the Uniform Act is on the one hand to make every party to a negotiable instrument liable in accordance with its terms, regardless of the equities existing between the parties, and

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<sup>26</sup> *Cowan v. Ramsey*, 15 Ariz. 533, 536, 140 Pac. 501 (1914); *Vanderford v. Bank*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129 (1907); *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426; *Wolstenholme v. Smith*, 34 Utah 300, 97 Pac. 329 (1908); *Bradley Engineering, etc. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910); *National Citizens' Bank v. Toplitz*, 81 N. Y. App. Div. 593, 81 N. Y. Supp. 422; *Richards v. Market Exchange Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99 (1910); *Fritts v. Kirchdorfer*, 136 Ky. 643, 650, 124 S. W. 882 (1910); *Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514 (1912); *Night & Day Bank v. Rosenbaum*, 191 Mo. App. 559, 177 S. W. 693 (1915). Cf. *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50 (1908); *Goldberg & Louis v. Stone*, 10 Ala. App. 485, 65 So. 454 (1914).

<sup>26</sup> 212 Mass. 205, 98 N. E. 679 (1912).

<sup>27</sup> 1 AM. BAR ASS'N. J. 33.

<sup>28</sup> 2 AM. BAR ASS'N. J. 72.

<sup>29</sup> "Approaching the act from this point of view, it is apparent that no relation of principal and surety is established or contemplated by any of its sections. It determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, whether for accommodation or otherwise, is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute." 212 Mass. 207, 98 N. E. 680. The foregoing, with other portions of the opinion, is quoted with approval in *Cowan v. Ramsey*, 15 Ariz. 533, 536, 140 Pac. 501. See also the dissenting opinion of Sturgis, J., in *Long v. Shafer*, 185 Mo. App. 641, 650, 171 S. W. 690, 694 (1914).



on the other to exclude evidence as to what those equities are, is to ignore the essential characteristics not only of suretyship, but also of the credit-lender's contract. It is to confuse the two meanings of those abused terms "primary" and "secondary." In one, the strict "law merchant" sense, primary liability is that of a party not entitled to the formalities necessary to charge an indorser; secondary liability is that of a party so entitled. This special meaning of the terms is of course due to the peculiarities of mercantile custom, a party secondarily liable being in a sense entitled, before he can be held, to have ordinary commercial methods of collection exhausted against parties primarily liable.<sup>30</sup> In another, the equitable sense, primary liability is that of the beneficiary of the contract — in a negotiable instrument contract the party who has received value; secondary liability that of the party who, as between himself and the party primarily liable, is entitled to reimbursement if he be compelled to pay. In other words, primary and secondary liability in the "law merchant" sense depend upon and are part of the contract expressed in the instrument itself; in the equitable sense they arise collaterally out of the accommodated party's implied liability to reimburse his credit lender. So far as the instrument itself is concerned the holder need not regard this collateral matter; it is his knowledge of it, and his disregard of or interference with it notwithstanding knowledge, which bring the accommodation party's equities, like the surety's, into play.

This being true, it is fallacious to base upon the Uniform Act's definition of the liabilities arising out of the signatures to the instrument itself, or upon the Act's mere failure to mention suretyship, a statement that no incident of suretyship can attach to a negotiable instrument. This distinction between the rights defined by the terms of the instrument and the equities which may nevertheless attach is discussed with especial clarity in one or two of the decisions establishing the "law merchant" as to this proposition. We have already referred to *Duncan v. Bank*.<sup>31</sup> An earlier and not less conspicuous case is equally explicit:

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<sup>30</sup> "The terms 'primary' and 'secondary,' when they apply to the parties to an obligation, 'refer to the remedy provided by law for enforcing the obligation, rather than to the character and limits of the obligation itself.' *Kilton v. Prov. Tool Co.*, 22 R. I. 605, 48 Atl. 1039." Ellsworth, J., in *Northern State Bank v. Bellamy*, 19 N. D. 509, 514, 125 N. W. 888 (1910).

<sup>31</sup> 6 App. Cas. 1 (1880).

"In the case of *Hollier v. Eyre*<sup>32</sup> Lord *Cottenham*, in delivering his opinion in the House of Lords, laid down the rule of law relied upon by counsel for the plaintiff in the argument before us, that 'the question whether the plaintiff as between himself and the grantees was a principal in the grant of the annuity, or only a surety for the payment of it by another, must be ascertained by the terms of the instruments themselves: no extraneous evidence,' said he, 'is admissible for that purpose.' In this doctrine we entirely concur; and we think that, if the discharge of the surety could only be effected by establishing that there was a different contract as between the creditor and the alleged surety from that apparent on the written contract, as for instance that the latter would be liable, not primarily but collaterally only, on the default of the principal debtor, we should be satisfied that the defence was not made out. It remains, however, to consider whether, assuming the contract, as between the creditor and the parties contracting with him, to be, as apparent on the face of the written document, a primary and not a collateral liability, an equity does not arise from the relationship of the principal and surety inter se known to the creditor. . . . From those passages it seems to us that the rule, as laid down by Lord *Cottenham* in the House of Lords, may be inferred to be that equities such as that which we are discussing may arise, dehors the written agreement, from the relation of the principal and surety inter se if known to the creditor, and that such knowledge may be proved either from what appears on the face of the written instrument or from evidence aliunde."<sup>33</sup>

Mr. Chief Justice Shaw puts the same proposition as follows:

"The presumption, that two or more promisors of a note are equally responsible for its ultimate payment, so that if one pays the whole he shall have contribution, may be rebutted by showing that one signed for the accommodation and as surety for the other. . . . So, where one of two promisors annexes the word 'principal' to his signature, and the other 'surety,' these descriptions do not affect the terms or legal effect of the contract, they are equally bound to the promisee or indorsee as if such words of description had not been annexed. They indicate the relation in which the parties stand to each other, and notice of such relation to the holder. But the fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption. It goes to show, that the defendant was in fact a surety; and the rights of contribution result accordingly."<sup>34</sup>

<sup>32</sup> 9 Cl. & Fin. 1, 45 (1840).

<sup>33</sup> Coleridge, J., in *Pooley v. Harradine*, 7 El. & Bl. 431, 434 (1857).

<sup>34</sup> *Harris v. Brooks*, 21 Pick. (Mass.) 195, 196 (1838).



So also Mr. Chief Justice Gray:

"The fact that one debtor is a surety for the other is no part of the contract with the creditor, but is a collateral fact showing the relation between the debtors, and, if it does not appear on the face of the instrument, this fact and notice of it to the creditor may be proved by extrinsic evidence. . . . As the right of the surety does not depend upon the contract, but upon the equities arising out of the circumstances of the case, the creditor is affected by knowledge of the true relation of the debtors, acquired at any time before he does the act which alters the position of the surety; and one who makes a promissory note for the accommodation of another is a surety, within the rule. . . . In this Commonwealth, the surety may avail himself of this equity in defence of an action at law against him."<sup>35</sup>

In other words, the discharge of the accommodation party by reason of the holder's disregard of the equities of the credit-lender's suretyship has nothing to do with "secondary" liability in the "law merchant" sense. Viewing the matter from this angle, it is evident that, even if the purpose of the Uniform Act is to secure uniformity in commercial transactions by making the instrument itself express the obligation of each party to it, that purpose has no effect upon the collateral contract of suretyship, or upon the equities arising from the holder's knowledge and disregard of such contract. As far as concerns the discharge of the accommodation maker by extension of time, the Act itself, including such extension among the causes for discharge of a party "secondarily" liable, and omitting it from the corresponding list for the instrument itself, may perhaps reasonably be held by its terms to furnish warrant for the abrogation of that defense<sup>36</sup> — though even that language of the Act may be a result of the aforementioned confusion between the two senses in which the terms "primary" and "second-

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<sup>35</sup> *Guild v. Butler*, 127 Mass. 386, 389 (1879).

<sup>36</sup> But see BRANNAN, *NEG. INST. LAW*, 2 ed., 117, contending that the Act should not be construed as abrogating even this defense. "The discharge of a party who, though primarily liable, is known to the holder to be a surety, by giving time to the principal debtor, seems to be covered by section 119-4. But if this is not so, then, since the discharge of a surety-maker or surety-acceptor by an extension of time granted to the principal by a holder with knowledge of the relation, is neither a discharge of the instrument nor a discharge of a party secondarily liable, this must be regarded as an omitted case, and therefore to be governed by the law merchant under section 196."

ary" are used. But upon this revelation of implied legislative intention, and not upon the Act's failure to mention suretyship, the courts ought to base the accommodation maker's increased liability. It is enough to deprive him of the equity of which the Act itself may be construed as suggesting that legislatures in enacting it intend to deprive him.<sup>37</sup> The other equities of his peculiarly disadvantageous commercial and legal situation ought to remain in the "law merchant," codified or uncoded. The same is true of proof *aliunde* that such equities exist.<sup>38</sup> Farther than this the rule *expressio unius est exclusio alterius*<sup>39</sup> ought not to go.

In the application of this rule to the Uniform Act, moreover, we encounter another misconception, as far-reaching as that regarding "primary" and "secondary" liability. We have noted that the limitation of the defense of extension of time to parties "secondarily" liable may find some warrant in its inclusion in Section 120 alone, indicating that the drafters of the Act had it in mind and would have included it elsewhere had they intended it to apply to any other party's liability. But is there anything to indicate that

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<sup>37</sup> See *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50 (1908), where the court evaded what it considered the harshness of the majority rule by a strict construction of the Act, limiting "holder" as used in the Act to holders for value, and discharging an accommodation maker because of time given the real maker by an original payee. Following this decision, as authority, one branch of the intermediate court of Missouri, in *Long v. Shafer*, 185 Mo. App. 641, 650, 171 S. W. 690 (1914), held the accommodation maker discharged by release of security by an original payee. On account of conflict with a prior decision of another branch of the court (*Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514 (1912)), the case was certified to the Supreme Court of the state, where it is still pending. In a dissenting opinion Sturgis, J., said (185 Mo. App. 658, 171 S. W. 695): "Most, if not all, of the cases cited deal with the question of the release of the accommodation maker because of the holder making an agreement for the extension of time; and the majority opinion has not discussed, nor will I do so, whether or not a discharge by reason of the holder releasing securities held should be placed on a different basis as being a subject not treated of by the negotiable instruments act, and the further question of defendants' equitable rights against the holder, conceding that all parties to this note are makers and primarily and absolutely bound to its payment, because of his surrendering or appropriating to the payment of another note the security held by him from one of the makers of this note. See on this point *Woods v. Finley*, 153 N. C. 497, 69 S. E. 502."

<sup>38</sup> See the opinion of Chase, J., in *Haddock v. Haddock*, 192 N. Y. 499, 85 N. E. 682 (1908).

<sup>39</sup> *Richards v. Bank*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99 (1910); *Vanderford v. Bank*, 105 Md. 164, 66 Atl. 47 (1907); *Cellers v. Meachem*, 49 Ore. 186, 89 Pac. 426 (1907); *Cleveland Nat. Bank v. Bickel*, 159 Pac. 302, 303 (Okla.) (1916).



they had in mind the accommodation party's other equitable defenses, or any of his equitable rights as against the holder, or that these, any more than his rights and remedies as against the accommodated party, of which there is no pretense that the Act deprived him, are impliedly excluded by the failure to include them? Such interpretation we can justify only by assuming that the Uniform Act is an attempted codification of the whole body of the "law merchant," by implication repealing whatever it omits.

It is true that some of the decisions quoted by the conference hint at such assumption.<sup>40</sup> A more logical view, however, Section 196 of the Act itself suggests:

"In any case not provided for in this act the rules of the law merchant shall govern."<sup>41</sup>

On its face this provision is compatible neither with the theory that the Act codifies the entire "law merchant," nor with the assumption that it necessarily sets aside or changes such rules of the "law merchant" as it fails specifically to mention. The common-sense view of it is not that it is an attempt to codify the entire law of commercial paper, or anything more than an effort in the direction of uniformity in commercial transactions, leaving matters not covered by it to the operation of the general "law merchant." Properly speaking, the rule *expressio unius* cannot apply to it at all. Even Mr. Chief Justice Rugg's remark, in discussing the purpose of the Act, that "it does not cover the whole field of negotiable instruments law,"<sup>42</sup> bears out this view.

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<sup>40</sup> *Brophy v. Wilson*, 45 Mont. 489, 124 Pac. 510 (1912); *Wisner v. Bank*, 220 Pa. 21, 68 Atl. 955 (1908); *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086 (1908); *Trustees v. McComb*, 105 Va. 473, 54 S. E. 14 (1906); *Wirt v. Stubblefield*, 17 App. D. C. 283 (1900).

<sup>41</sup> AMERICAN UNIFORM COMMERCIAL ACTS, p. 184.

<sup>42</sup> *Union Trust Co. v. McGinty*, *supra*. This is also the view of the leading critics of the Act. See the quotation from Professor Brannan's work on the Act, *supra*; also his suggestions for amendments to it. 26 HARV. L. REV. 588-600. See also the discussions of the Act by Professor Street, 11 LAW NOTES 105; Professor McGehee, 12 LAW NOTES 122; Professor H. H. McMahon, 80 LAW REPORTER 25; Professor McKeehan, 41 AM. L. REG. (N. S.) 437, 499, 561. The subject receives some attention, also, in the Ames-Brewster debate (14 HARV. L. REV. 241; 10 YALE L. J. 84; 14 HARV. L. REV. 442; 15 HARV. L. REV. 26; 16 HARV. L. REV. 255; BRANNAN, NEG. INST. LAW, 162 *seq.*).

His earlier suggestion in the same opinion, as to the elimination of suretyship, therefore goes too far. So also does the conference report above quoted, for which his suggestion was a precedent. The Uniform Act does not codify suretyship *out of* the "law merchant," any more than it codifies a "law merchant" in which suretyship never belonged. On the contrary, it leaves such rules of suretyship as the "law merchant" has by analogy adopted, still operative in those cases involving commercial paper, to which the analogy applies.<sup>43</sup> As at least one court has suggested, the abrogation of the defense of extension of time may perhaps be justified not only by the terms of the Uniform Act, but also by the fact that such defense has always been at best a technical one, seldom based upon any real injury to the accommodation party.<sup>44</sup> Not so of surrender of security or release of funds or other acts of the holder with knowledge constituting positive neglect or wrong. To abolish the equities of the accommodation party's suretyship, therefore, is to ignore both the fundamental nature of his contract and the purpose of the Uniform Act. Such abolition the rule *expressio unius*, applied to the Act, alone justifies. The same reasoning which regards extension of time as a merely technical defense must condemn that rule, so applied, as also too technical for consonance with the spirit of equity which permeated the "law merchant" and which the Uni-

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<sup>43</sup> Bean, J., in *Hunter v. Harris*, 63 Ore. 505, 513, 127 Pac. 786, 789 (1912), an action between accommodation parties. "In the examination of this question it is worthy of note that a surety on a negotiable instrument is not mentioned in the negotiable instruments law. This law provides that, in any case not provided for in the act, the rules of the law merchant shall govern."

The late Dean Ames, discussing subsections 120-5 and 6 of the Uniform Act, said: "There seems to be no sufficient reason, on the one hand, for inserting these doctrines of suretyship in a negotiable instruments code, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance." 14 HARV. L. REV. 241, 254; BRANNAN, NEG. INST. LAW, 175. He favored the dropping of these subsections, and the adding of a subsection providing for the release of the accommodation party if the holder with knowledge of the accommodation releases or gives time to the accommodated party.

Hon. Amasa D. Eaton, former president of the Conference of Commissioners on Uniform State Laws, addressing the conference in 1907, expressed agreement with the critics who contend with Professor Brannan, that the Act can be so construed as to harmonize with the established rules of suretyship. 31 REPORTS OF THE AMERICAN BAR ASSOCIATION, 1154, 1164. See also the discussion of the Act by Professor Crawford D. Hening, 59 U. OF PA. L. REV. 532, 542.

<sup>44</sup> Mason, J., in *First National Bank v. Livermore*, 90 Kan. 395, 398, 133 Pac. 734, 47 L. R. A. (N. S.) 277 (1913).



form Act, designed to remove minor differences and technical inequalities without changing general rules,<sup>45</sup> ought to strengthen rather than destroy.

*Anan Raymond.*

OMAHA, NEBRASKA.

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<sup>45</sup> Mr. Chief Justice Winslow, in *State Bank v. Michel*, 152 Wis. 88, 139 N. W. 748, 749 (1913). Similar views are expressed in *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451 (1908); *Campbell v. Bank*, 137 Ky. 555, 126 S. W. 114 (1910); and by Mr. Chief Justice Rugg in *Fourth Nat. Bank v. Mead*, 216 Mass. 521, 523, 104 N. E. 377, 52 L. R. A. (N. S.) 226 (1914); and *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 466, 105 N. E. 605, L. R. A. 1915B, 144, 148.

# HARVARD LAW REVIEW

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THE LAW SCHOOL.—The registration in the School on November 15 of each of the last twelve years is shown in the following table:

|                        | 1905-06    | 1906-07    | 1907-08    | 1908-09    | 1909-10    | 1910-11    |
|------------------------|------------|------------|------------|------------|------------|------------|
| Res. Grad. . . . .     | 1          | —          | 2          | —          | —          | 2          |
| Third year . . . .     | 192        | 190        | 171        | 169        | 187        | 178        |
| Second year . . . .    | 216        | 199        | 198        | 207        | 191        | 238        |
| First year . . . . .   | 243        | 243        | 280        | 244        | 311        | 296        |
| Unclassified . . . .   | —          | —          | —          | —          | —          | 82         |
| Specials . . . . .     | 64         | 62         | 63         | 64         | 70         | 3          |
|                        | <u>716</u> | <u>694</u> | <u>714</u> | <u>684</u> | <u>759</u> | <u>799</u> |
|                        | 1911-12    | 1912-13    | 1913-14    | 1914-15    | 1915-16    | 1916-17    |
| Res. Grad. . . . .     | 3          | 6          | 4          | 5          | 8          | 10         |
| Third year . . . . .   | 219        | 176        | 169        | 167        | 177        | 213        |
| Second year . . . . .  | 217        | 186        | 197        | 197        | 226        | 234        |
| First year . . . . .   | 289        | 287        | 260        | 288        | 308        | 335        |
| Unclassified . . . . . | 76         | 84         | 64         | 68         | 66         | 64         |
| Specials . . . . .     | 4          | 5          | 1          | 5          | 1          | 2          |
|                        | <u>808</u> | <u>744</u> | <u>695</u> | <u>730</u> | <u>786</u> | <u>858</u> |

Of the students now registered all but five are college graduates,\* and of those five, three are graduates of other law schools.

There are now in the School representatives from one hundred and

\* Fifteen men who have completed all the work necessary for a degree but who have not actually received their diplomas are reckoned as graduates.



fifty-five colleges and universities, as compared with one hundred and forty-four last year and the same number the previous year.

The following table shows the Geographical source from which the twelve successive first year classes have been drawn:

|      | Massachusetts |            | New England<br>outside of<br>Massachusetts |            | Outside of<br>New England |            | Total in<br>Class |
|------|---------------|------------|--|------------|---------------------------|------------|-------------------|
|      | Number        | Percentage | Number                                     | Percentage | Number                    | Percentage |                   |
| 1908 | 71            | 29         | 39   | 16         | 134                       | 55         | 244               |
| 1909 | 71            | 29         | 34   | 14         | 138                       | 57         | 243               |
| 1910 | 81            | 29         | 37   | 13         | 162                       | 58         | 280               |
| 1911 | 72            | 29         | 33   | 14         | 137                       | 57         | 242               |
| 1912 | 78            | 25         | 45   | 14         | 189                       | 61         | 312               |
| 1913 | 65            | 22         | 32   | 11         | 200                       | 67         | 297               |
| 1914 | 73            | 25         | 44   | 15         | 172                       | 60         | 289               |
| 1915 | 59            | 21         | 34   | 12         | 194                       | 67         | 287               |
| 1916 | 59            | 22         | 23   | 9          | 179                       | 69         | 261               |
| 1917 | 65            | 23         | 29   | 10         | 194                       | 67         | 288               |
| 1918 | 81            | 26         | 39   | 12         | 188                       | 62         | 308               |
| 1919 | 70            | 21         | 26   | 8          | 239                       | 71         | 335               |

In the present first year class one hundred and seven colleges and universities are represented as follows:

Harvard, 78; Yale, 35; Princeton, 20; Dartmouth, Brown, 10; Washington & Jefferson, 7; Cornell Univ., 6; Boston College, Grinnell Coll., Univ. of Michigan, 5; Amherst Coll., Bucknell Univ., Univ. of Illinois, Oberlin, Wabash, Williams, 4; Univ. of California, Univ. of Cincinnati, Clark, Colby, Indiana Univ., Univ. of Minnesota, Univ. of Missouri, Trinity Coll. (Conn.), Univ. of Wisconsin, 3; Bowdoin, Carleton, Univ. of Chicago, Davidson College, Franklin & Marshall, Univ. of Georgia, Georgetown Univ., Holy Cross College, Univ. of Kansas, Lake Forest College, Univ. of Nebraska, Univ. of North Carolina, Northwestern Univ., Univ. of Oregon, Univ. of Pennsylvania, Pomona College, Utah Agricultural College, Wooster Univ., Illinois Coll., Coll. of Charleston, Reed Coll., 2; Univ. of Alabama, Univ. of Arkansas, Beloit Coll., Carroll Coll., Colgate, Colorado, Univ. of Colorado, Columbia Univ., Cornell Coll., Fordham Univ., Franklin, Hamilton, Haverford, Howard, Johns Hopkins Univ., Kenyon Coll., Knox Coll., Lafayette, Leland Stanford Jr. Univ., Lincoln Univ., Miami Univ., Middlebury Coll., Ohio State Univ., Ohio Wesleyan Univ., Oxford Univ. (England), Rutgers Coll., Shurtleff Coll., Univ. of South Carolina, Syracuse Univ., Univ. of Tennessee, Univ. of Texas, Union Coll., Univ. of Utah, Washington & Lee Univ., Western Reserve Univ., West Virginia Univ., Wofford Coll., Washington, Univ. of So. California, Wm. Jewell Coll., Va. Union Univ., Mt. St. Mary's Coll., Univ. of Mississippi, Roanoke Coll., McMaster Univ., Coe Coll., Wake Forest Coll., Randolph-Macon Coll., Univ. of Washington, Carthage Coll., City College (N. Y.), McGill Univ., Mercer Univ., Rice Institute, Hobart Coll., Whitman, Mt. Union Coll., Mt. Allison Univ., Alabama Polytechnic Institute, Lehigh Univ., Collegiate Institute of Havana, 1.

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THE HARVARD LEGAL AID BUREAU. — The increasing difficulties of the administration of justice in a modern city make the work of the

Legal Aid bureaus increasingly necessary and important. In Cambridge this work is handled by the Harvard Legal Aid Bureau, made up of students in the second- and third-year classes of the Law School. The history of this Bureau, running back now more than four years, proves beyond all doubt the willingness and ability of law students to carry on legal aid work. The services of the members of the Bureau are entirely voluntary and the necessary expenses of the work are defrayed by voluntary contributions.

During the year ending in June, 1916, 147 cases were brought before the Bureau, resulting in a total cash recovery for clients of \$1,647.50. Of the ten cases requiring court action that arose or were continued from the year before, five were won, one lost, two dropped, and two are still pending. An interesting sidelight is the fact that of the 147 clients of the Bureau 72 were men and 75 women.

The officers and members of the Bureau for the current year are: George B. Barrett, president; Whitney B. Shepardson, vice-president; Arthur E. Case, secretary-treasurer; Walcott B. Hastings, Marion Rushton, Carl W. Painter, directors; B. D. Bromley, G. G. Chandler, Lawrence Clayton, Joseph France, J. F. Gunster, M. M. Manning, S. Miller, Jr., K. F. Pantzer, Shelton Pitney, A. L. Rabb, Norman Schaff, S. P. Speer, W. B. Tippetts, from the third-year class; O. T. Bradley, R. S. Cowan, W. M. Ellis, E. M. Hay, F. B. Hubachek, Day Kimball, H. Parkman, Jr., W. T. Sanders, Jr., from the second-year class.

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THE CASE OF *THE APPAM*. — The arrival of the steamship *Appam* at Hampton Roads on January 31, 1916, at once raised legal questions of international importance. The *Appam*, two weeks before, had been lawfully taken as prize by a German man-of-war, at a point on the high seas much farther distant from the Virginia Capes than from the nearest German port. She was brought into Hampton Roads by a German prize crew, who asked that the ship be interned until the end of the war, claiming a right to such internment under the treaty with Prussia of 1799. While the Secretary of State was still considering<sup>1</sup> this application for internment, the British owners filed libels in the United States District Court to recover possession of the vessel and cargo. The court decreed the restitution. *The Appam*, 234 Fed. 389 (U. S. Dist. Ct., E. D., Va.).

Whether the *Appam* was entitled to sequestration in an American port was decided by the court upon general principles of international law, since the treaty of 1799 with Prussia<sup>2</sup> had been construed as not applying to such a case as that of the *Appam*.<sup>3</sup> In the past there has

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<sup>1</sup> The Secretary of State to the British Ambassador, April 4, 1916, DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL RIGHTS AND DUTIES, EUROPEAN WAR NO. 3, 341, 342.

<sup>2</sup> 8 STAT. 162, 172.

<sup>3</sup> The Department of State construed the treaty as giving German prizes a right of asylum in American ports only when under convoy of a man-of-war, and only then when *en route* to the place named in the commission of the man-of-war's commander. This construction was reached by an admittedly strict interpretation, justified since



been, unfortunately, no settled international rule upon this question,<sup>4</sup> but in recent years the tendency has been for neutrals to exclude prizes from their ports, except in cases of temporary necessity.<sup>5</sup> Great Britain, because of maritime conditions, has been especially strong in support of this rule.<sup>6</sup> It is not, however, even by the British view, a breach of neutrality for a neutral, if it chooses, to permit prizes to lie in its ports, at least pending their condemnation by a prize court<sup>7</sup> (which may amount in effect to an asylum as long as desired). The law of the United States upon the sequestration of prizes has apparently varied from time to time,<sup>8</sup> until recently. But now, at least, this country has taken the view that no prizes shall come into its ports except for the purpose of satisfying temporary need.<sup>9</sup> This policy, enunciated again in the principal case, must inevitably result in the destruction at sea of vessels that would otherwise be harbored until the close of war;<sup>10</sup> but, unless disturbed by the Supreme Court, its adoption by us seems certain.

The coming of the *Appam* into Hampton Roads for a purpose other than to get supplies or repairs was, then, a breach of the United States'

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the treaty "is in modification of the established rule." The Secretary of State to the German Ambassador, March 2, 1916, DEPARTMENT OF STATE, *supra*, 335.

While the Department of State's construction should, of course, have been conclusive upon the court, nevertheless, Judge Waddill also construed the treaty, reaching the same result though upon a different basis of interpretation. See principal case, at p. 396. For a mild illustration of the confusion which this action of the court is bound to cause, as well as for a strong criticism of the merits of the interpretation, see 16 COL. L. REV. 585.

<sup>4</sup> Cf. WHEATON, ELEMENTS OF INTERNATIONAL LAW, 5 ed., 695 (an English text, published in 1916), with James Brown Scott, "The Right of Prize and Neutral Attitude toward the Admission of Prizes," 10 AM. J. INT. LAW, 104, 107 *et seq.*; HALL, INTERNATIONAL LAW, 6 ed., 614. See 16 COL. L. REV. 585. Mr. Scott thinks the policy for exclusion is stronger in the case of a prize not under convoy, but his reasons are not convincing.

<sup>5</sup> 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 243.

<sup>6</sup> WHEATON, *supra*, 695; 16 COL. L. REV. 585. Cf. James Brown Scott, "The Right of Prize and Neutral Attitude toward the Admission of Prizes," *supra*, 109.

<sup>7</sup> HALL, *supra*, 614.

<sup>8</sup> See 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1302. Cf. with the justification for a strict interpretation of the treaty, note 3, *supra*.

<sup>9</sup> The Secretary of State to the German Ambassador, April 7, 1916, DEPARTMENT OF STATE, *supra*, 342. (The Secretary of State's opinion is on the question of law involved.) But cf. The President's Proclamation concerning the Neutrality of the Panama Canal Zone, November 13, 1914, Rule 4: "Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents."

Art. 23 of the Hague Convention (13) of 1907 allowed sequestration of prizes in a neutral port, pending condemnation by a prize court; but the United States commissioners reported adversely upon this article, and the Senate refused to confirm it. See Charles Cheney Hyde, "The Hague Convention Respecting the Rights and Duties of Neutral Powers in Naval War," 2 AM. J. INT. LAW, 507, 524, 525. The British government declined to accede to Art. 23, "pending the renunciation of the right to sink neutral prizes." HALL, 615, n. 2. This article is not restricted by the preceding articles. 2 OPPENHEIM, INTERNATIONAL LAW, 2 ed., 396, 397.

Germany's rights under the treaty of 1799 of course remained unchanged by Articles 21 and 22 of this convention, which the United States adopted, since the convention was not ratified by both belligerents.

<sup>10</sup> See 16 COL. L. REV. 585, 587. For practical demonstrations that the theories concerning its harmful effects are sound, see Berlin correspondence of the International News Service, BOSTON AMERICAN, October 12, 1916, and cf. the letter of Captain Boy-Ed concerning the activities of the German man-of-war U-53 off Nantucket light-ship, THE BOSTON TRAVELER, October 24, 1916.

neutrality,<sup>11</sup> and it is that breach which is relied upon to give a court of the United States jurisdiction to decree restitution of the prize. It is as settled as any principle of international law can be, that in general a court of the captor's country only can have jurisdiction in a prize case.<sup>12</sup> To this general rule, however, there is an equally well-settled exception, that in certain cases where the prize has been made in breach of the neutrality of the country in whose waters the ship now is, the courts<sup>13</sup> of the injured neutral have a right, and indeed a duty,<sup>14</sup> to compel restitution of the prize to the original owner.<sup>15</sup> The limits of this exception have never been definitely formulated, but there are only two accepted examples under it<sup>16</sup> — one, the capture of a prize in the territorial waters of the neutral,<sup>17</sup> and the other, the capture of a prize by a belligerent man-of-war which has been fitted out in violation of the neutrality of the country whose court now sits.<sup>18</sup> A very eminent authority has limited the exception to the first case, that of capture within the territorial waters

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<sup>11</sup> The Secretary of State expressly denied that the *Appam*'s remaining in port until the filing of the libels constituted a breach of neutrality, since the Department of State reached no decision as to the construction of the treaty until after that time. The Secretary of State to the British Ambassador, April 4, 1916, DEPARTMENT OF STATE, *supra*, 341. Cf. James Brown Scott, "The Case of *The Appam*," 10 AM. J. INT. LAW, 809, 825. It is difficult to reconcile this with the Secretary's prior decision that the *Appam* had no right to remain in Hampton Roads either under treaty or under international law. If the Secretary is correct in considering that there was no violation of neutrality at the time the libels were filed, there was no breach of neutrality at all, for subsequently the ship was held in port by the United States court. In that event there could not have been the slightest basis for the court's assumption of jurisdiction in the case.

<sup>12</sup> UPTON, LAW OF NATIONS AFFECTING COMMERCE DURING WAR, 3 ed., 348; ROBERTS, ADMIRALTY AND PRIZE, 452; WHEATON, 605; 2 HALLECK, INTERNATIONAL LAW, 4 ed., 424.

<sup>13</sup> Theoretically perhaps this restitution should be made by the neutral's administrative department rather than by its courts. See 2 HALLECK, *supra*, 197. Cf. Marshall, C. J., in *Chacon v. Eighty-nine Bales of Cochineal*, 1 Brock. (U. S. C. C.) 478, Fed. Cas. No. 2568; *The Lilla*, 2 Sprague 177. The jurisdiction for restitution by the courts is in the United States vested in the courts of admiralty. Whether it is comprised within the instance side or the prize side of their jurisdiction, is an interesting question. It is submitted that it falls upon the instance side. HENRY, JURISDICTION AND PROCEDURE OF ADMIRALTY COURTS OF THE UNITED STATES, 82.

<sup>14</sup> For restitution upon demand of the owners, and not of the injured state, see HALL, 617, n.

<sup>15</sup> 1 KENT, COMMENTARIES, 12 ed. (Holmes), \*121; 2 WESTLAKE, *supra*, 230, 245; 2 HALLECK, 96, 197; WHEATON, 605, 662; HALL, 616; *L'Invincible*, 1 Wheat. (U. S.) 238. (Cf. with *Moxon v. The Fanny*, 2 Pet. Adm. 309, Fed. Cas. No. 9895, which expresses the contrary doctrine, held at first by our courts.)

<sup>16</sup> 7 MOORE, DIGEST OF INTERNATIONAL LAW, § 1225; HALL, 616; WHEATON, 605, adds a third exception, *i. e.*, the filing of a salvage claim by neutrals, where the prize has been abandoned by her captors. See *M'Donough v. Danney and the Ship Mary Ford*, 3 Dall. (U. S.) 188; *The Adventure*, 8 Cranch (U. S.) 221. In such a case the validity of the capture can be passed upon at most only collaterally, so that to consider it as within the exception to the rule of prize court jurisdiction seems of doubtful propriety.

<sup>17</sup> There are apparently no decided cases upon this point, though it is uniformly cited as an example by the text-writers. The combination of circumstances necessary for it to occur is a most unusual one, and in addition the violation of neutrality is so outrageous that more direct means of securing reparation are naturally taken. See HALL, 616, n. 2.

<sup>18</sup> See *L'Invincible*, *supra*; *La Amistad de Rues*, 5 Wheat. (U. S.) 385.



of a neutral.<sup>19</sup> The principal case extends the jurisdiction to a case never before comprehended within it, and does so, it is submitted, without reason. The court argues that the breach of neutrality in coming into a neutral port "relates back," so that the capture itself becomes in violation of neutrality.<sup>20</sup> The logical difficulties of such a theory are apparent. The capture may not even be the proximate cause of this breach of neutrality which is made to taint it, for an unforeseeable independent force — the near approach of an enemy man-of-war, for example — may well intervene. What the court has in mind, apparently, is this: that for a prize to remain in safety in a neutral port is, under existing maritime conditions, in substance a second capture, since only thus can the original taking be made effective. That, however, is untrue, for the capture might have been made effective, and doubtless would have been if this decision had been foreseen, by sinking the prize (as in subsequent cases it has been<sup>21</sup>). The capture itself was lawfully made, and it is submitted that the exception giving a neutral court jurisdiction to decree restitution of prizes extends only to cases in which the violation of neutrality was a proximate cause of the loss to the original owners.<sup>22</sup> Otherwise the exception to the general rule of jurisdiction can have no justification, since it is based solely upon the neutral's duty to undo the harm the violation of its neutrality has caused.<sup>23</sup> "Relation back," always a fiction, is here an especially uncalled-for one. There are other means<sup>24</sup> of exacting reparation for the breach of neutrality, that would not involve the practical difficulties which the court in the principal case might well have had to face.<sup>25</sup> The extension of jurisdiction which the principal case makes is, then, unwarranted by precedent, unsound in principle, and unwise in policy.<sup>26</sup>

That to decree restitution of the *Appam* adversely affects the interest of a foreign sovereign without its consent may, in the writer's opinion,

<sup>19</sup> 4 CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRACTIQUE, 5 ed., § 2666.

<sup>20</sup> HALL, 614, suggests that bringing a belligerent prize into a neutral port constitutes a continuance of the act of war.

<sup>21</sup> Cf. note 10, *supra*.

<sup>22</sup> Where a privateer has been fitted out in violation of neutrality, the violation gives the court of a neutral country jurisdiction over prizes captured during the first voyage only, and not over prizes made on a subsequent cruise. Story, J., in *The Santissima Trinidad and the St. Andre*, 7 Wheat. (U. S.) 283, 348. See 2 HALLECK, *supra*, 199, n. 2; WHEATON, 662; and cf. *Chacon v. Eighty-nine Bales of Cochineal*, *supra*.

It is possible that in a given case (though not in *The Appam*) the violation of neutrality may proximately cause the loss to the original owners, not of the ship, but of the chance of its recapture. The breach may also benefit the belligerent who is guilty of it, in that the prize is retained instead of sunk. But even in a case where both these conditions are present, the neutral's courts should not take jurisdiction over the prize, under this abnormal and impolitic exception to the rule of jurisdiction over prizes.

<sup>23</sup> HALL, 616, "to undo the wrongful act."

<sup>24</sup> The common method of securing reparation is, of course, by diplomatic representation. If that method had been taken in the principal case, the executive department would almost certainly have declined to restore the *Appam* to her original owners, since the violation of neutrality had had no causal connection with their loss. See The Secretary of State to the British Ambassador, April 4, 1916, DEPARTMENT OF STATE, *supra*.

<sup>25</sup> Such difficulties would have been raised if the *Appam* had been condemned and sold by a German prize court. See note 38, *infra*.

<sup>26</sup> Cf. note 10, *supra*.

be a bar to the exercise of jurisdiction by a court of the United States. The immunity of a ship from libel has been made to depend upon the fact that title is in a foreign sovereign,<sup>27</sup> that possession is,<sup>28</sup> or that both title and possession are.<sup>29</sup> It has sometimes been restricted to vessels used by the foreign sovereign in its public and sovereign capacity.<sup>30</sup> It is submitted that the true test for the immunity is to determine whether, and to what degree, the interest of the foreign sovereign will be adversely affected if the immunity is not given,<sup>31</sup> rather than the technical considerations of possession or of title.<sup>32</sup> The immunity is given as much from reasons of international caution as of comity, and the possibility of strained relations pursuant upon a serious injury to a foreign sovereign should be enough to give a court pause in its exercise of jurisdiction. Especially should this be true in a court of admiralty, whose exercise of jurisdiction in any case is discretionary.<sup>33</sup> And that the foreign sovereign, as claimant, asks this immunity should obviously be strong evidence of its right to it. Nor should the rule be different when the foreign sovereign comes into court as libellant, if it demands the immunity. There is some authority for the proposition that a foreign prize enjoys, because of its nature, the same immunity from suit that a foreign man-of-war has.<sup>34</sup> In the principal case,<sup>35</sup> nevertheless, the court<sup>36</sup> exercised jurisdiction on the narrow ground that, since title had not

<sup>27</sup> *The Schooner Exchange v. M'Fadden*, 7 Cranch (U. S. C. C.) 116.

<sup>28</sup> *The Johnson Lighterage Co. No. 34*, 231 Fed. 365. In that case the United States District Court (D. N. J.) allowed a salvage suit *in rem* against a scow and cargo owned by the Russian government and destined for its public use, but temporarily in the possession of a lighterage company.

<sup>29</sup> *The Attualita* (C. C. A., 4th Circ.) (not yet reported). See note 32, *infra*.

<sup>30</sup> See HENRY, *supra*, 85. But see 17 HARV. L. REV. 270, also 348.

<sup>31</sup> Under this test there might be cases where both title and possession were vested in a foreign sovereign, yet, its interests not being adversely affected to too great a degree, jurisdiction might still be taken.

<sup>32</sup> *The Attualita*, 73 Leg. Int. 608 (Dist. Ct., E. D. Va.). A merchant ship had been requisitioned by the Italian government, but was still managed by its private owners, though subject to government orders. (Many thousands of merchant ships are thus controlled at the present time.) Judge Waddill held that it was immune from attachment, since that would be "an interference with the control and use of the ship by the Italian government." (Cf. HENRY, *supra*, 85, to the effect that a ship chartered to a foreign government is immune during the period of the charter.) The Circuit Court of Appeals reversed this decision (note 29), upon the ground that to grant immunity would create a large class of vessels for whom no one would be responsible. The court overlooks the fact that there remain personal remedies in the courts, as well as diplomatic action.

<sup>33</sup> Cf. *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 224 Fed. 188, discussed in 20 HARV. L. REV. 108.

<sup>34</sup> See 1 HALLECK, 230, 231; 2 OPPENHEIM, *supra*, 242. Cf. The President's Proclamation concerning the Neutrality of the Panama Canal Zone, note 9, *supra*.

<sup>35</sup> It is curious that the claim that the *Appam* had been converted into a man-of-war (in which case she would have been entitled not only to immunity but also to internment) was not pressed. See Memorandum from the German Embassy, DEPARTMENT OF STATE, *supra*, 333, and The Secretary of State to the German Ambassador, March 2, 1916, DEPARTMENT OF STATE, *supra*, 335. The British government itself acknowledged the possibility of the claim. Memorandum from the British Embassy, February 4, 1916, DEPARTMENT OF STATE, *supra*, 332.

<sup>36</sup> It should be observed that two months later, in *The Attualita*, *supra*, note 32, Judge Waddill laid down a different, and, it is submitted, a much sounder, test for the exercise of the jurisdiction.



vested<sup>37</sup> in the German government,<sup>38</sup> there could be no basis for granting the immunity. And this was done, it should be observed, not only over the urgent pleadings in court of the German government, but also despite its strongest diplomatic representations.<sup>39</sup> The German government clearly considered that its interest was seriously affected (which alone might warrant the extension of immunity), and there can be little doubt that in fact it was, not only by losing to England the ship and cargo, but also by the closing of our ports to future prizes and by the political results of the decision.<sup>40</sup> Accordingly, although the decision is in the court's discretion, it would seem that immunity should have been extended to the *Appam*.

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IS DECEPTION A NECESSARY INGREDIENT OF UNFAIR COMPETITION? — The law of unfair competition as distinguished from the law of technical trade-mark is of comparatively modern origin.<sup>1</sup> The fundamental notion underlying this branch of the law has been tersely stated by Lord Halsbury to be that nobody has any right to represent his goods

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<sup>37</sup> Upon the question of whether title to a belligerent prize passes upon capture or upon the subsequent decree of the prize court, there have been much confusion and dispute. See 5 CALVO, *supra*, §§ 3009, 3011 *et seq.*; TAYLOR, INTERNATIONAL PUBLIC LAW, § 554; Moxon v. The Fanny, *supra*. WHEATON, 581, says that in the period between the capture and the prize court's condemnation the legal title is in abeyance, or at least "is legally sequestered." James Brown Scott, "The Right of Prize and Neutral Attitude toward the Admission of Prizes," *supra*, 105, argues that a distinction is to be made between the capture of a belligerent prize (in which case title passes at once) and the capture of a neutral prize (in which case the condemnation of a prize court is needed to pass title), "because if force be a measure of title between belligerents, law determines the relations of belligerent and neutral." In 2 OPPENHEIM, 238 *et seq.*, however, the opinion is expressed that a necessity for condemnation even in the case of a belligerent prize follows from the necessity that exists in the case of a neutral prize. HALL, 613, 614, states that the captor's title is complete at once as between him and the enemy, but that as between him and a neutral, the judgment of a prize court is required. Accordingly the court in the principal case takes a dubious position when it holds that title to the *Appam*, a belligerent prize, did not pass on capture.

<sup>38</sup> A German prize court might have condemned the *Appam*, and even sold her, prior to or pending the exercise of jurisdiction by the United States court. The *Arabella* and the *Madeira*, 2 Gall. (U. S. C. C.) 367, Fed. Cas. No. 569. See HALL, 614; WHEATON, 604; 2 WESTLAKE, 230. WESTLAKE (vol. ii, p. 244) says that this power, though unsound in theory, is in practice perfectly well established. In the principal case it is admitted (p. 403) that a German court might have thus acted, but restitution is nevertheless decreed. When it is remembered that the decree of a prize court is recognized by all the world as conclusive of title, the difficulties of the court's position are obvious.

<sup>39</sup> The German Ambassador to the Secretary of State, February 22, 1916, DEPARTMENT OF STATE, *supra*, 334; Memorandum from the Imperial Government, DEPARTMENT OF STATE, *supra*, 339.

<sup>40</sup> See the references in note 10, *supra*. Cf. William C. Bullitt, "Worse or Better Germany," 8 NEW REPUBLIC 321 (October 28, 1916). A careful examination of these authorities will show that, considered from the point of view outlined above, The *Appam* presents a new and important (though subsidiary) question: how far is the interest of the party in control of the foreign government to be considered as that of the foreign sovereign? In the principal case that interest happens to be identical with the United States' interest. See Herbert B. Swope's articles on Germany, in the NEW YORK WORLD, beginning November 4, 1916.

<sup>1</sup> See HOPKINS, TRADE-MARKS, 2 ed., § 18; ROGERS, GOOD-WILL, TRADE-MARKS AND UNFAIR TRADING, 271-74.

as the goods of somebody else,<sup>2</sup> and this principle has uniformly been the basis of the vast number of decided cases. Of late, however, a sporadic tendency has manifested itself to extend the scope of the doctrine to cases in which the "offending" trader has practiced no deception.<sup>3</sup> It is with the most recent of these decisions that we are at present concerned.

In *Meccano, Ltd. v. Wagner*<sup>3</sup> the plaintiff at considerable expense placed upon the market an ingenious toy consisting of strips of metal of various shapes and sizes, with which it was possible to build in miniature some of the more common mechanical contrivances. The toy was sold in "outfits," seven in all, each "outfit" fitting in with the previous ones purchased and enlarging the possibilities of the toy. The defendant began its manufacture, purposely made his "outfits" of such dimensions as to render them susceptible of use along with the originator's product, and sold at a lower price, resulting in a considerable falling off in the plaintiff's business. In restraining the defendant from making further sales, the court, as in *Prest-O-Lite Co. v. Davis*,<sup>3</sup> proceeded upon the ground that the plaintiff had established a "business system" and the defendant's interference with the same constituted unfair competition. The question of deception was thus made an irrelevant inquiry.

"Business system" in this connection seems on close scrutiny to come to nothing more than this, that the plaintiff by an ingenious method has rendered the probability of future demand for a given article very great. The sale of "outfit" No. 1 is calculated to generate a desire for succeeding "outfits." The plaintiff has sown the seed of demand. Advertising accomplishes the same result, and yet it has never been supposed that the advertiser who creates a popular demand for a new commodity not the subject of patent is entitled to be saved from competition.<sup>4</sup> All that he can insist on is that his competitors sell their product as of their own manufacture.

It is well settled that the manufacturer of an unpatented machine is

<sup>2</sup> *Reddaway v. Banham*, [1896] A. C. 199, 204.

<sup>3</sup> *Meccano, Ltd. v. Wagner*, 234 Fed. 912. By the same court, *Prest-O-Lite Co. v. Davis*, 209 Fed. 917, affirmed in 215 Fed. 349. The facts of the latter case in substance were presented in five other suits. In *Searchlight Gas Co. v. Prest-O-Lite Co.*, 215 Fed. 692, in affirming a judgment for the appellee the court reasoned vaguely about a property right of "service" which the appellee had acquired and with which the appellant had interfered, but relied wholly on the ground of deception, taking the view that the appellant could go on provided he distinguished his product from appellee's. In *Prest-O-Lite Co. v. Bogen*, 209 Fed. 915; *Prest-O-Lite Co. v. Avery Lighting Co.*, 161 Fed. 648; *Prest-O-Lite Co. v. Post & Lester Co.*, 163 Fed. 63, the courts found for the plaintiff on the ground that the defendant was deceiving purchasers, but intimated that the defendant could continue if he distinguished his product. In *Prest-O-Lite Co. v. Auto Acetylene Light Co.*, 191 Fed. 90, the court negatived any passing off, and, though urged, declined to extend the law of unfair competition to a case in which there was no deception.

<sup>4</sup> "... the instrument sold is made as it is, partly, at least, because of a supposed or established desire of the public for instruments in that form. The defendant has the right to get the benefit of that desire even if created by the plaintiff. The only thing it has not the right to steal is the good will attaching to the plaintiff's personality, the benefit of the public's desire to have goods made by the plaintiff." *Holmes, C. J.*, in *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 91, 59 N. E. 667. See also *Keystone Type Foundry v. Portland Pub. Co.*, 186 Fed. 690.



not entitled to a monopoly in the business of supplying repair parts,<sup>5</sup> although in these cases the manufacturer may be said to have established a "business system" within the meaning of the court. In *Globe-Wernicke v. Fred Macey Co.*<sup>6</sup> the court declined to restrain the defendant from making sections which fitted a sectional bookcase exploited by the plaintiff. The Meccano case and its predecessor, *Prest-O-Lite v. Davis*,<sup>3</sup> thus represent a distinct innovation in the law of unfair competition.<sup>7</sup> This court would infuse a new morality into business activities, a more exacting ethical standard, which, we believe, cannot survive in the face of other and weightier considerations with which it necessarily comes in conflict.

Free competition is a part of the creed of every enlightened community. There is but one exception to this, namely, patent and copyright legislation, necessary concessions to the promotion of invention and literary achievement. But unless a commodity is a subject for these exceptional protective laws, the bars are down and competition is not only permissible but highly desirable. The principal case runs violently counter to these notions. It holds in store grave dangers for the consuming public, calculated as it is to create monopolies in articles not the subject of patent; and furthermore monopolies that are perpetual, a privilege not accorded by the patent laws to the greatest of inventions. Should the time arrive when it seems politic to curtail competition in other than patentable products, the very vastness of the step would seem to recommend it as a matter to be dealt with by the legislature rather than by the courts. Meanwhile the prohibition of the law of unfair competition is better confined to cases in which the "offending" trader has resorted to some sort of deception.

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THE FEDERAL TRADE COMMISSION AS SPECIAL MASTER IN ANTI-TRUST SUITS. — Section seven of the Federal Trade Commission Act<sup>1</sup> permits a federal court which has determined upon the dissolution of a combination violating the Sherman Act<sup>2</sup> to refer to the Commission the drawing of the decree directing the scheme of dissolution. This

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<sup>5</sup> *Bender v. Enterprise Mfg. Co.*, 156 Fed. 641; *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.*, 91 Fed. 376; *Magee Furnace Co. v. Le Barron*, 127 Mass. 115; *Neostyle Mfg. Co. v. Ellam's Duplicator Co.*, 21 Reports of Patent, Design and Trade-Mark Cases, 185.

<sup>6</sup> 119 Fed. 696.

<sup>7</sup> These decisions can find no support in such cases as *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, in which the defendant induced a breach of trust; or *Sperry & Hutchinson Co. v. Weber & Co.*, 161 Fed. 219, and *Butterman v. Louisville & Nashville R. Co.*, 207 U. S. 205, where the defendant was bringing about breaches of contract. In *Fonotopia, Ltd. v. Bradley*, 171 Fed. 951, the defendant was restrained from reproducing phonograph records from a record obtained from the plaintiff. This element of using another's product in the production of one's own is not to be found in *Prest-O-Lite v. Davis*, *supra*, and though perhaps present in *Meccano, Ltd. v. Wagner*, *supra*, was not the ground relied on, the decision going squarely on the basis of interference with a selling system. Moreover, *Fonotopia, Ltd. v. Bradley* seems to be nothing more than the reproduction of an unpatented and uncopyrighted article — most imitations profit by the labor and money expended in perfecting the original product. Cf. *Keystone Type Foundry v. Portland Pub. Co.*, 186 Fed. 690.

<sup>1</sup> 38 STAT. AT LARGE, § 7, 722.

<sup>2</sup> 26 STAT. AT LARGE, 209.

section was evoked by the incompetency which the courts have exhibited in handling the problem of dissolution. What is an illegal monopoly under section one of the Sherman Act is a purely judicial question; but how to make it legal under section four is an administrative question, requiring for a judge an unconscionable devotion of time and an impossible application of special knowledge.<sup>3</sup> Conscious of their ineptitude, the judges have not attempted to draw the decrees themselves. Instead they have extended the analogy in ordinary equity practice of letting the successful counsel draw the decree on approval<sup>4</sup> to letting the defendant combination dissolve itself on approval.<sup>5</sup> However effective a comparatively simple decree drawn by the successful counsel may be, it is another thing to ask an illegal combination to cut its own throat. For it has every interest to miss the jugular, particularly when the attendant court is manifestly ignorant of where the jugular of a vast industrial organism is.<sup>6</sup> Nevertheless, almost two years have passed and already two judges<sup>7</sup> have expressly refused to make use of the provision before Judge Learned Hand of the District Court for the Southern District of New York for the first time accepts the opportunity. In *United States v. Corn Products Refining Co.*<sup>8</sup> Judge Hand decreed that the defendant should file a plan for dissolution with the Federal Trade Commission and requested that body to present a final plan for confirmation by the court. A most happy consummation, for the Commission alone, composed of business men "equal to the task of keeping pace with the perverse ingenuity of private concerns"<sup>9</sup> and armed with the power of requiring testimony and documents,<sup>10</sup> combines in itself the eagerness for success that inspires the court and the Department of Justice and the expert knowledge possessed by the defendant itself. Furthermore, the Commission is able under section six to investigate

<sup>3</sup> "How to secure a satisfactory dissolution of a trust is an immensely difficult economic problem, rather than a legal problem." E. D. DURAND, *THE TRUST PROBLEM*, 110. "It is an economic question, not a legal question, and neither the court nor the Department of Justice is equipped to solve it." Alex. G. Barret, "The Federal Trade Commission," 81 CENT. L. J. 166, 170. Referring to the Australian Industries Prevention Act of 1906, "I arrive at the general conclusion that . . . what is more imperatively needed is an independent commission for the administrative supervision and judicial enforcement of the general purposes of the Acts." W. JETHRO BROWN, *THE PREVENTION AND CONTROL OF MONOPOLIES*, 90. And see HARLAN AND McCANDLESS, *THE FEDERAL TRADE COMMISSION*, § 37.

<sup>4</sup> See *Stepp v. National Life, etc. Ass'n*, 37 S. C. 417, 431, 16 S. E. 134, 139, where the objection that the plaintiff's counsel was allowed to draw the decree was held properly overruled. See also *Horn v. Horn*, 234 Ill. 268, 274, 84 N. E. 904, 906; and 1 WHITEHOUSE, *EQUITY PRACTICE*, § 412, p. 654. Also the equity rules in Massachusetts, Maine, Pennsylvania, Rhode Island, and Vermont. Of course, this does not prevent the court from doing it itself. *Rider v. York Haven Water, etc. Co.*, 242 Pa. St. 141, 145, 88 Atl. 903, 904.

<sup>5</sup> See *United States v. International Harvester Co.*, 214 Fed. 987, 1001.

<sup>6</sup> Witness the signal unsuccess of the dissolution of the Standard Oil Co., attempted in *United States v. Standard Oil Co.*, 173 Fed. 177, 197.

<sup>7</sup> Judge Hazel, in *United States v. Eastman Kodak Co.*, 226 Fed. 62, 80, and 230 Fed. 522, 524. And Judge McPherson, in *United States v. Reading Co.*, 226 Fed. 229, 285, who said: "We are unable to see any advantage in turning this matter over to the Commission instead of dealing directly with it ourselves."

<sup>8</sup> 234 Fed. 964, 1018.

<sup>9</sup> W. JETHRO BROWN, *THE PREVENTION AND CONTROL OF MONOPOLIES*, 91.

<sup>10</sup> Federal Trade Commission Act, § 9, 38 STAT. AT LARGE, 722.



and report to the Attorney General the manner in which its decree is being carried out; and either this report may be made public or application may be made to the court through the Attorney General for a supplementary decree.<sup>11</sup>

What is the place of this provision in our legal system? It is not an exotic; it is not drawn from foreign analogies. Rather, as the section itself announces, it is a development of the ancient office of master in chancery. Moreover it would seem that the step from the ordinary master to an expert commission was not too broad for judicial legs, even without legislation. Perhaps at first the chancellor employed a master merely to save his own time for other suitors; no special experience or knowledge which the chancellor did not possess was necessary to ascertain heirs, next of kin, or creditors, to inquire into a title, to settle an accounting, or to conduct a judicial sale. But a reference is not improper merely because the subject may be beyond the court's competence.<sup>12</sup> At the least, what may be asked of counsel may be asked of a master. In fact, there is no limit to the subjects which may be referred to a master.<sup>13</sup> The only restriction is that the court may not surrender its prerogative of final decision. Therefore the complaint of Judge Learned Hand in *Parke-Davis & Co. v. Mulford Co.*,<sup>14</sup> that he had to determine by himself a complicated question of chemistry in a patent suit, seems to be founded only on his own hesitation.

Nevertheless, although the difference between the dissolution of a partnership and the dissolution of a monopoly be one of degree only, the difficulties of the latter are so portentous that more was necessary adequately to meet them than a mere extension of equity practice. For, unlike a simple decree enjoining a single act or forbearance, these decrees of dissolution no more enforce themselves than does the Sherman Law itself. Section seven must be read with section six and the rest of the Act. A modern American monopoly is too much for a master to cope with; a commission with permanent sittings becomes necessary. And only an Act of Congress could create such a commission.

<sup>11</sup> See *Mootry v. Grayson*, 104 Fed. 613, 615; and *Fulton Inv. Co. v. Dorsey*, 220 Fed. 298, 299. Also 1 WHITEHOUSE, EQUITY PRACTICE, § 417. Furthermore, the court often expressly retains jurisdiction to make such further decrees as may become necessary. See *United States v. American Tobacco Co.*, 191 Fed. 371, 431.

<sup>12</sup> Thus, for example, in *Barr v. Lamaster*, 48 Neb. 114, 119, 66 N. W. 1110, 1112, an architect was appointed to be special commissioner to erect a partition wall through a building. See also *Chicago, Milwaukee, etc. Ry. Co. v. Tompkins*, 176 U. S. 167, 180, where the Supreme Court advised that adjustments of railroad rates should be sent to a master.

<sup>13</sup> "And it has been truly said that there was no question at law or in equity which a master may not have to decide, or respecting which he may not be called upon to report his opinion to the court." BENNET, THE MASTER'S OFFICE, 4. The only restriction put upon reference to a master by the Federal Equity Rules, 59, 226 U. S. 649, 666, is that "some exceptional condition requires it."

<sup>14</sup> 189 Fed. 95, 115. "I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without even the rudiments of chemistry to pass upon such questions as these. . . . How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice no one knows." But expense, it is submitted, was the only obstacle to his stretching out his hand for such assistance in the shape of a special master.

THE POWER OF THE STATE TO GRANT LANDS UNDER NAVIGABLE WATERS TO THE ABUTTING UPLAND OWNER. — A recent case in New York, while not raising the point squarely, has discussed the power of the state to grant lands under navigable waters to the abutting upland owners. *People v. Steeplechase Park Co.*, 113 N. E. 521. The statute under which the particular grant in question was made provided that the commissioners of the land office should have power to grant so much of the lands under navigable waters as they should deem proper for the beneficial enjoyment of the same by the adjacent owners.<sup>1</sup> Apparently, then, the legislature considered its power of disposal to be unrestricted. The court did not clearly indicate its opinion.

As the grant in the principal case was made to the abutting owner the question of the state's power to destroy by a grant of the shore whatever rights the littoral owner as such may have was not raised.<sup>2</sup> The discussion was rather concerning the nature of the state's ownership with reference to the public rights, which are, in the main, those of navigation and fishing.<sup>3</sup> Since, then, the statute affects public and not private property, there is no constitutional restriction on the action of the legislature save that found in the grant to the federal government of the power to regulate commerce.<sup>4</sup> Yet if the rule laid down in the great majority of the decisions in this country is adopted, the power of the legislature is restricted to grants for the benefit of navigation and commerce or for some other public purpose.<sup>5</sup> The common expression is that the state holds the title of lands under navigable waters in trust for the public benefit.<sup>6</sup> There is, however, authority for the statement that the power of the legislature is in no way restricted and that it may grant to whomsoever it chooses for whatsoever purpose.<sup>7</sup>

In following the trust doctrine, the courts purport to lay down a rule of property law to the effect that the soil under navigable waters "is not the proper subject of ownership in the sense that it can be sold and disposed of as private property,"<sup>8</sup> and therefore the state, having

<sup>1</sup> N. Y. PUBLIC LAND LAWS § 75, CONSOL. LAWS, ch. 46, art. 6.

<sup>2</sup> For a discussion of this question, see 18 HARV. L. REV. 341. Also *Stevens v. Paterson & Newark R. Co.*, 34 N. J. L. 532.

<sup>3</sup> GOULD, WATERS, 3 ed., ch. 4.

<sup>4</sup> It is well settled that Congress has ultimate and superior jurisdiction over navigable waters that are "avenues of commercial intercourse with other States." 1 WOOD, NUISANCES, 3 ed., § 473.

<sup>5</sup> The leading case is *Illinois Central R. Co. v. Illinois*, 146 U. S. 387. See especially pp. 452-53. *Matter of Long Sault Development Co.*, 212 N. Y. 1, 105 N. E. 849. In *People v. B. & O. R. Co.*, 117 N. Y. 150, 156, 22 N. E. 1026, 1027, Gray, J., said that the only restriction on the power of the legislature in this connection was that it should be used "in the direction of public utility."

<sup>6</sup> See *People v. N. Y. & S. I. F. Co.*, 68 N. Y. 71, 78, where the court said: "The State in the place of the crown holds the title as trustee of a public trust."

<sup>7</sup> *Langdon v. Mayor, etc. of City of New York*, 93 N. Y. 129. The trust doctrine is not applied in Massachusetts. *Commonwealth v. Boston Terminal Co.*, 185 Mass. 281, 70 N. E. 125. See also *Stevens v. Paterson & Newark R. Co.*, 34 N. J. L. 532, 550, *per Beasley, C. J.*: "The principle seems universally conceded that . . . the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute." For a statement of the law in the various states see *Shively v. Bowlby*, 152 U. S. 1, 18, and following; GOULD, WATERS, 3 ed., § 56, and following; and 59 L. R. A. 33, 43, n.

<sup>8</sup> 18 HARV. L. REV. 362. In *Illinois Central R. Co. v. Illinois*, *supra*, the court says



a limited title, can grant no more than it has. If the ownership of the state is not complete, the courts mean either that entire dominion is impossible in the nature of things, or that the ownership though full is divided between the state and the public. But surely there is nothing in the nature of things to prevent the state or a private individual from holding as complete a fee in land under navigable waters as they may in any realty. The second alternative must be their real meaning. Yet merely to establish a rule of property law does not check the legislature, for the latter body may change rules of property subject to constitutional restrictions. Consequently to set a so-called rule of property law in the teeth of legislative act not constitutionally prohibited is to impose on the law-making body a court-made constitutional limitation, protecting public property in a way analogous to that in which private property is protected by the Fourteenth Amendment. That such constitution-making is quite unjustified does not need argument; that it is inexpedient is only the less clear. For it would seem that the administration of the natural highways of commerce is a matter best left in the hands of the legislature, composed of the representatives of the public whose rights are in question. Control of these agents is the proper means of securing the most beneficial disposition, from the public's point of view, of the natural highways of intercourse. Whether one public use should yield to another, or whether private ownership should be restored, are hardly justiciable questions.

The courts even in the jurisdictions supporting the trust doctrine should be slow to find that the legislature has exceeded its powers; for the determination of what is a public purpose is clearly one for the legislative branch of the government on considerations of time, place, and circumstances. The question before the court is identical with that which arises under the Fourteenth Amendment when the legislature is dealing with the power of eminent domain. The courts should act only if it is clear that the legislatures have acted unreasonably.<sup>9</sup>

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**EQUITABLE RELIEF AGAINST INJURIOUS FALSEHOODS.** — A recent case presents in an interesting form the old problem as to the possibility of equitable relief against injurious falsehoods. *Howell v. Bee Publishing Co.*, 158 N. W. 358 (Neb.). At an early stage in the gubernatorial campaign the plaintiff had made public a statement declining to be a candidate for office and giving his reasons. Subsequently, however, he became an active aspirant for the Republican nomination. On the day before the primary election, the defendants, a daily newspaper of wide circulation, published the plaintiff's former declination under the headlines: "HOWELL WILL NOT RUN. HIS ANNOUNCEMENT EXPLAINING WHY HIS FRIENDS SHOULD NOT CAST THEIR VOTES FOR HIM." The Supreme Court reversed and dismissed the order of the District Court granting an interlocutory injunction.<sup>1</sup> The majority opinion is rested squarely on

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in speaking of the title to lands under navigable waters: "But it is a title different in character from that which the State holds in lands intended for sale."

<sup>9</sup> See the dissenting opinion in *Matter of Long Sault Development Co.*, 212 N. Y. 1, 24, 105 N. E. 849, 856.

the constitutional provision guaranteeing "freedom of the press" and specifying that "truth" and "good motives" shall be a defense in all trials for libel.<sup>1</sup>

The publication in the present case appears to have amounted to a deliberate falsehood, without justification. It is, therefore, somewhat difficult to see the bearing of the second clause of this provision, upon which, however, no less than upon the first, the court expressly relies.<sup>2</sup> Even if the clause be taken as a guarantee of trial by jury in all cases analogous to defamation, its application to a case in which exist no issues of fact or inference for a jury would seem unwarrantable. For the rest, no authorities are cited, a rapid survey of the history of governmental censorship apparently leading the court to the conclusion, despite a *dictum* to the contrary, that "freedom of the press" means the absolute and inalienable right to speak, print, and disseminate libels and lies, provided one is willing, subsequently, to pay for the privilege.<sup>3</sup>

In a previous number of this REVIEW Dean Pound has discussed at length the effect upon equity jurisdiction of such guarantees of free speech and trial by jury.<sup>4</sup> He points out that that interpretation of "freedom of the press" which the court here adopts, though advocated by Blackstone<sup>5</sup> and embodied in certain decisions,<sup>6</sup> is, nevertheless, open to severe criticism. It is far too sweeping and conflicts with many well-established decisions.<sup>7</sup> Any narrower interpretation, however, would fail to support the principal case. Here is involved no right of the defendant freely to publish his own ideas and opinions; the right contended for is that of republishing the composition of another, with a single, deliberately false statement of fact — in substance that the plaintiff was no longer a candidate — appended. Moreover, "absolute rights" are a slippery foundation upon which to base a sound opinion; freedom of any sort must inevitably be limited somewhere by the rights of others; and in incorporating in a Bill of Rights, for their better protection, the more cherished common law immunities and privileges, there was no intention of disregarding these necessary limitations.<sup>8</sup> Cooley's interpretation of "free-

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<sup>1</sup> NEB. CONST., Art. I, § 5. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defence."

<sup>2</sup> In his "concurring" opinion, Sedgwick, J., says: "The opinion does not . . . say why the fact that it is a defence in an action for libel to prove that the publication was for good motives and for justifiable ends should prevent a court of equity from interfering."

<sup>3</sup> The syllabus, which by statute in Nebraska is written by the judge who voices the majority opinion, recites that "the publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading, such relief being forbidden by . . . constitutional provisions."

<sup>4</sup> See Dean Pound, "Equitable Relief against Defamation," 29 HARV. L. REV. 640, 648-68.

<sup>5</sup> 4 BL. COMM., 152.

<sup>6</sup> The most important is *Brandreth v. Lance*, 8 Paige (N. Y.) 24.

<sup>7</sup> The position that the constitutional provision prohibits previous restraint in all cases of tortious writing or speaking would preclude relief in many cases where equity, however, will enjoin publications which it conceives are incidental to the attempted infringement of contracts or property rights. See the leading case of *Gee v. Pritchard*, 2 Swanst. 402; and also 4 POMEROY, EQ. JUR., 3 ed., § 1353, and cases there cited.

<sup>8</sup> As Sedgwick, J., in his concurring opinion puts it: "the constitution itself pro-



dom of the press" as freedom from administrative and legislative censorship only,<sup>9</sup> would seem most in accord with history, logic, common sense, and the authorities in general.<sup>10</sup> So construed it would leave unimpaired the general rules of law; and, in the absence of need for trial by jury, equity should be as free to exercise concurrent jurisdiction here as in any other branch of the law of torts. This is the conclusion which Dean Pound reaches on principle;<sup>11</sup> and it is supported by modern English authority.<sup>12</sup>

If it be conceded, then, that reason discloses in a case like the present no fatal obstacle to equitable relief, the further question yet remains: Is there in this specific instance any tort, actual or threatened, upon which to base such concurrent jurisdiction? That the intentional infliction of injury, without justification, invariably constitutes a tort may or may not be settled law. But when the means employed are, as here, fraudulent, that is, in themselves illegal, the law is clear. Provided that the damage inflicted amount to "legal harm," the injured party may recover in tort.<sup>13</sup> What legal harm, if any, then, has the present plaintiff suffered? Two possibilities suggest themselves.<sup>14</sup> The immediate result of the

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vides that those who publish are 'responsible for the abuse of that liberty'; and it is the abuse of the liberty that is enjoined and not the liberty itself." See also the remarks of Brown, J., in *Robertson v. Baldwin*, 165 U. S. 275; quoted in 29 HARV. L. REV. 652, n. 29.

<sup>9</sup> COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 605. He defines "freedom of the press" as "complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character when judged by such standards as the law affords."

<sup>10</sup> See *supra*, n. 7; also *infra*, n. 12.

<sup>11</sup> See 29 HARV. L. REV. 655, 668. Perhaps an added reason may be found in the more than usual difficulty of assessing money damages in the class of cases under discussion.

<sup>12</sup> *Liverpool Ass'n. v. Smith*, 37 Ch. Div. 170; *Collard v. Marshall*, [1892] 1 Ch. 571; *James v. James*, 13 Eq. 421. The American courts, affected no doubt by Puritanism's distrust of equity, have only recently begun to exercise a concurrent jurisdiction over legal injuries through publication; and that indirectly by viewing such injuries as incidental to unlawful intimidation, boycotts, or extortion. For the earlier authorities, see *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, and the cases cited in Dean Pound's article, 29 HARV. L. REV. 661, n. 60. For examples of the modern tendency, see *ibid.*, 29 HARV. L. REV. 655, n. 41; 666, n. 78; and 667, notes 80, 82, and 83.

<sup>13</sup> *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. This case bears an interesting analogy to the principal case in that the defendant newspaper was held liable for publishing a statement that the plaintiff had ceased to carry on business, knowing this to be untrue. *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74. The cases are collected in 1 AMES, CASES ON TORTS, 3 ed., 693 *et seq.*

<sup>14</sup> A third possibility might be added to these because of a certain historical interest. In *Gee v. Pritchard*, 2 Swanst. 402, Lord Eldon held that the writer of purely personal letters, apparently of no literary value, to whom the actual written pages had been returned, had, nevertheless, a sufficient "property right" to enable equity to enjoin the publication of copies which had been retained by the defendant. It might be urged on an attempted analogy with this famous old case that in the present case a property right of the plaintiff's had been violated by the unauthorized publication of his written statement. Such a contention seems untenable because of plaintiff's own prior publication of his statement to the world. However, it is not without interest. It calls attention to the somewhat metaphysical basis upon which the then unrecognized right of privacy was protected in the "parent" case of this entire branch of our law. It also not unnaturally suggests the thought that relatively very little more creative fancy would be required of a twentieth century Lord Eldon to find in the case before us the infringement of some emaciated but "technical" right of property.

defendant's act was the violation of the plaintiff's right to be freely voted on by his fellow citizens. But such a right is primarily political, not civil; it is enjoyed by enfranchised citizens only, not by all men equally. Its infringement, therefore, falls short of the civil "legal harm" now sought for.<sup>15</sup> Moreover, the practical difficulties in the way of any general interference by equity in local primaries support the view taken by the cases, that remedies other than equitable injunction must be looked to for the redress of such a wrong.<sup>16</sup> A loss, however, to constitute "legal harm" need not be of something to which plaintiff was already legally entitled,<sup>17</sup> nor which was even certain, otherwise, to have accrued to him.<sup>18</sup> Why then is not the plaintiff's chance of election to public office, like any salaried business position, a probable pecuniary expectancy,<sup>19</sup> — a right of substance? In analogous tort cases the damage need only be proved with such particularity as the circumstances allow;<sup>20</sup> and reason would suggest that a suit in equity might well be maintained in a case like the present, where grave injury, for which damages would be inadequate redress, was clearly and imminently threatened. The answer may well be that such a contention, however much in accord with the actual facts of politics under a spoils system, is too far removed from the common law notion of the nature of office-holding to be maintainable in a court of law.<sup>21</sup> But even so, such an office of trust and honor might well be considered a social relation of profit and value, quite apart from the salary entailed. If so, it is as worthy of equity's protection as, let us say, the domestic relation, where value, likewise, cannot be computed in terms of dollars and cents.

<sup>15</sup> *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683; *Kearns v. Howley*, 188 Pa. 116, 41 Atl. 273. As to the converse political right to cast one's vote unhindered, its violation would seem, curiously enough, to be recognized as civil legal harm. At least this is true when the violation is intentional and in bad faith and when the plaintiff is wronged as an individual and not merely in common with the general public. *Ashby v. White*, 2 Ld. Raym. 938; *Lincoln v. Hapgood*, 11 Mass. 350; 2 COOLEY, TORTS, 3 ed., 626, 801.

<sup>16</sup> *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, distinguishing the use in such connection of the ordinary injunction in equity from that of the prerogative writs of *mandamus* and *quo warranto*. *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681, in which the court declares that the voters themselves constitute the proper tribunal for the redress of this class of wrongs.

<sup>17</sup> *Rice v. Manley*, 66 N. Y. 82; *Lewis v. Corbin*, 195 Mass. 520, 8 N. E. 248.

<sup>18</sup> In *Chaplin v. Hicks*, [1911] 2 K. B. 786, the court held that the deprivation of one chance in four of winning a beauty contest was legal harm for which actual damages might be estimated and awarded. Note that neither the conjectural nature of plaintiff's probable expectancy nor the fact that it depended wholly upon the act of a third person, intrusted with the final selection, prevented its infringement from amounting to a complete wrong.

<sup>19</sup> This right is one form of what Terry calls the "right to unimpaired pecuniary condition." See TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, §§ 350-358. When the usurper of a public office is dispossessed by *quo warranto* or other suitable proceeding, the money value of the office is recognized and the rightful holder allowed to recover in damages the amount of the emoluments. 2 COOLEY, TORTS, 3 ed., 629, 630.

<sup>20</sup> The leading case is *Ratcliffe v. Evans*, referred to in n. 13, *supra*.

<sup>21</sup> MECHEM, PUBLIC OFFICES, § 241. Speaking of the common law the author says: "An office was regarded as a burden which the appointee was bound in the interest of the community and of good government to bear."



THE STATUS OF STATE MILITIA UNDER THE HAY BILL. — The United States Circuit Court of Appeals for the first circuit, reversing the District Court for the District of Massachusetts,<sup>1</sup> has held in a very recent opinion that a member of the Massachusetts militia who refuses to take the oath prescribed in the Hay Bill<sup>2</sup> is not relieved from federal obligations under the Dick Bill and its amendments.<sup>3</sup> *Sweetser v. Emerson* (not yet reported). The appellee, Emerson, contended that the Hay Bill provided for an organized militia consisting exclusively of a class designated National Guards;<sup>4</sup> that no one could be a member thereof without taking the federal oath;<sup>5</sup> that if he refused to take the oath, he could not be part of the organized militia, and so could not be required to do federal service under the terms of his existing contract.<sup>6</sup> In short, he argued that there was an implied repeal of the parts of the Dick Act requiring militiamen to perform such service without the oath.<sup>7</sup>

The law in general is not in favor of repeals by implication; if two measures are not so utterly inconsistent that they cannot stand together, both are enforced in the absence of an express provision to the contrary.<sup>8</sup> In addition, courts are even stricter when a repeal by implication would mean the relinquishing of a governmental power over any matter of public concern.<sup>9</sup> The construction of the appellee would require such a surrender, and the burden is on him of proving that there is an immediate repeal of the sections of the Dick Bill<sup>10</sup> supposed to conflict with the provisions of the Hay Bill.

The keystone of Emerson's argument is that the classification of the militia is an exclusive one and leaves no organized militia other than the National Guard. He cannot be a member of this force, as he has not taken the required oath, and so he says that he is not a part of the organized militia.<sup>11</sup> That this classification is not intended to be all-embracing is shown by other provisions of the Act. The army of the United States is to consist of certain named bodies, including the National Guard,

<sup>1</sup> *Emerson v. Sweetser*. Opinion given 10 August, 1916.

<sup>2</sup> NATIONAL DEFENSE ACT OF 3 JUNE, 1916.

<sup>3</sup> See 32 STAT. AT LARGE, 776, and 35 STAT. AT LARGE, 400.

<sup>4</sup> See §§ 57, 58.

<sup>5</sup> See §§ 70, 71.

<sup>6</sup> See MASS. ACTS OF 1908, ch. 604, §§ 85, 86.

<sup>7</sup> The Hay Bill contains no express repeal of existing statutes; there is only a general clause, repealing all inconsistent measures. See § 128. Thus any repeal of other acts must be found solely by implication.

<sup>8</sup> See 1 SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 247; SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 97.

<sup>9</sup> See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 11 Pet. (U. S.) 420, 547; *Wheeling, etc. Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 293; *Bird v. U. S.*, 187 U. S. 118, 124. "Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the government of a power which has been confided to it to be used for the general good — or which would enable individuals to embarrass it, in the discharge of the high duties it owes to the community — unless plain and express words indicated that such was the intention of the legislature." Chief Justice Taney, in *Brown v. Duchesne*, 19 How. (U. S.) 183, 195.

<sup>10</sup> The only contention was over the liability of the appellee under his existing contract; it was assumed that no new contracts may be made except under the terms of the Hay Bill. If there was no implied repeal, the appellee admitted his obligation to enter the service of the United States at the time he was called.

<sup>11</sup> See notes 4 and 5, *supra*.

and such other land forces as were authorized at the passage of the statute or might thereafter be authorized.<sup>12</sup> By the Dick Act the Massachusetts militia was one of those land forces authorized by law.<sup>13</sup> By another provision it is enacted that the section should not be construed to prevent any state from maintaining existing organizations if they would conform to such regulations as the President should prescribe.<sup>14</sup> At the passage of the Hay Bill there were no such regulations; so existing organizations would temporarily remain as they were. The Hay Bill further provides that if any state fails to comply with or enforce the requirements of the Act, the National Guard of such state shall receive no aid from the United States.<sup>15</sup> This seems to imply that a state may still have a National Guard that is not organized under the Act; true, it will not be recognized for purposes of federal aid, but it certainly does not follow that the United States will not enforce its rights to service from such body. Thus the Hay Bill assumes that organized militia may exist other than under its terms. Undoubtedly the ultimate aim of the policy expressed in the Hay Bill is the establishment of a standardized National Guard, and at the expiration of existing contracts, binding members to other forms of service, this object will be attained. But in the interim, the bill offers members of militia organizations the choice of becoming a part of the new body or of retaining their status under outstanding contracts, subject to all the obligations thereof.<sup>16</sup> Emerson, accordingly, was subject to federal service under his enlistment, signed in accordance with the terms of the Dick Act.<sup>17</sup>

Though not involved in the present decision the question arises as to the scope of authority over the National Guard conferred on the United States by the Hay Bill.<sup>18</sup> By the federal Constitution the power of Congress over the state militia is limited specifically to three purposes,<sup>19</sup>

<sup>12</sup> See § 1.

<sup>13</sup> See 32 STAT. AT LARGE, 775.

<sup>14</sup> See § 62.

<sup>15</sup> See § 116.

<sup>16</sup> It is clear that congressional debates may not be used as a means of construing a statute, though they may be resorted to as a means of ascertaining legislative environment at the time of enactment of a particular law. See *Standard Oil Co. v. U. S.*, 221 U. S. 1, 50. Reports of congressional committees are to be given but little more respect in interpretation. See *St. Louis, etc. R. Co. v. Craft*, 237 U. S. 648, 661. There is small aid to be obtained from the Congressional Record in the construction of the Hay Bill. The debates are full of contradictions. See 53 CONG. RECORD 5294; 53 CONG. RECORD 5299. We have, accordingly, confined ourselves to the actual statute, and have found it sufficient to support the court's opinion.

<sup>17</sup> Section 61 of the Hay Bill provides that no state shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under that Act. Militia are not generally considered troops in the sense in which the word is used in the Constitution of the United States. See *Dunne v. People*, 94 Ill. 120, 138; *State v. Wagener*, 74 Minn. 518, 523; *Smith v. Wanser*, 68 N. J. L. 249, 258. There is no reason to believe that the word is used in any different sense in this bill. Accordingly this section would not forbid the continuance in service of men enlisted under the Dick Act.

"The courts have thus far refused to apply the term 'troops' to bodies of men who are armed and who leave their ordinary vocations only temporarily for the purpose of training for short periods as the militia have done in the past, and restrict the application of that term to men who have adopted the military profession more or less as their calling." Statement made by the Judge Advocate General of the United States Army.

<sup>18</sup> See 53 CONG. RECORD 4927.

<sup>19</sup> U. S. CONSTITUTION, Art. I, par. 8, cl. 15 and 16.



yet the Act now under discussion provides that Congress may draft the National Guard into the service of the United States for any object requiring troops in excess of those of the regular army.<sup>20</sup> Escape from constitutional restrictions does not lie in a metamorphosis of the militia, for the National Guard is certainly to be militia.<sup>21</sup> There was no intent to abolish this form of state organization; to avoid such a result was a prime reason for jettisoning the Garrison plan for a volunteer army.<sup>22</sup> Though rendered more amenable to federal control and discipline, the National Guard remains a force enlisted and officered by the states, quartered within the states, and at the service of the states in time of peace.<sup>23</sup> That the federal government will pay the members of the National Guard does not militate against its militia character, for this provision is only to insure the availability of efficient state forces.<sup>24</sup> Moreover, granting that the Guard retains its local nature, it cannot be shorn thereof by a federal draft. Called into the United States Army as militia, it serves as such and is protected by constitutional guarantees. Therefore compatibility with constitutional restrictions must be found in a waiver by the militia of its right to be called on as such to serve the nation for only three specified purposes. It would appear that the states, by enlisting men under the authority of the bill and by accepting federal aid as therein provided, will waive their right to object to the action of Congress under the terms thereof — by action under the Act they have given their assent. As for the individuals, their enlistment oath binds them to serve under the conditions prescribed by law, to defend the United States against all enemies whomsoever, and to obey the orders of the President.<sup>25</sup> This would seem to constitute an express waiver of their constitutional right to object to a draft for other than the constitutionally specified purposes. Congress accomplishes this result by using its constitutional power to organize the militia to abolish the constitutional limitations placed on its use of the militia. A state is given

<sup>20</sup> See §§ 101, 111.

<sup>21</sup> The National Guard is provided for under the title "The Militia." Names are not of great importance in general, but the term "militia" has an important constitutional history behind it, and it is to be presumed that Congress uses it with this historical connotation in mind. "Remember always that the great principle of the Constitution on that subject is that the militia is the militia of the States, and not of the general government, and being thus the militia of the States, there is no part of the Constitution worded with greater care and with a more scrupulous jealousy than that which grants and limits the power of Congress over it." 2 WEBSTER, WORKS, 95.

<sup>22</sup> See 53 CONG. RECORD 4951. It was stated by a member of the Senate Committee on Military Affairs that to adopt the Garrison scheme would be destructive of the National Guard. See 53 CONG. RECORD 4929. Chairman Hay of the House Committee declared that there was no attempt to legislate any organization whatever out of existence. See 53 CONG. RECORD 5299.

<sup>23</sup> See §§ 74, 75, where the qualifications of officers are set out, but no change in the authority from which they take their commission is made.

Sections 69, 70, and 71 make no change in the method of enlistment, though the contract is changed.

Section 68 gives states the right to determine and fix the location of the units of the National Guard within their respective borders.

Section 61 says that the Act does not limit the use of the National Guard by the states during time of peace.

<sup>24</sup> See 53 CONG. RECORD 4951.

<sup>25</sup> See §§ 70, 71.

the choice of having no militia or one unprotected by constitutional guarantees. The net result is that the old sort of militia, known to the Constitution, is to be done away with.

THE PROPOSED MODEL STATUTE ON INSANITY AND CRIMINAL RESPONSIBILITY. — The revolution of the social conception of insanity, together with the recognition that it is a disease rather than a bedevilment,<sup>1</sup> has led to a demand for more humane and scientific methods of dealing with insane offenders. Accordingly, the Institute of Criminal Law and Criminology, at last summer's meeting, approved a model statute intended to define criminal responsibility in its relation to insanity with a view of substituting for the rule of *M'Naghten's Case*<sup>2</sup> a test more in accord with contemporary theories. Section 1, the gist of the proposed statute, provides that "No person hereafter shall be convicted of any criminal charge, when at the time of the act or omission alleged against him, he was suffering from mental disease and did not have by reason of such disease the particular state of mind which must accompany such act or omission in order to constitute the crime charged." The test thus laid down is open to numerous objections. It neglects entirely the important and steadily growing class of crimes in which a specific intent is unnecessary. Under the statute those who have a mania for purchasing lottery tickets, for dispensing liquors to minors, or for frequenting gambling dens and brothels would be unable to plead insanity and would apparently be sent to prison instead of to an insane asylum. Nor would the statute cover statutory rape committed by insane offenders. Inasmuch as the criminal law of the future will be greatly concerned with cases in which a particular state of mind is unimportant, the statute is not comprehensive enough for a model act.

It is difficult to see wherein the proposed legislation would materially change the existing legal situation.<sup>3</sup> The section adequately states the

<sup>1</sup> The supernatural view of insanity persisted as late as 1862. In *State v. Brandon*, 8 Jones (N. C.) 463, the court said: "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one. . . . If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it against all supernatural agencies." In the same year (1862) the Lord Chancellor of England declared in the House of Lords that "the introduction of medical theories into the subject has proceeded on the vicious principle of considering insanity as a disease." HANSARD, DEBATES, 1st series, clxv, 1297.

<sup>2</sup> 10 Cl. & Fin. 200.

<sup>3</sup> At present the states may be divided into three groups. The first is composed of those in which the rule of *M'Naghten's Case* has been adopted as the complete statement of the law. This is true in the federal as well as in the following state courts: Ark., Cal., Del., Id., La., Me., Minn., Miss., Mo., Neb., N. J., Nev., N. Y., N. C., Okla., Ore., S. D., Tenn., Va., Wis., Ga. (but see *Flanagan v. State*, 103 Ga. 619) and Tex. (but see *Harris v. State*, 18 Tex. Cr. App. 287). Wrong is in many cases understood to mean morally wrong. *U. S. v. Guiteau*, 10 Fed. 161; *People v. Schmidt*, 216 N. Y. 324. See 29 HARV. L. REV. 538.

In the second group the effect of insanity on the emotions and will is recognized and the so-called irresistible impulse test is added to the knowledge test. This test was first used by Chief Justice Shaw in *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500, and by Chief Justice Gibson in *Commonwealth v. Mosler*, 4 Barr (Pa.) 266. It has been followed in Conn., Ia., Ky., Mont., and Ohio.

The third group leaves it all to the jury whether, as a matter of fact, responsibility



sound rule that an insane delusion may eliminate knowledge of "the nature and quality of the act" and so prevent the necessary mental element. But an insane delusion of this sort is a species of the genus mistake of fact, and excuses on that ground. What the section fails to cover is the "irresistible impulse" case, the case, that is, where the power of choice is negated by the mental disorder; in more scientific terms, where the ratio between impulse and inhibition is abnormal. This is a material omission. If this is not a true analysis of the meaning of the statute, the fact that it is a reasonably possible analysis makes the proposal unsatisfactory as model legislation.

The statute, according to its authors, will introduce the doctrine of partial responsibility, *i. e.*, the holding of lunatics for part of their crimes. It would seem to lead to the result that the law would establish a barometric scale of states of responsibility divided into as many grades as there are degrees of insanity.<sup>4</sup> As has been pointed out, a "phrenometer," which will penetrate into the human soul and fix the exact degree of mental malady, has not yet been invented. To admit such partial responsibility is to make concessions to a science of the past where partial insanity was recognized. The creation of a class who would be held responsible in part only would lead to faulty results, for when conflicting evidence of alienists is introduced there will be danger of a compromise by the jury, and either a prisoner who is responsible will receive too light a punishment or one who ought to escape altogether will be condemned.

The truth is that for reasons that have been becoming increasingly clear with the development of knowledge about mental things, it is as yet impossible to crystallize any scientifically correct test into a rule of law which shall be comprehensive and precise. But if we consider that cases must be decided, and by juries, some general rule of approximate applicability becomes indispensable. The incompleteness as such a rule of section 1 of the present statute follows from what has been said. Previous rules, though less precise, were more complete. For all previous rules required knowledge of the "nature and quality of the act," thus covering the ground of section 1. The "irresistible impulse" cases supply the element of power of choice. *M'Naghten's Case*, by the moral flavor of its test, gave juries an excuse to hang only the right men. The best solution lies then not in a new rule, but in a new jury. And if a jury of experts is made impossible of proposal by the improbability that

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does or does not exist. The criterion of legal responsibility is the existence of a causal connection between the mental disease and the crime. This test has been adopted in N. H. (*State v. Jones*, 50 N. H. 369), Ala. (*Parsons v. State*, 81 Ala. 577, 2 So. 854), Ill., Ind., Kan., Mich. See OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, 78-80.

<sup>4</sup> This method has been followed in Greece. GREEK PENAL CODE, 1835, Art. 87, provides: "If it clearly and unambiguously appears from all the circumstances, that owing to any of the states of mind specified in the previous article (Art. 86) the intellectual powers are not completely abolished, but nevertheless substantially disturbed and weakened to such an extent that from such cause, the condition for the application of full punishment provided by law to be inflicted is not present, the punishment shall be reduced, the reduction being in proportion to the deviation from the normal standard of responsibility found to exist in each case."

Utah recognizes the doctrine of partial responsibility in *State v. Anselmo*, 148 Pac. 1071.

any legislature could or would adopt it,<sup>6</sup> the next best course is to assure expert and impartial advice to the jury of inexperts. This is what the committee has done in its additional bill relating to expert testimony.<sup>6</sup> One of the chief abuses of the insanity plea has been the partisanship of such testimony. The very essence of scientific testimony should be its disinterestedness, and the statute, by allowing the court to call in its own experts, takes a step in the proper direction. It is, however, to be regretted that the final draft of the statute omits provisions for the establishment of psycho-pathological wards<sup>7</sup> where the accused may be observed pending trial, for only such a provision could lead to a thorough knowledge of the case. It must be remembered that the expert is called on as a rule to testify not to the present mental condition of the accused, but to his mental state at the time of the alleged crime, which is usually several months past.<sup>8</sup> On the whole the administrative features of the statute do not make as radical a change as one might desire, probably for

<sup>6</sup> As to the unconstitutionality of a jury of experts, see THAYER, PRELIMINARY TREATISE ON EVIDENCE, 94, where various cases are collected in which juries of various sorts of experts have been used. Indeed, a jury of experts would be to-day in a very real sense a modern revival of the ancient jury of the vicinage. Neighbors were summoned because they were wise through propinquity; experts are summoned because they are wise through study and education. We are going back to a demand for special knowledge in the jury, reacting from the mischievous search for impartiality in ignorance.

<sup>6</sup> "Sec. 1. *Summoning of Witnesses by Court.* Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the judge does so, he shall notify counsel of the witnesses so called, giving their names and addresses. Upon the trial of the case, the witnesses called by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

Sec. 2. *Written Report by Witnesses.* When the issue of insanity has been raised in a criminal case, each expert witness, who has examined or observed the defendant, may prepare a written report regarding the mental condition of the defendant based upon such examination or observation, and such report may be read by the witness at the trial after being duly sworn. The written report prepared by the witness shall be submitted by him to counsel for either party before being read to the jury, if request for this is made to the court by counsel. If the witness presenting the report was called by the prosecution or defense, he may be cross-examined regarding his report by counsel for the other party. If the witness was called by the court, he may be examined regarding his report by counsel for the prosecution and defense."

<sup>7</sup> An earlier draft of the statute had provided that: "Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before whom the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides."

<sup>8</sup> See Dr. White in 4 J. CRIMINAL LAW AND CRIMINOLOGY, 106.



fear that a stronger statute would never be adopted, or perhaps would be held unconstitutional.

Other sections of the statute provide useful reforms for dealing with persons who are acquitted because of insanity.<sup>9</sup>

## RECENT CASES

**ADMIRALTY — JURISDICTION OF COURT OF A NEUTRAL COUNTRY TO DECREE RESTITUTION OF PRIZE MADE IN BREACH OF THAT COUNTRY'S NEUTRALITY.**

**INTERNATIONAL LAW — RIGHT TO SEQUESTER PRIZES IN NEUTRAL PORTS — IMMUNITY OF SHIP FROM SUIT BECAUSE OF FOREIGN SOVEREIGN'S INTEREST.** — The *Appam*, which had been lawfully taken as prize by a German man-of-war, was brought into Hampton Roads by a prize crew, who asked that the ship be interned until the end of the war, claiming a right of such internment under a treaty. While the Secretary of State was still considering the application for internment, the British owners filed libels in the United States District Court to recover possession of the ship and cargo. The court decreed the restitution. *The Appam*, 234 Fed. 389 (U. S. Dist. Ct., E. D., Va.).

For a discussion of this case, see NOTES, p. 161.

**ADMIRALTY JURISDICTION — POWER OF A STATE COURT TO DECREE THE SALE OF A VESSEL.** — Plaintiffs are the minority owners of a vessel and are dissatisfied with the employment thereof by the majority owners. An accounting, the appointment of a receiver, the sale of the vessel, and a division of the proceeds ratably amongst the part owners are sought by the plaintiffs in a State court. *Held*, that the U. S. district courts have exclusive jurisdiction to give the relief sought. *Fisher v. Carey*, 159 Pac. 577 (Cal.).

The Constitution provides that "The Judicial power [of the United States] shall extend . . . to all Cases of Admiralty and Maritime Jurisdiction." Art. III, § 2. The Judiciary Act gives to the district courts original jurisdiction in all civil admiralty cases, reserving to suitors in all cases the remedies of the common law where it is competent to afford relief. U. S. COMP. STAT. 1913, § 991 (3). Manifestly, this Act was not intended to, and no act of Congress can, detract from the jurisdiction left in the State courts by the Constitution. It is to the Constitution, therefore, that one must go to ascertain whether equitable relief, such as is desired in a suit for partition and sale, may be

<sup>9</sup> "Sec. 2. When in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was mentally diseased at the time when he did the act or made the omission charged, then if the jury before whom such person is tried concludes that he did the act or made the omission charged, but by reason of his mental disease was not responsible according to the preceding section, then the jury shall return a special verdict that the accused did the act or made the omission charged against him but was not at the time legally responsible, by reason of his mental disease.

Sec. 3. When such special verdict is found, the court shall remand the prisoner to the custody of [the proper officer] and shall immediately order an inquisition by [the proper persons] to determine whether the prisoner is at that time suffering from a mental disease so as to be a menace to the public safety. If the members of the inquisition find that such person is mentally diseased as aforesaid, then the judge shall order that such person be committed to the state hospital for the insane, to be confined there until he shall have so far recovered from such mental disease as to be no longer a menace to the public safety. If they find that the prisoner is not suffering from mental disease as aforesaid, then he shall be immediately discharged from custody." The two bills, and the report of the committee recommending them, may be found in 7 J. CRIMINAL LAW AND CRIMINOLOGY, 484.

given in the State courts. Inasmuch as the Constitution confines itself to an affirmative declaration of jurisdiction in the Federal courts over admiralty matters, it is obvious that it makes no distinction between legal and equitable remedies so far as the concurrent jurisdiction of the State courts is concerned. Hence the State courts are deemed competent to exercise their customary jurisdiction whether the relief sought is properly granted by a common law court or a court of chancery. *Knapp, Stout Co. v. McCaffrey*, 177 U. S. 638; *Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414. It is true that the decree of a sale in co-tenancy is a right acquired comparatively recently by equity. 1 FREEMAN, CO-TENANCY AND PARTITION, § 537. But its jurisdiction over proceedings for partition in such cases has long been established. FREEMAN, *supra*, § 423. So it would seem as if the right of sale were simply a new incident to a general jurisdiction long held, and thus not in conflict with admiralty's jurisdiction. It is well settled, on the other hand, that the district courts have exclusive jurisdiction to entertain an action *in rem*. *Steamer Petrel v. Dumont*, 28 Ohio St. 602; BENEDICT, ADMIRALTY, § 313. In the principal case, however, it is not the action, but the enforcement which is *in rem*. Accordingly it is clear that the State court has jurisdiction to grant the relief sought; and so it has been decided in several well-considered cases. *Andrews v. Betts*, 8 Hun (N. Y.) 322; *Swain v. Knapp*, *supra*; *Reynolds v. Nielson*, 116 Wis. 483, 93 N. W. 455. See *Leon v. Galceron*, 11 Wall. (U. S.) 185, 191. This is all the more desirable since the Admiralty courts have steadfastly refused to decree a sale at the instance of a minority owner. *Tunno v. Betsina*, Fed. Cas. 14236; *Lewis v. Kinney*, Fed. Cas. 8325; *The Ocean Belle*, Fed. Cas. 10402. Indeed it has been urged that the Admiralty courts have no jurisdiction to decree a sale under these circumstances; but there seems no substantial ground for such a doctrine. See *Coyne v. Caples*, 8 Fed. 638, 639-40; HUGHES, ADMIRALTY, § 189. But see STORY, PARTNERSHIP, § 439.

ATTORNEY AND CLIENT — DISCHARGE WITHOUT CAUSE — ACTION ON CONTRACT FOR BREACH. — An attorney was employed to procure certain awards, his fee to be a percentage of the recovery. After having made material progress, he was discharged without cause. The client employed another attorney, who procured the awards. The original attorney now sues on the contract. *Held*, that he cannot recover on the contract. *Martin v. Camp*, 41 N. Y. L. J. 241 (Ct. of App.)

The measure of damages for a breach of such a contract was discussed in an earlier issue of the REVIEW, in dealing with the decision of the Appellate Division upon this case. See 28 HARV. L. REV. 101. The lower court had allowed the attorney to recover on the contract. The principal case reverses this decision and holds that the attorney may not recover on the contract, but is limited to a recovery upon a *quantum meruit*. An attorney is bound by the contract both as to his services and the compensation for them. *Houghton v. Clarke*, 80 Cal. 417, 22 Pac. 288. See *Tenney v. Berger*, 93 N. Y. 524, 529. It is a fundamental principle of contracts that both parties must be bound by the agreement. To this rule there is the notable exception of the voidable promise of an infant. *Holt v. Clarencieux*, 2 Strange 937. The principal case would make these contracts also voidable at the option of the client. It is doubtful whether policy demands the extension of such an anomaly. The attorney has no peculiar advantage in the formation of the agreement, for the client, unlike the infant, is presumably competent to contract; the fiduciary relation arises afterward. On the other hand, such a right would enable the client unjustifiably to deprive the attorney entirely of the benefits of the contract, though the services were substantially complete. A client may dissolve his relationship with the attorney at any time and without cause. *In re Dunn*, 205 N. Y. 398, 98 N. E. 944; *Lynch v. Lynch*, 99 Ill. App. 454; *Delaney v. Husband*, 64 N. J. L. 275,



45 Atl 265. This would seem to give him ample protection. It follows that the attorney should be allowed to recover for breach of the contract. The weight of authority is to this effect, and opposed to the principal case. *Barllett v. Odd-Fellows' Sav. Bk.*, 79 Cal. 218, 21 Pac. 743; *Scheinesohn v. Lemonek*, 84 Ohio St. 424, 95 N. E. 913; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060. The scope of this decision, however, is expressly limited to an attorney employed for a single litigation.

**BANKRUPTCY — DISCHARGE — DEBTS NOT AFFECTED: RIGHT OF REIMBURSEMENT OF ONE INDUCED BY FALSE REPRESENTATIONS TO BECOME SURETY.** — One Dunfee by false representations induced a surety company to become surety on his bond. Upon Dunfee's default the company was compelled to pay on the bond. Later Dunfee was discharged in bankruptcy. Section 17, cl. 2, of the National Bankruptcy Act (U. S. COMP. STAT., § 9601) provides that a discharge in bankruptcy shall not release a debtor from "liabilities for obtaining property by false pretenses or false representations." The company sues for reimbursement. *Held*, that it may recover. *In the matter of Dunfee*, 56 N. Y. L. J. 287.

The Bankruptcy Act originally provided that a judgment for any fraud should not be released by a discharge in bankruptcy. Under such a broad provision it is clear that obtaining a loan under false pretenses creates a liability which is not discharged in bankruptcy. *Forsyth v. Vehmeyer*, 177 U. S. 177. This part of the Act was amended to its present form in 1903. The effect of the amendment is to require the obtaining of actual property by fraud, in order to bar the operation of discharge. *Rudstorm v. Sheridan*, 122 Minn. 262, 142 N. W. 313. Obtaining a promissory note by fraud has been held to constitute the statutory crime of obtaining property by false pretenses, even though no payment has been made on the note. See *People v. Reed*, 70 Cal. 529, 11 Pac. 676. The obligation incurred is considered to satisfy the statutory requisite of "property." It has also been intimated that fraudulently inducing another to become a surety may constitute the crime. See *State v. Thatcher*, 35 N. J. L. 445. No reason is apparent why the same facts would not satisfy the requirement of the bankruptcy statute. Where, as in the principal case, payment is made on the obligation, there would seem to be no doubt that "property" is obtained. For the intended and proximate result of the fraud is the payment of money. The Act also requires that property be "obtained." But the crime of fraudulently obtaining property is held to be committed by fraudulently inducing delivery of a chattel to a third person. *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885. There is no reason why this should not govern the principal case. The tendency of the courts, however, has been to give as wide effect as possible to discharges in bankruptcy. See *Hennequin v. Clews*, 111 U. S. 676; *Gleason v. Thaw*, 236 U. S. 558. In view of such policy, it is possible that other courts may reach a different result.

**CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION AND ENFORCEMENT OF CONSTITUTIONS — MEANING OF LEGISLATURE IN THE FEDERAL CONSTITUTION.** — The general assembly of Ohio passed an act rearranging the congressional election districts. Under the referendum provision of the state constitution the law was submitted to popular vote and disapproved. Art. 1, § 4, of the Constitution of the United States provides that "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof." A *mandamus* was brought to order the state election officers to disregard the referendum as void. *Held*, that the referendum may constitutionally be made part of the state legislative power for the purpose of creating congressional districts. *State of Ohio ex rel. Davis v. Hildebrandt*, 36 Sup. Ct. Rep. 708.

The court argued only the constitutional objection that the inclusion of the referendum in the state legislative power for the purpose of creating congress-

sional districts is destructive of a republican form of government. U. S. CONST., Art. 4, § 4. This is a political question not for judicial determination. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118. See 24 HARV. L. REV. 141. Cf. *Kiernan v. City of Portland*, 57 Ore. 454, 112 Pac. 402; *State v. Board of Commissioners*, 93 Kan. 405, 144 Pac. 241. But the question whether the word "legislature" in Art. 1, § 4, of the Constitution means the periodical representative assembly of the state, or the whole constitutional law-making machinery, including, as in this case, the people acting by initiative or referendum, was not discussed. The latter construction has been approved by a decision of the Supreme Court of South Dakota. *State ex rel. Schrader v. Polley*, 26 S. Dak. 5, 127 N. W. 848. See 24 HARV. L. REV. 220. In 1911 Congress impliedly recognized the more inclusive definition by providing that states might redistrict themselves "in the manner provided by the laws thereof." 37 STAT. AT LARGE, 13, ch. 5, COMP. STAT. 1913, § 15. The decision in the principal case assures the constitutionality of this act, and, although it does not in terms discuss the point, necessarily sanctions the definition of the South Dakota case.

CONTRACTS — DEFENSES: IMPOSSIBILITY — FAILURE OF CONSIDERATION — DIMINUTION OF PRICE. — In 1911 a gas company entered into a contract with an urban council whereby the gas company was to install a gas plant, furnish street lamps, and maintain them for five years. The council agreed to pay therefor a fixed annual sum per lamp, payment to be made in four equal quarterly installments. On January 1, 1915, the Defence of the Realm Act prohibited lighting street lamps "until further order." Consequently no gas was consumed between January 1, 1915, and November 1, 1915, when the gas company sued for the first three quarterly installments of 1915. *Held*, the gas company can recover. *Leiston Gas Co. v. Leiston-cum-Sizewell Urban District Council*, [1916] 2 K. B. 428.

Where performance is rendered impossible by domestic law, the promisor is not liable. *Bailey v. De Crespigny*, L. R. 4 Q. B. 180; *Horlock v. Beal*, [1916] 1 A. C. 486; *Cordes v. Miller*, 39 Mich. 581. This defense rests upon the policy of the law in refusing to force a party to do that which it has expressly forbidden. See 18 HARV. L. REV. 384. The principal case goes further, in that it allows the defaulting party to profit by his non-performance. The court, considering the erection of the plant and lighting system, the full performance for a long period, and the indefinite duration of the order, decided that there had not been a substantial failure of consideration. Thus the plaintiff's breach neither created liability, nor did it furnish a defense for defendant's refusal to perform. It would seem equitable in such a case to diminish the contract price, to which the plaintiff is thus entitled, to the extent that he has profited by his non-performance. In the principal case, under this rule, the plaintiff would recover the installments reduced by the expenses which he has saved by his non-performance. He would then recover fully for the services performed and his profit for the whole. This remedy in the nature of a recoupment for unearned enrichment is recognized in France, Germany, and other jurisdictions following the civil law. See WILLISTON, SALES, § 606. Surely the law, having created the loss, should apportion it equitably.

CORPORATIONS — CAPITAL, STOCK, AND DIVIDENDS — NATURE OF OVER-ISSUED STOCK. — The defendant corporation issued stock certificates in excess of its charter limit to a purchaser for value without notice. The purchaser assigned to a third person for value "all claims and demands of every description and kind" against the defendant. Later he assigned the certificates without consideration to the plaintiff. The defendant refused to issue new certificates to the plaintiff. The plaintiff sues. *Held*, that he may not recover. *Smith v. Worcester, etc. Ry. Co.*, 113 N. E. 462 (Mass.).

An issue of stock in excess of the charter limit is void. *New York, etc. R. Co.*



v. *Schuyler*, 34 N. Y. 30; *Scovill v. Thayer*, 105 U. S. 143. An illustration of this is the fact that equity will not compel the corporation to recognize as a shareholder a person acquiring certificates of such stock. 1 COOK, CORPORATIONS, 6 ed., § 284. But the *bonâ fide* purchaser of such certificates may recover damages at law. A stock certificate is a representation by the corporation that the person to whom it is issued is the owner of shares. *In re Bahia, etc. R. Co.*, 3 Q. B. 584. If knowledge of the falsity of the misrepresentation can be brought home to the corporation, all the requisites of an action of deceit are present. See *First Avenue Land Co. v. Parker*, 111 Wis. 1, 9, 86 N. W. 604, 607. Recovery may also be based on estoppel. For a corporation wrongfully refusing to recognize as owner the transferee of a valid certificate may be held liable in an action on the case. See *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69. Some courts also permit the transferee to recover in assumpsit. *Hill v. Pine River Bank*, 45 N. H. 300. A recovery in trover has also been allowed. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476. A purchaser for value of a void certificate, in an action for refusal to issue a new certificate, should have the same three remedies. For against a *bonâ fide* purchaser of a certificate of void stock the corporation is estopped to set up invalidity. *In re Bahia, etc. R. Co.*, *supra*. See *Allen v. South Boston R. Co.*, 150 Mass. 200, 204, 22 N. E. 917, 918. But the plaintiff in the principal case was not a purchaser for value. He therefore acquired only the rights of his assignor. As under any of the theories of recovery set forth the *bonâ fide* purchaser of overissued stock holds only a "claim or demand," the assignor had already assigned his rights and had nothing to give to the plaintiff.

**DANGEROUS PREMISES — LIABILITY OF CONTRACTOR IN POSSESSION TO EMPLOYEE OF OWNER.** — The defendant, a contractor, was in possession of certain premises while erecting a building for the owner. The contract provided that defendant should afford the use of scaffolding to other tradesmen employed by the owner. The plaintiff, a tradesman, fell on the scaffolding and was injured. *Held*, that the plaintiff is entitled to the rights of an invitee. *Elliott v. C. P. Roberts & Co.*, 32 Times L. R. 478.

As a greater duty of care as to the condition of the premises is owed by the landlord to an invitee than to a licensee, the determination of the status of an entrant upon the land becomes a matter of distinct importance. See 28 HARV. L. REV. 329. Now it has been held that the servant of a landowner is merely a licensee in a structure in course of erection on the land by an independent contractor. *Blackstone v. Chelmsford Foundry Co.*, 170 Mass. 321, 49 N. E. 635. For according to the general rule, the acquisition of the status of invitee is dependent on the fact that the entry on the land was at the express or implied invitation of the occupier and to his business interest. See *Indemaur v. Dames*, L. R. 1 C. P. 274, 288. In the principal case, however, the use of the premises by the servants of the landlord was one of the considerations of the contract. Now it is true that the plaintiff can have no direct right under a contract to which he is not a party. *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Roddy v. Missouri Pacific R. Co.*, 104 Mo. 234, 15 S. W. 1112. But the contract in establishing the business interest of the contractor in the use of the premises by the plaintiff does determine the plaintiff's status. For such interest need not necessarily be direct. *Watkins v. Great Western Ry. Co.*, 46 L. J. C. P. 817. *Low v. Grand Trunk Ry. Co.*, 72 Me. 313. The same result has been reached where the premises were jointly occupied by a contractor and the plaintiff's employer. *Gile v. Bishop Co.*, 184 Mass. 413, 68 N. E. 837. Instead of basing the right of recovery on these technical relationships, it might have been better to adopt a single broad rule of reasonable care, such as that once stated in a well-known English opinion. See *Heaven v. Pender*, 11 Q. B. D. 503, 509. But the courts have not followed this suggestion. There is a

tendency, however, in some American decisions to extend the limits of the invitee relationship. *Atlanta Cotton Seed Oil Co. v. Coffey*, 80 Ga. 145, 4 S. E. 759; *Illinois Central R. Co. v. Hopkins*, 200 Ill. 122, 65 N. E. 656.

**DEEDS — CONSTRUCTION — LIFE ESTATE RAISED BY IMPLICATION.** — A settlor by deed assigned the residue of a long term for years to trustees, to the use of A. and B., husband and wife, "for and during the term of their lives as tenants in common"; and "after the decease of the survivor" to the use of their children. A. died leaving children. *Held*, that B. was entitled during the remainder of her life to the whole of the net income from the property. *In re Stanley's Settlement*, 51 L. J. 206 (Ch. D.).

The court here raised a life-estate in the survivor by implication to fill the unintentional gap in the limitations. Such cross-limitations to the survivor have often been implied in the case of wills. *Ashley v. Ashley*, 6 Sim. 358; *Draycott v. Wood*, 8 L. T. (N. S.) 304. See *In re Hudson*, 20 Ch. D. 406, 415. But as to deeds, the authorities have declared that no estate or trust can arise by implication. See NORTON, DEEDS, 377; FEARNE, CONTINGENT REMAINDERS, 9 ed., 49. As regards legal estates, the cases bear them out. *Cole v. Livingston*, 1 Vent. 224; *Doe v. Dorvell*, 5 T. R. 518. See 1 JARMAN, WILLS, 6 ed., 660. In equity, however, there have been some decisions in which estates have been implied as in the principal case. *Tunstall v. Trappes*, 3 Sim. 286; *Allin v. Crawshaw*, 9 Hare 382; *In re Akeroyd's Settlement*, [1893] 3 Ch. 363. But see *Mara v. Browne*, [1895] 2 Ch. 69, 81. It is difficult to see what justification there can be in these distinctions between wills and deeds, and between law and equity. If in a deed the intent of a settlor is clear beyond a reasonable doubt, a life interest in the survivor should certainly be implied. For, after all, the ultimate aim of the judicial construction of deeds, as of wills, is to carry out the intention of the parties. *Temple's Adm'r. v. Wright*, 94 Va. 338, 26 S. E. 844. See *Ballard v. Louisville & N. R. Co.*, 9 Ky. L. R. 523, 524, 5 S. W. 484, 485; *Walton v. Drumtra*, 152 Mo. 489, 497, 54 S. W. 233, 235; DEVLIN, DEEDS, 3 ed., § 844 a.

**EMINENT DOMAIN — COMPENSATION — COMPENSATION FOR LOSS OF PROFITS CAUSED BY GRADING STREET.** — A garage company held a lease of certain premises from year to year. Street grading done by the city cut off access to the garage for four months, causing a loss of profits to the company during that time. No evidence tended to show the leasehold less valuable after the grading than before. Act XVI, § 8, of the Constitution of Pennsylvania provides that just compensation be made for property "taken, injured or destroyed" by municipal corporations in the construction of highways. The company seeks to recover damages from the city. *Held*, that it may not recover. *Iron City Automobile Co. v. City of Pittsburg*, 98 Atl. 679 (Pa.).

Injury caused an abutting owner by the regrading of a city's streets is not a "taking" under the ordinary constitutional provision against taking private property for public use without just compensation. Therefore, if the grading is done under authority of law and with due care, in the absence of statute the owner is entitled to no compensation. *Callender v. Marsh*, 1 Pick. (Mass.) 417, 430; *Radcliff's Executors v. Mayor, etc. of Brooklyn*, 4 N. Y. 195, 203. See LEWIS, EMINENT DOMAIN, 3 ed., § 133. But under constitutional provisions, such as in the principal case, municipalities must make compensation for injuries caused abutting property. *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *Sheehy v. Kansas City Cable Ry. Co.*, 94 Mo. 574, 7 S. W. 579. See *City of Atlanta v. Green*, 67 Ga. 386; LEWIS, EMINENT DOMAIN, 3 ed., §§ 346, 348. The cases, however, are in hopeless conflict as to what elements determine the amount of the owner's damage. SEDGWICK, DAMAGES, 9 ed., § 1170. In general, where a leasehold is damaged, the measure of damages is the difference between the fair market value of the leasehold interest before



and after the construction of the improvement. *Philadelphia & R. R. Co. v. Getz*, 113 Pa. St. 214, 6 Atl. 356; *Mayor, etc. of Baltimore v. Rice*, 73 Md. 307, 21 Atl. 181. So, apart from the language of particular statutes the lessee cannot recover for permanent injuries to business. *Chambers v. South Chester*, 140 Pa. St. 510, 21 Atl. 409. *A fortiori*, he cannot recover for mere temporary loss of profits suffered during the progress of the improvements. *Plant v. Long Island R. Co.*, 10 Barb. (N. Y.) 26. But evidence of permanent injury to business has been held to be admissible, not as specific items of damage, but as an element in determining the reduced market value. *Laflin v. Chicago, etc. R. Co.*, 33 Fed. 415. See LEWIS, EMINENT DOMAIN, 3 ed., § 342; 3 SEDGWICK, DAMAGES, 9 ed., § 1169. Temporary loss of profits, however, does not tend to show a reduced market value of the leasehold. Consequently the principal case seems correct in allowing no recovery.

EQUITY — JURISDICTION — DAMAGES AWARDED AFTER EQUITABLE REMEDY HAS BECOME UNDESIRABLE. — The plaintiffs, induced by fraudulent representations, purchased from the defendant all the shares of capital stock in a theater company. The plaintiffs sued in equity, praying for a rescission of the sale, and damages. But at the hearing, the plaintiffs having in the meantime made the business a successful one, disclaimed a desire to have the transaction rescinded and prayed for damages. *Decreed*, that the bill will be retained to award damages. *Rosen v. Mayer*, 54 Bk. & Tr. 519 (Mass.).

A court of equity will not generally retain a bill to assess compensatory damages unless given in addition or as an incident to some special equitable relief. *Green v. Stewart*, 19 App. Div. 201, 45 N. Y. Supp. 982; *Collier v. Collier*, 33 Atl. 193 (N. J. Eq.); *Alger v. Anderson*, 92 Fed. 696. See 1 POMEROY EQ. JUR., 3 ed., § 237. But equity will retain the bill and award damages where the special relief which was originally possible becomes impracticable after the bringing of the suit. *Grubb v. Starkey*, 90 Va. 831, 20 S. E. 784; *Holland v. Anderson*, 38 Mo. 55; *Moon v. Nat. Wall-Plaster Co.*, 31 Misc. 631, 66 N. Y. Supp. 33. See *Morss v. Elmendorf*, 11 Paige (N. Y.) 277, 288. Indeed such relief is often given though the special relief sought became impracticable before the bringing of the suit, provided the plaintiff, when he brought his bill, was ignorant of that fact. *Milkman v. Ordway*, 106 Mass. 232; *Tenney v. State Bank of Wisconsin*, 20 Wis. 152. The principle underlying this class of cases seems to be that where the plaintiff has come into equity in good faith, asking for a distinctively equitable remedy, to which he was once entitled, the bill should not be dismissed even though damages are found to be the only remedy. This doctrine commends itself as in accord with the growing tendency of equity to give complete relief where its jurisdiction has once been invoked. In the present case the fact that the plaintiff himself has made the equitable remedy no longer needed should not work to his disadvantage. There is danger that a plaintiff, who wants damages, may get into equity by a pretense of originally seeking equitable relief, and thus deprive the defendant of his right to a jury. But this should rather cause equity carefully to scrutinize the *bonâ fides* of the plaintiff's position than to deny relief in every case.

EQUITY — JURISDICTION — RESTRAINT OF INJURIOUS FALSEHOODS. — At an early stage of a political campaign the plaintiff publicly refused to be a candidate for governor. He later changed his mind and actively sought the nomination. On the day preceding the primary elections the defendant newspaper published his two months' old letter of declination under staring headlines announcing that plaintiff had decided not to run. It was admitted that the defendant acted in bad faith. The trial court enjoined a repetition of the publication. *Held*, that the restraining order be reversed and dismissed. *Howell v. Bee Pub. Co.*, 158 N. W. 358 (Neb.).

For a discussion of this case, see NOTES, p. 172.

**EXECUTORS — TRUSTEES — DOUBLE COMMISSIONS.** — The executors under a will were directed, among other things, to invest the estate and to turn over to a legatee the income and parts of the *corpus* of the estate at stated intervals during a period of more than twenty years. The will made no division between their trust duties and their functions as executors. A subsequent court decree allowed the executors to continue as such with respect to the realty, and as trustees with respect to the personalty. *Held*, that the executors were not entitled to double commissions on the transfer to themselves as trustees of the proceeds from the sale of realty. *In re Ziegler*, 218 N. Y. 544, 113 N. E. 553.

In New York the rule is that double commissions will not generally be granted to an executor who also serves as trustee. *Valentine v. Valentine*, 2 Barb. Ch. 430; *McAlpine v. Potter*, 126 N. Y. 285, 27 N. E. 475. Nor will a court decree terminating the executorship and declaring a continuation of the duties as trustee affect the rule. *Johnson v. Lawrence*, 95 N. Y. 154. But an exception is made if the terms of the will clearly indicate a point where the duties as executor end and those as trustee begin. *Olcott v. Baldwin*, 190 N. Y. 99, 82 N. E. 748; *Laytin v. Davidson*, 95 N. Y. 263. Other jurisdictions, in general, determine the right to double commissions by the substance of the work actually done. *Pitney v. Everson*, 42 N. J. Eq. 361, 7 Atl. 860; *Lyon v. Bird*, 79 N. J. Eq. 157, 80 Atl. 450; *Kennedy v. Dickey*, 99 Md. 295, 57 Atl. 621; *Albro v. Robinson*, 93 Ky. 195, 19 S. W. 587. This would seem to be the more equitable test. It is difficult to see why the testator's intent or the chance phrasing of a will should deprive the executor of additional payment as trustee where it is clear that he is acting in both capacities.

**INSURANCE — CONSTRUCTION AND OPERATION OF CONDITIONS — VALIDITY UNDER "SUICIDE STATUTE" OF REDUCED RECOVERY FOR DEATH BY POISON.** — A life insurance company issued a policy containing a provision that in the event of death by poisoning the beneficiary should recover only one fifth of the face value of the policy. The insured committed suicide by taking poison. A statute provides that suicide shall be no defense in a suit upon a policy of insurance, and that any provision in a policy to the contrary shall be void. 1909 MISSOURI REV. STAT., § 6945. The beneficiary seeks to recover the face value of the policy. *Held*, that she may recover only one fifth of the face value. *Scales v. Nat. Life & Accident Ins. Co.*, 186 S. W. 948 (Mo. App.).

Under the Missouri statute a provision in a life insurance policy reducing recovery in case of death by suicide is held to be void since it makes suicide a partial defense. *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557; *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489. Likewise any provision discriminating in any way against recovery for suicide would seem void. In the principal case, however, the clause does not mention suicide but makes the physical cause of death the basis of reduced recovery. *Primâ facie* this is clearly not within the purview of the statute. If it should appear in a particular case that by such a clause a company is really cloaking a discrimination against recovery for self-destruction, it should of course be held void. But to deny the validity of such a provision upon the ground that the death was incidentally a suicide would be to prefer recovery for a suicidal death by poison over recovery for any other death by poison. This construction would give to the statute an effect affirmatively favoring recovery for suicide. Such a construction would seem abnormal, being entirely counter to the policy of the common law; for insurance against suicide has long been held void at common law. See *Moore v. Woolsey*, 4 El. & Bl. 243, 254; *Ritter v. Mut. Life Ins. Co.*, 169 U. S. 139, 154. This so-called suicide legislation is of doubtful public policy under any construction, as it tends to restrain freedom of contract and removes a deterrent from suicide. To extend the effect of such a statute beyond its normal scope would seem deplorable. Another Missouri court of appeals had, how-



ever, made this extension on facts exactly similar to those of the principal case. *Applegate v. Travelers' Ins. Co.*, 153 Mo. App. 63, 132 S. W. 2. But the court in the principal case seems to have reached a more desirable result in refusing to follow this decision.

INTERSTATE COMMERCE — JURISDICTION OF COMMISSION — COMMON CARRIER. — A corporation was chartered for the purpose of doing an interstate freight business between ports connected by no existing steamship line. The stock was subscribed to conditionally upon the declaration by the Interstate Commerce Commission of rates favorable to the enterprise. Before it had acquired any boats or terminal facilities the company brought its complaint under the Panama Canal Act of 1912, amending the Act to Regulate Commerce, and asked that the Commission require the railroads named as defendants to establish and maintain proportional freight rates, that is, rail rates applicable to through rail and water shipments lower than the local rail rates to the port of loading on vessels. *Held*, that the complaint be dismissed. *Charleston & Norfolk S. S. Co. v. Chesapeake & Ohio Ry. Co.*, 40 Int. Com. Rep. 383.

A hardship has apparently resulted to a corporation which seeks in good faith to learn under what rates it will be allowed to do business before spending further funds in an enterprise the success of which depends upon those rates. But the decision that the complainant is not a "common carrier engaged in," etc. and therefore not within the Commission's jurisdiction seems to be a correct interpretation of the terms of the Act to Regulate Commerce. 24 STAT. AT LARGE, 379. The amendment in question does not increase the agencies over which the Commission shall have jurisdiction. It only confers special powers relative to through rail and water carriage. 37 STAT. AT LARGE, 568. And yet the tenor of the Commission's opinion is noticeably different from that of at least two earlier decisions not under this amendment. *Flour City S. S. Co. v. Lehigh Valley R. Co.*, 24 Int. Com. Rep. 179; *Suffern Grain Co. v. Illinois Central R. Co.*, 22 Int. Com. Rep. 178. In public service regulation by the states the same difficulty in terms exists. Since 1910 several legislatures have included specifically within the jurisdiction of the commissions established corporations organized for public service but as yet transacting no business and acquiring no property. 8 BIRDSEYE, 2153 (1910 N. Y.); PAGE & ADAMS ANN. GEN. CODE, § 614-2a (1911 Ohio); 1911 NEW JERSEY LAWS, c. 195, § 15; DIST. COL. APPROPRIATION ACT OF MARCH 4, 1913, § 8, par. 1.

JUDGMENTS — COLLATERAL ATTACK — MISTAKE CONCERNING DEATH OF LEGATEE AS GROUND FOR ATTACK ON PROBATE DECREE. — A testator left a fund in trust to his widow for life, then equal shares to be given to each of his children "or their heirs." After the life estate the trustees under order of court deposited in a bank the share of the plaintiff legatee, one of the children. Later the court, erroneously believing the plaintiff legatee to be dead, decreed that the bank pay the fund to his heirs. Payment was made. The plaintiff now seeks to have the decree vacated and an order made against the bank. *Held*, that although the decree will be vacated, no liability will be imposed on the bank. *Jones v. Jones*, 223 Mass. 540.

Since the death of the testator is necessary to confer jurisdiction on the probate court a grant of probate of the estate of a living person is void, and the decree can afford no protection to one acting under it. *Scott v. McNeal*, 154 U. S. 34; *Jochumsen v. Suffolk Savings Bank*, 3 Allen (Mass.) 87. See 1 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 208; 10 HARV. L. REV. 62. In the principal case, however, the probate court was administering a fund over which it had jurisdiction through the death of the plaintiff's testator. By the terms of the will, at the death of the life tenant the share in question was to go to the plaintiff or his heirs; and the court's mistake of fact as to the

death of the plaintiff was merely a mistake as to the person entitled to the fund. This raises no question of jurisdiction. It is the duty of a court of probate to decide who on the facts are the proper distributees. See *Loring v. Steineman*, 1 Metc. (Mass.) 204, 209. A decree of payment or distribution made by a probate court which has jurisdiction will protect an executor or administrator if he makes payment in good faith in accordance therewith. *Ernst v. Freeman*, 129 Mich. 271, 88 N. W. 636; *Louvy v. McMillan*, 35 Miss. 147. This protection is accorded him, even if the decree be subsequently reversed. *Cleaveland v. Draper*, 194 Mass. 118, 80 N. E. 227; *Charlton's Appeal*, 88 Pa. St. 476; *Johnson v. Clem*, 5 Ky. L. R. 793. The reason is that the court protects those who in accordance with a legal duty act in obedience to a valid decree. The bank in the principal case has a statutory duty to pay according to the decree of the probate court. MASS. REV. LAWS, c. 150, § 23. Accordingly, it should be protected in making the payment.

**LIENS — ATTORNEY — LIEN ON DOCUMENT ENFORCED OUT OF FUND REALIZED THEREBY.** — A solicitor held, under his general lien, papers of a company which had been his client. During proceedings to wind up the company, the solicitor, pursuant to an order expressly reserving his lien, surrendered into court a document reciting an agreement to lease mining rights to the client. The liquidator contracted to sell the mining rights. Upon the purchaser's default, a sum of money deposited with the liquidator became forfeited. The latter applies for an order allowing him to retain the fund. The solicitor claims priority for his lien. *Held*, that the fund is to be applied first to the satisfaction of the solicitor's lien. *In re The Ardnull Copper Mines, Ltd.*, 50 Ir. L. T. R. 95.

Voluntary surrender to the bailor ordinarily dissolves a lien. *Vinal v. Spofford*, 139 Mass. 126, 29 N. E. 288. Therefore where an attorney has acquired a lien on papers prior to winding-up proceedings, an order for surrender to the liquidator will not be sustained. *In re Rapid Transit Co.*, [1909] 1 Ch. 96. *Cf. In re Wilson*, 12 Fed. 235, 244. But if the delivery is for a temporary purpose only, with the lien reserved, it is not dissolved. *De Witt v. Prescott*, 51 Mich. 298, 16 N. W. 656. *Cf. Blunden v. Desart*, 2 Dr. & War. 405, 419. *Contra, McFarland v. Wheeler*, 26 Wend. (N. Y.) 467. *Cf. Gregory v. Morris*, 96 U. S. 619. Especially must this be so in the principal case, for the court ought surely to keep faith with its own order. *Cf. Greenfield v. Mayor*, 28 Hun (N. Y.) 320. The documents in the main case were of assistance in obtaining the forfeiture. It would therefore seem that the lien preserved on the document in court should be extended to the forfeiture money. *Cf. Boynton v. Braley*, 54 Vt. 92, 93, with *Blunden v. Desart*, 2 Dr. & War. 405, 424. For offspring and accessions to chattels are subject to the same bailee's and pledgee's rights as the chattels. See *Kellogg v. Lovely*, 46 Mich. 131, 133, 8 N. W. 699, 700. *Cf. Putnam v. Cushing*, 10 Gray (Mass.) 334. See 2 KENT, COMMENTARIES, 14 ed., 361. *Cf. Cory v. Harte*, 13 Daly (N. Y.) 147. Again, money collected by an attorney's efforts is subject to his charging lien. *In re Wilson*, 12 Fed. 235, 238. And courts have held, apparently on this analogy, that money realized by the delivery of essential papers might be subjected to the same lien. *Aycinena v. Peries*, 6 Watts & S. (Pa.) 243. See *In re Wilson*, 12 Fed. 235, 244. An objection to the application of such analogy is the fact that a charging lien is specific rather than general.

**NATIONAL GUARD — THE STATUS OF THE STATE MILITIA UNDER THE HAY BILL.** — The appellee, Emerson, a member of the Massachusetts militia, was called into the service of the United States to aid in repelling the incursions of Mexican bandits. He refused to take the oath required by the recent Hay Bill, and claimed to be discharged of all federal obligations, on the theory that so much of the Dick Act, under which he had enlisted, as provided for



federal service for militia had been impliedly repealed by the Hay Bill. He was seized by United States officers, and, thereupon, succeeded in having a writ of *habeas corpus* issued. *Held*, that he be returned to custody. *Sweester v. Emerson*, U. S. Circ. Ct. of Appeals (1st Circ.) (not yet reported).

For a discussion of the principles involved in this case, see NOTES, p. 176.

**SPECIFIC PERFORMANCE OF CONTRACT TO DEVISE — STATUTE OF FRAUDS — BREACH BY PROMISEE — INJUNCTION AGAINST PROBATE OF INCONSISTENT WILL.** — In compliance with the terms of an oral agreement entered into between a son and father, by which the father promised to devise his homestead to the son in return for the son's engagement to live with and support the father and mother during their lives, the son entered and made improvements on the land, and the father executed and delivered to the son a will in his favor. After fifteen years of performance, the son died. Both his wife and executor offered to complete the contract, but the father refused and went to live with the defendants, to whom he subsequently devised the homestead. The plaintiffs, the heirs-at-law of the son, bring this action to enjoin the probate of the second will, and to declare a trust in their favor of the homestead in fee, subject only to the surviving widow's life estate. *Held*, that the injunction issue and the trust be declared. *Torgerson v. Hauge*, 159 N. W. 6 (N. D.).

It is well established that valid contracts to devise realty in consideration of personal services will be specifically enforced against the heir or devisee where the promisee has fully performed. *Parsell v. Stryker*, 41 N. Y. 480; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415. See *Johnson v. Hubbell*, 10 N. J. Eq. 332, 335. And it has been held, as in the principal case, that the execution and delivery of a will in pursuance of the parol contract satisfies the Statute of Frauds. *Naylor v. Shelton*, 102 Ark. 30, 143 S. W. 117; *Brinkner v. Brinkner*, 7 Pa. 53, 55. Whatever the merits of this notion, the contract in the principal case may on one theory be "taken out of the Statute" upon the basis of making lasting improvements where taking of possession was impossible, the part performance being of such a nature that the court cannot restore the promisee to his former position or adequately compensate him in damages. *Sutton v. Hayden*, 62 Mo. 101; *Best v. Grolapp*, 69 Neb. 811, 96 N. W. 641. But cf. *Barnes v. Teague*, 1 Jones Eq. (N. C.) 277, 279; *Burns v. Daggett*, 141 Mass. 368, 6 N. E. 727; *Butcher v. Stapely*, 1 Vernon 363; *Frame v. Dawson*, 14 Vesey 386. But the plaintiff, the promisee, is not entitled to specific enforcement unless his promise has been fully performed, for the court is powerless, and at all stages of the agreement has been powerless, to insure enjoyment in specie to the promisor. *Jones v. How*, 9 C. B. 1; *Newman v. French*, 138 Iowa 482, 116 N. W. 468; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514. Cf., however, *Bartley v. Greenleaf*, 112 Iowa 82, 83 N. W. 824; *Prater v. Prater*, 94 S. C. 267, 77 S. E. 936. Nor is this altered by the offers to perform by the widow and the executor; the personal nature of the obligation allows the substitution to be refused without prejudice to the promisor. *Blakely v. Sousa*, 197 Pa. 305, 47 Atl. 286; *Schultz v. Johnson's Adm'r*, 5 B. Mon. (Ky.) 497. See WALD'S POLLOCK ON CONTRACTS, 3 ed., 543, note. The denial of specific performance, however, does not leave the children of the son without remedy. The value of their father's services may be recovered in *quantum meruit*. *Wolfe v. Howes*, 20 N. Y. 197; *Green v. Gilbert*, 21 Wis. 395. See KEENER, QUASI-CONTRACTS, 244. The value of the improvements may likewise be recovered. *Smith v. Adm'rs of Smith*, 28 N. J. L. 208. Further, the principal case asserts the jurisdiction of equity to enjoin probate of a will made in violation of a contract to devise. Since probate merely establishes the fact of the will, theoretically the injunction should not issue. *Sumner v. Crane*, 155 Mass. 483, 29 N. E. 1151; *Allen v. Bromberg*, 147 Ala. 317, 41 So. 771. In the principal case, however, the practical advantage of completely disposing of the cause in one action justifies the intervention.

**STATUTE OF FRAUDS — CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR — SPECIFIC PERFORMANCE OF AGREEMENT TO REDUCE TO WRITING DENIED.** — The plaintiff and defendant entered into an oral contract which was not to be performed within one year. There was also an oral agreement to reduce the contract to writing. Plaintiff seeks specific performance of this latter agreement. *Held*, that the agreement is within the Statute of Frauds and will not be specifically enforced. *Clark v. City of Bradford Gas & Power Co.*, 98 Atl. 368 (Del.).

Technically the agreement to reduce the main contract to writing is not within the statute, for it may be performed within one year. But as a practical matter, the recognition of such an agreement as valid would be tantamount to taking the main contract out of the statute. For this reason, courts of law treat the two contracts as inseparable, and refuse to give damages for a breach. *McLachlin v. Village of Whitehall*, 114 App. Div. 315, 99 N. Y. Supp. 721. See BROWN, STATUTE OF FRAUDS, 5 ed., § 284. Nor will equity specifically enforce such a contract. *Sarkisian v. Teele*, 201 Mass. 596, 88 N. E. 333; *Henderson v. Henrie*, 68 W. Va. 562, 71 S. E. 172. See *McKinley v. Lloyd*, 128 Fed. 519, 521. If the plaintiff has been induced by actual fraud of the defendant to dispense with a written memorandum, specific enforcement will be granted. *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227. But see *Box v. Stanford*, 13 Sm. & M. (Miss.) 93. But mere breach of promise to reduce the agreement to writing does not constitute such a fraud. *Caylor v. Roe*, 99 Ind. 1.

**STATUTES — INTERPRETATION — “ADDED” AND “MIXED” INGREDIENTS WITHIN THE PURE FOOD ACTS.** — The Food and Drugs Act prohibits the manufacture of food containing an “added deleterious ingredient which may render such article injurious to health.” 34 STAT. AT LARGE, 768. Under this Act a quantity of Coca Cola was libeled. The formula for Coca Cola includes caffeine. *Held*, that the caffeine was an “added ingredient” within the meaning of the Act. *U. S. v. Forty Barrels of Coca Cola*, 36 Sup. Ct. Rep. 573.

The English Sale of Food and Drugs Act enacts that “no person shall mix any article of food with any ingredient or material so as to render the article injurious to health,” and that “no person shall sell any such article so mixed.” 38 & 39 VICT. c. 63. Under this Act the defendant was prosecuted for selling “preserved cream,” a well-known commodity, made up of cream and boric acid. *Held*, that the boric acid was a “mixed” ingredient within the meaning of the Act. *Haigh v. Aerated Bread Company*, 114 L. T. R. 1000 (K. B.).

In both cases the objectionable ingredient was an essential element of the food. Counsel therefore argued that it couldn't be “mixed” or “added,” as it constituted the food itself, and was so understood by the public. But the courts refused to give the words “added” and “mixed” any significance. Now it is a rule of construction that, whenever possible, effect should be given to every word of a statute. See *Market Co. v. Hoffman*, 101 U. S. 112, 115; *Bend v. Hoyt*, 13 Pet. 263, 272. But this will not be done at the expense of defeating the intent of the act. See *Cearfoss v. State*, 42 Md. 403. The decision therefore in these cases really rests on the imputed intent of the legislature to pass a general health measure and not merely protect the public from injurious deception. In neither case is the intent obvious. But in the American case the purpose of Congress appears to be especially obscure. Cf. *U. S. v. Forty Barrels of Coca Cola*, 215 Fed. 535, 539, with *French, etc. Co. v. U. S.*, 179 Fed. 824, 825, and *U. S. v. Lexington, etc. Co.*, 232 U. S. 399, 409.

**TAXATION — PARTICULAR FORMS OF TAXATION — INCOME TAX: TAX ON THE INCOME OF A PERSON DYING BEFORE THE PASSAGE OF THE LAW.** — The Federal Income Tax became a law October 3, 1913. It provided that incomes should be taxable from March 1, 1913. The plaintiff's testator died July 22,



1913. *Held*, that his income may be taxed from March 1 until his death. *Brady v. Anderson*, 55 N. Y. L. J. 1999 (U. S. Dist. Ct., S. D., N. Y.).

A tax law is always construed as having only a prospective effect if that construction is possible. *State v. Newark*, 40 N. J. L. 92. The specific provision to the contrary bars this construction of the income tax law. The court in the main case construes this provision to apply even when the person whose income is taxed has died before the law was passed. If this construction involves serious constitutional doubt, it should not be adopted if the language of the act will reasonably bear another. It is true that a tax on income can be measured retrospectively by the income of the preceding year. *Stockdale v. Insurance Co.*, 20 Wall. (U. S.) 323. In fact it has been held so under this very law. *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1. But it would seem that the basis of such decision is the fact that in reality the tax is on the person, and that the income of the preceding year is a fair measurement for such a tax. See FOSTER, *INCOME TAX*, 2 ed., 111, 115. This is true also of property taxes. *People v. Seymour*, 16 Cal. 332; *People v. Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383. The language of some courts would even seem to put a tax on realty in the same category. *Rundell v. Lakey*, 40 N. Y. 513; *Succession of Mercier*, 42 La. Ann. 1135, 1142, 8 So. 732, 734. If, similarly, an income tax is a tax on the person, the principal case, in taxing a dead man, is certainly novel. The physical possibility of such a tax is not easy to grasp; but even if possible, it would seem unconstitutional, being a tax for protection he can never enjoy. If, however, the tax is upon the transfer of wealth, then the rule in inheritance taxes, that as the privilege is already enjoyed it cannot be taxed retroactively, must apply. *Matter of Pell*, 171 N. Y. 48, 63 N. E. 789; *Case of Lansing*, 182 N. Y. 238, 74 N. E. 882. If, however, the third possibility is the case, and this tax is a tax on income as property, still it would be unconstitutional, if for no other reason than that it is a direct tax not apportioned among the states. For the Sixteenth Amendment refers only to income, and when the law in the principal case was passed the income had already become capital. It has been held that the income of a person who dies during the year may be taxed, under a law already in force during the entire year, for the proportion of the year during which he was living. *Mandell v. Pierce*, 3 Cliff. (U. S. C. C.) 134. But in that case there was both a person in existence and income coming in during a period when the tax law was in force.

#### TREASON — JURISDICTION — BREACH OF ALLEGIANCE COMMITTED ABROAD.

— An indictment was brought against Casement for high treason charging adherence to the king's enemies in Germany. There was a motion to quash the indictment. *Held*, motion refused. *Rex v. Casement*, 32 Times L. R. 667.

Nations vary greatly in the extent to which they claim jurisdiction over crimes committed outside their kingdom. See HOLLAND, *ELEMENTS OF JURISPRUDENCE*, 9 ed., 400 *et seq.* In general the jurisdiction of the English common law has been strictly territorial. See *MacLeod v. Attorney-General for New South Wales*, [1891] A. C. 455, 458. This limitation, it is interesting to note, is apparently a result of the feudal conception of land-allegiance. See MAINE, *ANCIENT LAW*, 5 ed., 102. However, the feudal system also demanded personal allegiance. And a breach of allegiance will naturally be apt to occur outside the territorial control of the sovereign. Wherefore, even in the earliest times it is to be noted that in case of treason, jurisdiction was personal. See 1 HALE, *PLEAS OF THE CROWN*, 159 *et seq.*; 2 HAWKINS, *PLEAS OF THE CROWN*, 306; 3 COKE, *INSTITUTES*, c. 1, pp. 10-11. In recent times, however, England has extended this theory of personal jurisdiction, by statute, to cases of murder, manslaughter, or bigamy. See 24 & 25 VICT. c. 100, §§ 9, 57. Undoubtedly in this country the constitutional provision as to treason would be construed to confer an equally extensive jurisdiction.

**UNFAIR COMPETITION — INTERFERENCE WITH ANOTHER'S SELLING SYSTEM.** — The plaintiff was the originator and manufacturer of a toy consisting of strips of metal of various shapes and sizes, with which it was possible to build in miniature some of the more common mechanical contrivances. The toy was sold in "outfits," seven in all, each "outfit" fitting in with the previous ones purchased and increasing the possibilities of the toy. The defendant began its manufacture, making his "outfits" interchangeable with the plaintiff's and selling at a lower price than his rival. This resulted in a considerable falling off in the plaintiff's business, for which relief is now sought in the form of an injunction restraining the defendant from selling "outfits" interchangeable with the plaintiff's. *Decreed*, that the injunction issue. *Meccano, Ltd. v. Wagner*, 234 Fed. 912.

For a discussion of the principles involved, see NOTES, p. 166.

**WILLS — CONSTRUCTION — RULE IN SHELLEY'S CASE — REMAINDER TO "ISSUE, SHARE AND SHARE ALIKE."** — Land was devised to trustees to the testator's daughter for life, and then to "her issue, and if there be more than one, share and share alike." By statute fee tail is transformed into fee simple. *Held*, that the daughter takes a fee simple. *Bullen v. O'Leary*, 1916 Vict. L. R. 297.

The rule in *Shelley's Case* creates a fee tail where a life estate is followed by a remainder to the direct descendants of the life tenant in an indefinite line of inheritable succession. See SPITZ, *CONDITIONAL AND FUTURE INTERESTS IN PROPERTY*, 42. The rule was originally applicable only where the remainder was to "heirs of the body." It still applies wherever there is a remainder in these words. See CHALLIS, *REAL PROPERTY*, 3 ed., 153. For the words "heirs of the body" are conclusively presumed to denote an indefinite line of succession. In wills the rule has also been extended to certain other words equivalent in meaning. So it has been applied where there is a remainder to "issue." *Bowen v. Lewis*, L. R. 9 A. C. 890. See CHALLIS, *REAL PROPERTY*, 3 ed., 164. In England, as in the principal case, the rule has been held applicable in wills to such other words, even where the context clearly shows that they are intended to designate particular individuals and not an indefinite line of succession. *Van Grutten v. Foxwell*, [1897] A. C. 658; *Roddy v. Fitzgerald*, 6 H. L. C. 823. *Contra, Montgomery v. Montgomery*, 3 Jo. & La T. 47. An analogous problem has also arisen in wills as to what words constitute words of limitation so as to create a fee tail directly, without the use of Shelley's rule. In that case, although words other than "heirs of the body" may be considered words of limitation and so may create an estate tail, yet they do not create such an estate, if it appears that they were meant to be words of purchase. See SMITH, *EXECUTORY INTERESTS*, 248. In other words, except where the technical words "heirs of the body" are used, the intention is held to govern. The same principle is applied in America to Shelley's rule. So where, as in the principal case, words other than "heirs of the body" are used with a clear intent for a remainder to definite individuals and not to an indefinite line, the rule is held not applicable. *Kemp v. Reinhard*, 228 Pa. 143, 77 Atl. 436; *Mallery v. Dudley*, 4 Ga. 52; *In re Daniel Utz*, 43 Cal. 200.

**WITNESS — PRIVILEGE AGAINST SELF-INCRIMINATION — APPLICATION TO COMPULSORY STATEMENTS OUT OF COURT.** — The defendant was convicted of violating a statute requiring an operator of a motor car who knows that he has injured a person to return to the scene of the accident and give his name, address, and license number to any proper person demanding the same. N. H. LAWS 1911, ch. 133, § 20. The Constitution of New Hampshire provides that "no subject shall . . . be compelled to accuse or furnish evidence against himself." BILL OF RIGHTS, Art. 15. *Held*, that the statute is constitutional. *State v. Sterrin*, 98 Atl. 482 (N. H.).



The authorities are unanimously in accord with the principal case. *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530; *People v. Diller*, 24 Cal. App. 799, 142 Pac. 797; *Ex Parte Kneedler*, 243 Mo. 632, 147 S. W. 983. They proceed upon the argument that automobile driving is a privilege granted by the state upon condition that the operator waives his constitutional privilege against self-incrimination. But it is suggested that in the case of an unlicensed driver a waiver of the constitutional privilege could not reasonably be inferred from the act of going on the highway, without knowledge of the condition and without intent to waive the privilege. If that is so, the statute, being unconstitutional as to part of the persons falling within its terms, would be unconstitutional as a whole. *James v. Bowman*, 190 U. S. 127. The principal case may be supported on other grounds, however. The problem is to determine the legal meaning of the word "evidence" in the New Hampshire Constitution. Though there is a singular lack of authority in the books, it would seem that at early common law "evidence" meant matters of fact offered in a judicial investigation, and that nowadays it is properly stretched to include matters of fact offered in all sorts of investigations. *In re Emery*, 107 Mass. 172. See *In re Van Tine*, 12 How. Pr. (N. Y.) 507; THAYER, PRELIMINARY TREATISE ON EVIDENCE, 264. But the existence of an investigation and the offering of facts for their probative or testimonial value in that investigation are apparently necessary elements; and neither of them was to be found in the defendant's situation under the statute. See *People v. Rosenheimer*, 146 App. Div. 875, 878, 130 N. Y. Supp. 544, 546; *U. S. v. Cross*, 20 D. C. 365, 382; WIGMORE, EVIDENCE, §§ 2263, 2264. If the New Hampshire constitutional privilege were phrased with the word "witness," as in the federal Constitution, the conclusion would be easier to grasp; but the extent of the privilege does not vary with the terms used to describe it. See WIGMORE, EVIDENCE, § 2252. Cf. 24 HARV. L. REV. 570.

## BOOK REVIEWS

### A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW.

By Joseph H. Beale. Volume I, Part I, pp. lxxx, 189. Cambridge: Harvard University Press. 1916.

The above is but a small fraction of a comprehensive treatise on the Conflict of Laws, the finishing of which, according to the preface, will involve the labor of many years. It is offered merely in a tentative form for the purpose of inviting criticism and of enabling the author to benefit "by further study and by more mature thought, and especially by that ocular demonstration of faulty thought and inept expression which seeing one's thought in print alone can give." When at last the work is completed, our author hopes that it will include this part in a much improved form.

The treatise proper is preceded by a bibliography covering eighty pages, which includes such books and articles only as are of general scope. Books and articles upon separate topics are to be collected in a section of each chapter in which the topics are considered. The books are classified in two parts: first, books written before 1800; second, books written since 1800. Each part is further classified according to the country in which, or, in the case of modern books, the language in which each book was written. In the case of almost every book a short note is given stating the nature and the scope of the book or something which will give the student unfamiliar with the book some idea of its helpfulness. With the books the names of articles which consider the subject in a general way are given, classified according to the language of the periodical in which they appear. A list of books and special periodicals are suggested as desirable for a public law library in America or England, and a

smaller list as necessary for the working library of a lawyer who desires an office library on the subject.

Professor Beale has placed all students of the Conflict of Laws under a debt of gratitude for having included in the part now published the most complete bibliography of general books and articles on the Conflict of Laws to be found in any language, the value of which is greatly enhanced by the author's notes and comments. American students will welcome with especial satisfaction the exhaustive list of works dealing with the Conflict of Laws in Central and South America, which it was exceedingly difficult to secure heretofore. The laborious and difficult task of preparing the bibliography has been executed with great care, even in the smallest details, such as the citing of the foreign titles. Though these titles involve many different languages, only a few errors occur. A few of the books and articles mentioned relate to special topics and should not have appeared, therefore, in the general list — e. g., Daireaux, p. xxviii; Haus, p. xxxi; Visscher, p. xxxvii; Puetter, p. xlvi; Sieber, p. xlviii; Woerner, p. xlix; Baisini, p. lii; Buzzati, p. lii. One or two minor omissions may also be noted in passing, such as Ottolenghi, *Sulla Funzione e sull' Efficacia delle Norme Interne di Diritto Internazionale Privato*, Turin 1913, and International Law Notes, a monthly bulletin of matters of interest to practitioners in private international law, published in London since January, 1916.

Of the treatise itself, two books are now offered which are introductory in their nature. Book I has three chapters: (1) Scope and Name of the Subject (pp. 1-17). (2) History of the Conflict of Laws (pp. 18-61). (3) Current Doctrine on the Conflict of Laws (pp. 62-113). Book II is entitled "Preliminary Consideration of Jurisprudence" and deals in chapter 4 with Law and Jurisdiction (pp. 114-61), and in chapter 5 with Rights (pp. 162-89). The principal criticism to be made of chapter 1 is that it does not set forth the scope of the work with sufficient definiteness. The reader is told to what extent Criminal Law will be dealt with, but nothing is said about International Procedure, Maritime Law, the Law of International Copyright, Trade-marks, and the like. As v. Bar, Meili, and others deal with these topics in general works on the Conflict of Laws, some statement should be made concerning the author's purpose in this regard. The nature of the subject also might be explained more fully, so as to show the relationship of the Conflict of Laws to Municipal Law in the narrower sense, and to International Law.

In a note to section 1 of the treatise Professor Beale contrasts the Conflict of Laws, which deals primarily with the application of laws in space, with the "application of laws in time." According to Professor Beale the latter "has received no name; and though it makes use of similar principles, it is not usually regarded as sufficiently important for separate treatment." This statement is not quite accurate. A learned treatise on the subject has been written by Professor Affolter, who calls it "Inter-temporal law." By others it is called "Transitory Law"; for example, by Professor Cavaglieri (*Diritto Internazionale Privato e Diritto Transitorio*, 1904).

Chapter 2, entitled "History of the Conflict of Laws," traces the story of the Conflict of Laws from the days of the Roman Empire to the beginning of the nineteenth century. Professor Beale correctly states that notwithstanding the Edict of Caracalla (A. D. 212), which extended Roman citizenship to all inhabitants who were thereby entitled to the enjoyment of the *ius civile*, local customs long survived and gave rise, for a long time, to questions relating to the Conflict of Laws. It cannot be said, however, that "in the end a considerable body of doctrine (concerning the Conflict of Laws) became embodied in the *Corpus Juris*," for the number of passages contained therein is surprisingly small. The reason for this is undoubtedly due to the fact, as v. Bar suggests, that the compilers under Justinian were practical men who were not interested in the discussion to be found in the juristic literature concerning a subject which



was antiquated at the time of the codification. Concerning the passages most frequently cited, disagreement exists among the European scholars as to whether they actually relate to the Conflict of Laws. Professor Beale's generalizations are not supported in their totality by the *Corpus Juris*. In fact in some respects clear statements to the contrary are to be found therein. Professor Beale says, for example, "the maxim *locus regit actum* is established . . . for the form of legal documents" (p. 23). The only citation from the *Corpus Juris* made in support of this statement is that of Dig. XXIX. 1. ult. The passage referred to may mean that all who are of such a condition that they cannot make a will by military law, if they are seized and die in a hostile country, may make a will in the form authorized by the local law. It certainly does not prove that wills in general may be executed, as regards form, in the mode prescribed by the local law. A rescript of the Emperor Diocletian shows clearly that the law of domicile governed the validity of wills as regards form. Cod. VI. 23. 9. The maxim *locus regit actum* was not established until the fourteenth century. Bartolus and his followers attempted to find support for the rule in *Corpus Juris*, but it is now generally conceded that their attempt failed. See Savigny, *Private International Law* (Guthrie's translation), pp. 326-27; II Lainé, *Introduction Au Droit International Privé*, pp. 340, 354-55; I Foelix, *Traité du Droit International Privé*, 4 ed., pp. 165-66; and Buzzati, *L'Autorità delle Legge Straniere relative alla Forma degli Atti Civili*, pp. 25-28.

Professor Beale regards Story as "the creator of the modern science" and his book "the point of departure of all modern theories" (p. 51). He says: "From him the law flowed on in three streams, the theory of the neo-statutists, the theory of the internationalists and the common law doctrine of territorial law recognizing vested rights" (p. 52). That Story is the founder of the Anglo-American school must, of course, be admitted by all, but can it be truthfully stated that "the doctrines of both the modern European schools were largely based on the work of Joseph Story" (p. 52)? The only evidence adduced by Professor Beale is (1) an admission on the part of Foelix, a neo-statutist, that he adopted Story's theory of comity; (2) that Schaeffner's first reference in his notes is to Story, whose commentaries are listed and described in the bibliography, and (3) that Savigny, in his preface to his Conflict of Laws, refers to Story's "excellent" and "extremely useful" work. This is certainly scanty evidence for the broad generalization made. That Story's great learning and helpful discussion of English and American cases should be duly appreciated by the continental writers is natural. No one would deny the great merit of Story's work. It has seemed to the continental and other writers on the Conflict of Laws, however, that as far as the leading features of Story's theory are concerned, he is but an adherent of Huber, but highly independent in details. See v. Bar, *Private International Law* (Gillespie's translation), p. 47. Story's theory of comity, though accepted by a few continental writers, such as Foelix, is rejected by nearly all of the neo-statutists and by all of the internationalists. Under these circumstances an assertion that the doctrines of both these modern schools were largely based on Story's work is not supported by fact.

A considerable portion of the subject matter now contained in chapter 3 under "Current Doctrine on the Conflict of Laws" belongs more properly to the preceding chapter, which deals with the history of the subject. Its contents proper form the most interesting portion of the part now submitted. According to Professor Beale, the modern writings on the subject involve three systems of thought, which he names the "statutory" system, the "international" system, and the "territorial" system. The fundamental differences underlying these systems are brought out clearly and the special doctrines or theories of such noted writers as Pillet, Waechter, Schaeffner, Savigny, v. Bar, Zitelmann, Jitta, Story, Vareilles-Sommières, and Bustamante are given. In the opinion of the reviewer, the value of this portion of the work would be enhanced if,

in connection with the discussion of the different schools of thought, all of the authors included in the general bibliography were specifically mentioned. A knowledge of an author's fundamental point of view in the treatment of a subject would help the reader in the study of a particular work. Professor Beale defends the Anglo-American system of vested rights (as he calls it) against the attacks made upon it by the internationalists, and rejects the statutory system because its doctrine of "public order," which nobody has been able to define, accepts the territorial theory, as it were, through the back door. He admits that the international theory "would furnish a basis for the protection of rights much more firm than that offered by either of the other theories," but concludes that as long as no definite body of rules on which nations can agree have found acceptance even among the scholars, it has no claim to superiority over the Anglo-American theory.

The *Renvoi* theory deserves, in the opinion of the reviewer, a fuller treatment. However vicious it may be, the fact remains that courts are prone to take refuge under it in order to avoid the application of a foreign law. As the English courts have sinned on a number of occasions in this connection, and there is no clear authority of weight to the contrary in either England or the United States, it would be desirable in the interest of the development of a consistent doctrine that such an authoritative treatise as the one prepared by Professor Beale should call particular attention to these decisions and warn the courts against the danger lurking in the adoption of the *Renvoi* theory. It would be well also if Professor Beale would express his view concerning such cases as *Armitage v. The Attorney General* (1906 P. 135), and *Lando v. Lando* (112 Minn. 257), where the *Renvoi* theory is adopted, though unconsciously, in order to sustain a divorce and a marriage respectively.

The reviewer cannot appreciate the value of the Preliminary Consideration of Jurisprudence contained in Book II. Whether the analysis of rights into primary rights, secondary rights, and remedial rights, which Professor Beale regards as a satisfactory basis for the study of the Conflict of Laws, will be helpful also to other students of the subject, can be known only when their application to the problems in the Conflict of Laws has been fully set forth.

The foregoing suggestions are offered in accordance with the author's wish, expressed in the preface, in the hope that they may be of some use to the author before the above pages receive their final form. They are not intended to belittle the great merit of the part now submitted. The exhaustive and scholarly treatment of the subject gives every assurance that when the treatise is completed, it will be authoritative and constitute the most comprehensive statement of the law in the English tongue.

ERNEST G. LORENZEN.

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ELEMENTS OF INTERNATIONAL LAW. By George B. Davis. Fourth edition, revised by Gordon E. Sherman. New York: Harper and Brothers. 1916. pp. xxiv, 668.

This work originally appeared in 1889; and now that the author has died, an editor has attempted the almost impossible task of making it fulfill the needs of the present day. It is a book that appeals to the general reader rather than to the lawyer. It is readable, especially when it states and discusses specific cases. For professional purposes, however, it is not sufficiently exact and not satisfactorily abreast of the times. A few examples must suffice. The account of citizenship and naturalization (pp. 138-47) does not clearly indicate whether a child born to American parents resident abroad is an American citizen, nor whether there may be more than one citizenship of origin, nor whether naturalization includes expatriation in the absence of a statute or treaty to that effect made by the country of origin, nor exactly what is the effect of present naturalization treaties, nor what are the terms of the present United States



statute regarding expatriation — the statute of 1907, which apparently is not cited. The list of works on diplomacy (p. 222) omits the books of John W. Foster. The list of references on war (pp. 354-56) omits the monumental work of Bloch. The accounts of the neutrality laws of the United States (pp. 437-38) fails to say that the present laws are found not in the places cited but in the Federal Penal Code of 1909. The account of occasional contraband, as the author well terms what is usually called conditional contraband (pp. 468-70), falls short of bringing that subject to date. All these are natural incidents of an attempt to keep alive a book that really belongs to a past generation. For the practical purposes of the present day the citations, which are very numerous, continue to be valuable. The appendices also are useful, containing a liberal collection of documents and a brief presentation of new topics, including intervention in Cuba, internment of prisoners of war, transfer to neutral flag, aircraft, and wireless telegraph.

EUGENE WAMBAUGH.

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SHIPPERS AND CARRIERS OF INTERSTATE AND INTRASTATE FREIGHT. By Edgar Watkins. Atlanta: The Harrison Company. 1916. pp. cxv, 1057.

After seven years Mr. Watkins has brought out a new edition of his book, in which, by means of India paper and a limp leather binding, eleven hundred pages have been compressed into a very small compass.

The scope of the book is indicated by its title. It should be of value to lawyers engaged in the practice of the American law of freight carriage, and it is obvious that no more than that has been intended by the author. The book is largely a compilation of the decided cases in this field. The compilation, however, is exceptionally comprehensive and well arranged, though unfortunately rather poorly indexed. In a few instances, the author expresses interesting independent opinions — for example, that a state can compel the interchange of traffic by purely intrastate carriers (p. 26) and that the decision of the circuit court of appeals concerning bulked shipments was erroneous (p. 267). Several hundred pages of the book are given over to an exhaustive annotation of the Act to Regulate Commerce and its amendments, and of the Sherman and Clayton laws. The Conference Rulings of the Interstate Commerce Commission are given in an appendix.

RAEBURN GREEN.

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THE LAW OF THE PUBLIC SCHOOL SYSTEM OF THE UNITED STATES. By Harvey Cortlandt Voorhees. Boston: Little, Brown and Company. 1916. pp. xi, 429.

This is a collection of the cases relating to the public schools. The questions involved are in the main of statutory construction, but the author has of course included those cases where the common law is applied to school affairs. The book also contains synopses of the principal state statutes. It partakes more of the nature of a digest than of a textbook, the personal contribution of the author being in amassing, compilation, and arrangement rather than in original and guiding thought. However, lawyers and those who manage the schools will find in the book a convenient and a full source of information of Public School Law.

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AMERICAN JUDICATURE SOCIETY, BULLETIN XII. A report on Commercial Arbitration in England. By Samuel Rosenbaum. 1916. pp. 72.

FORMS IN COMMON USE. Edited by Thomas F. O'Malley. Boston: Eugene W. Hildreth. 1916. pp. xix, 424.

REASONABLENESS AND LEGAL RIGHT OF THE "MINIMUM CHARGE" IN PUBLIC UTILITY SERVICES. By Samuel S. Wyer. 1916. pp. 82.

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## THE END OF LAW AS DEVELOPED IN JURISTIC THOUGHT

### II

#### 8. THE NINETEENTH CENTURY<sup>1</sup>

A CHARACTERISTIC juristic achievement of the nineteenth century was the setting off of jurisprudence as a separate science. This was the culmination of a development that began in the seventeenth century. Prior to that time jurisprudence and politics were treated along with theology as applications of its doctrines.<sup>2</sup> In a second stage jurisprudence, politics and international law were treated together. The philosophical foundation was taken to suffice for all three and the details of each subject were supposed to be reached by deduction therefrom.<sup>3</sup> Separation from politics was gradually achieved in the nineteenth century,<sup>4</sup>

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<sup>1</sup> Continuation of the paper in 27 HARV. L. REV. 605. See also my paper, "The Philosophy of Law in America," VII ARCHIV FÜR RECHTS- UND WIRTSCHAFTS-PHILOSOPHIE, 213, 385.

<sup>2</sup> See 27 HARV. L. REV. 605, 609 *et seq.* In HOBBS'S LEVIATHAN (1651) two of the four parts are theological. Compare also SPINOZA'S TRACTATUS THEOLOGICO-POLITICUS (1670).

<sup>3</sup> See, for example, the sequence of BURLAMAQUI, PRINCIPES DU DROIT NATUREL (1747) and PRINCIPES DU DROIT POLITIQUE (1751); the order of treatment, that is, general philosophical foundation, philosophical jurisprudence, politics, international law, in WOLFF, INSTITUTIONES IURIS NATURAE ET GENTIUM (1740-49), and the like order in RUTHERFORTH, INSTITUTES OF NATURAL LAW (1754-56).

<sup>4</sup> It is true the metaphysical jurists of the nineteenth century did not wholly abandon the old connection of jurisprudence, politics, legislation, and international law.



and as the three distinct methods, philosophical, analytical and historical, were definitely worked out, the English analytical school believed that they had achieved a separation of jurisprudence from philosophy and ethics and in consequence from the science of legislation.<sup>5</sup> The English historical school, conceiving that the traditional element in legal systems was the real law and that law was to be found in the unfolding of the principle of justice in human experience rather than made by legislators, agreed in this separation of jurisprudence and the science of legislation. Accordingly Maine said:

"Investigation of the principles on which direct improvement of substantive legal rules should be conducted belongs . . . not to the theorist on jurisprudence, but to the theorist on legislation."<sup>6</sup>

It has been suggested that a similar narrow tendency in nineteenth-century philosophy is to be attributed to division of labor in the universities and the requirements of academic courtesy. Very likely these played some part in the segregation of jurisprudence and the nineteenth-century Anglo-American tendency to insist upon analytical jurisprudence, where the lawyer required no aid from without and was continually in an atmosphere of pure law, as the whole of legal science.<sup>7</sup> But the great expansion of learning in the last century, which prevented anyone from taking more than a corner of knowledge for his province, and the general tendency of the time to lay out everything analytically, to confine it to defined limits and to reduce it to rule, a tendency which the idea of evolution

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See, for example, LORIMER, *INSTITUTES OF LAW*, 2 ed., bk. II, ch. 1, and bk. IV, ch. 3 (1880). Compare LASSON, *SYSTEM DER RECHTSPHILOSOPHIE* (1882), where the philosophical foundations of public law are discussed but not politics.

<sup>5</sup> Thus Markby says: "What . . . Austin's predecessors do not appear to me to have fully apprehended, at least not with that sure and firm grasp which proceeds from a full conviction, is the distinction between positive law and morals. We find, for example, that Bentham, when drawing the line between jurisprudence and ethics, classes legislation under jurisprudence, whereas, as Austin has shown, it clearly belongs to ethics. Austin, by establishing the distinction between law and morals, not only laid the foundations for a science of law but cleared the conception of law and of sovereignty of a number of pernicious consequences to which in the hands of his predecessors it had been supposed to lead." *ELEMENTS OF LAW*, 6 ed., § 12.

<sup>6</sup> *EARLY HISTORY OF INSTITUTIONS*, 7 ed., Lect. 12, p. 345.

<sup>7</sup> HOLLAND, *ELEMENTS OF JURISPRUDENCE*, ch. 1; MAINE, *EARLY HISTORY OF INSTITUTIONS*, 7 ed., Lect. 12, p. 370. The latter says: "The jurist properly so called has nothing to do with any ideal standard of law or morals." Compare the more temperate statement of this view by GRAY, *NATURE AND SOURCES OF THE LAW*, §§ 1-9.

has not yet succeeded in driving even from the biological sciences, are also to be reckoned with. In any event this extreme division of labor had its good side, since analysis and legal history, pursued excessively for a time, have afforded results upon which a new philosophy of law may proceed with assurance. The bad side was the abdication of all juristic function in improving the law, the abandonment of juridical idealism, and the reduction of those who were best qualified to take conscious part in legal development to the position of mere observers. Coinciding with a period of maturity and stability in the law, this juristic pessimism coincided also with the dominance of the idea of *laissez faire* in economics. Thus the conception of the end of law as an unshackling of individual energy, as an insuring of the maximum of individual free self-assertion, gave rise to a conception of the function of law as a purely negative one of removing or preventing obstacles to such individual self-assertion, not a positive one of directly furthering social progress.

Five types of nineteenth-century juristic thinkers deserve consideration. They may be called (1) the metaphysical jurists, (2) the English utilitarians, (3) the historical jurists, (4) the positivists, and (5) the social-individualists.

Metaphysical jurisprudence<sup>8</sup> begins with Kant, who puts in its final form the conception of the end of law which came in with the Reformation. In principle the Reformation denied the authority of any doctrine the evidence of which the individual could not find in his own reason and denied the authority of any rule which could not be referred to the will of the individual to be bound. Hence the

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<sup>8</sup> KANT, *METAPHYSISCHES ANFANGSGRÜNDE DER RECHTSLEHRE*, 2 ed., 1798, English translation, *KANT'S PHILOSOPHY OF LAW*, by Hastie, 1887 (a good exposition may be found in 2 CAIRD, *THE CRITICAL PHILOSOPHY OF KANT*, 293-350); FICHTE, *GRUNDLAGE DES NATURRECHTS*, 1798, new ed. by Medicus, 1908, English translation, *FICHTE'S SCIENCE OF RIGHTS*, by Kroeger, 1889; HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS*, 2 ed. by Gans, 1840, new ed. by Lasson, 1911, English translation, *HEGEL'S PHILOSOPHY OF RIGHT*, by Dyde, 1896; KRAUSE, *ABRISS DES SYSTEMES DER PHILOSOPHIE DES RECHTES*, 1825; KRAUSE, *SYSTEM DER RECHTSPHILOSOPHIE* (posthumous), ed. by Röder, 1874; AHRENS, *COURS DE DROIT NATUREL*, 8 ed., 1892 (1 ed., 1837); RÖDER, *GRUNDZÜGE DES NATURRECHTS*, 2 ed., 1860; GREEN, *PRINCIPLES OF POLITICAL OBLIGATION*, reprinted from his Complete Works, 1911 (lectures delivered 1879-80); LORIMER, *INSTITUTES OF LAW*, 1880; LASSON, *LEHRBUCH DER RECHTSPHILOSOPHIE*, 1882; MILLER, *LECTURES ON THE PHILOSOPHY OF LAW*, 1884; BOISTEL, *COURS DE PHILOSOPHIE DE DROIT*, 1899; HERKLESS, *LECTURES ON JURISPRUDENCE* (posthumous), 1901.



elaborate arguments by which eighteenth-century jurists seek to make out that each individual has consented to the law through representatives or has willed it through a social compact.<sup>9</sup> In Kant this fiction of consent of the individual will is replaced by an imposition upon the individual free will through the reciprocal action of free wills whereby they may be reconciled by a universal law, which, therefore, is imposed by a necessity inherent in the very idea of freedom.<sup>10</sup> Thus we realize individual freedom through rules of law, and the end of law is "to keep self-conscious beings from collision with each other, to secure that each should exercise his freedom in a way that is consistent with the freedom of all others, who are equally to be regarded as ends in themselves."<sup>11</sup>

Kant's separation of each man from the social organism was characteristic of the eighteenth century. But this putting of the individual person at the center of juristic theory and the individual conscience at the center of ethical theory "separated him also from the past out of which his intellectual life had grown."<sup>12</sup> Hegel saw that it was unhistorical and took the moral organism for the central point of his ethical theory.<sup>13</sup> Here we have the beginning of a new point of view, which becomes significant in the social philosophical jurists at the end of the century. But nineteenth-century metaphysical jurisprudence remained thoroughly individualist. It insisted not on the proposition that freedom was the realization of the universal will but on the proposition that the end of man was freedom.<sup>14</sup> It developed the idea of free will into the practical consequence of civil liberty, an idea of general freedom of action for individuals. Hence the end of law was to secure to each individual the widest possible liberty. The justification of law was that there

<sup>9</sup> 1 BLACKSTONE, COMMENTARIES, 140, 158-59; 1 WILSON, WORKS (Andrews' ed.), 88-89 (written 1790); WOODDESSON, ELEMENTS OF JURISPRUDENCE, xvii (1792).

<sup>10</sup> RECHTSLEHRE, 2 ed., xxii-xxiii. See a good exposition of this in 2 CAIRD, 296-300. Compare HERKLESS, LECTURES ON JURISPRUDENCE, 14-15.

<sup>11</sup> 2 CAIRD, 296.

<sup>12</sup> 1 CAIRD, 64.

<sup>13</sup> GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, § 33. See WALLACE, HEGEL'S PHILOSOPHY OF MIND, 21-23; 3 ERDMANN, HISTORY OF PHILOSOPHY (Hough's transl.), 4.

<sup>14</sup> See 2 STIRLING, THE SECRET OF HEGEL, 551-52; CROCE, CE QUI EST VIVANT ET CE QUI EST MORT DE LA PHILOSOPHIE DE HEGEL, 114. "The history of the world is nothing but the development of the idea of freedom." HEGEL, PHILOSOPHY OF HISTORY (Sibree's transl.), pt. IV, ch. 3.

is no true liberty except where there is law to restrain the strong who interfere with the freedom of action of the weak and the organized many who interfere with the free individual self-assertion of the few.<sup>15</sup> The test of right and justice was the amount of liberty secured.<sup>16</sup> Though Anglo-American jurists paid little or no attention to the systems of the metaphysical school, its central idea of abstract individual liberty fitted into our eighteenth-century individualism so well that the school began to have some influence in the United States<sup>17</sup> until a new and more attractive mode of getting to the same result was furnished by the positivists.

While the metaphysical jurists were deducing the whole system of

<sup>15</sup> "The value then of the institutions of civil life lies in their operation as giving reality to these capacities of will and reason, and enabling them to be really exercised. In their general effect . . . they render it possible for a man to be freely determined by the idea of a possible satisfaction of himself, instead of being driven this way and that by external forces, and thus they give reality to the capacity called will; and they enable him to realize his reason, *i.e.*, his idea of self-perfection, by acting as a member of a social organization in which each contributes to the better-being of all the rest. So far as they do in fact thus operate they are morally justified." GREEN, PRINCIPLES OF POLITICAL OBLIGATION, 32-33. Cf. COURCELLE-SENEUIL, PRÉPARATION À L'ÉTUDE DU DROIT, 114; PULSZKY, THEORY OF LAW AND CIVIL SOCIETY, § 170; EMERY, CONCERNING JUSTICE, 108-09. See also BENTHAM, THEORY OF LEGISLATION (transl. by Hildreth, 10 ed.), 95.

<sup>16</sup> I AHRENS, COURS DE DROIT NATUREL, 8 ed., §§ 17-18; TRENDLENBURG, NATURRECHT, § 46; LORIMER, INSTITUTES OF LAW, 2 ed., 353, 523.

"It reduces the power of coercion to *what is absolutely necessary for the harmonious co-existence of the individual with the whole.*" I LLOY, PHILOSOPHY OF RIGHT (transl. by Hastie), 121.

"Every rule of law in itself is an evil, for it can only have for its object the regulation of the exercise of rights, and to regulate the exercise of a right is inevitably to limit it. On the other hand every rule of law which sanctions a right, which preserves it from an infringement, which protects it from a peril is good because in this way it responds to its legitimate end. Thus if law is an evil, it is a necessary evil." BEUDANT, LE DROIT INDIVIDUEL ET L'ÉTAT, 148 (1891).

Cf. MILLER, LECTURES ON THE PHILOSOPHY OF LAW, 70-74.

<sup>17</sup> "This, the sole legitimate end and object of law, is never to be lost sight of — security to men in the free enjoyment and development of their capacities for happiness." SHARSWOOD, LEGAL ETHICS, 5 ed., 22.

"There is a guide which, when kept clearly and constantly in view, sufficiently informs us what we should aim to do by legislation and what should be left to other agencies. This is what I have so often insisted upon as the sole function both of law and legislation, namely, to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it." CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION, 337.



rights and the idea of the end of the legal system from a metaphysical conception of free will, another school was seeking a practical principle of law-making. The metaphysical school was a school of jurists. They had their eyes upon the law as a whole, upon systems of law which had come down from the past, and they sought the principles upon which such systems and their doctrines could be based philosophically and by which rules of law might be criticized and their further development might be directed. The English utilitarians,<sup>18</sup> on the other hand, were a school of legislators. The metaphysical jurists employed the philosophical method in jurisprudence and did not separate the science of law and the science of legislation. The English utilitarians developed the analytical method in jurisprudence and employed the philosophical method in the science of legislation. Accordingly while the metaphysical jurists sought principles of criticism of what was, the utilitarians sought principles of constructing a new body of law by conscious law-making. Bentham's life work was law reform.<sup>19</sup> The practical principle which he laid down, as that which should govern legislative reform of law, was the principle of utility: Does the rule or measure conduce to human happiness? The principle of criticism which he urged was: How far does the rule or measure conduce to human happiness? This principle and this criterion might have been used to break down the individualist idea of justice as Jhering used the idea of purpose later. But at this time individualist ideas were too firmly fixed in men's minds to be questioned. For the individualist tradition of seventeenth and eighteenth-century thought was reinforced by economic reasons in the age of Adam Smith and the great British economists and by political reasons in the reaction from the age of absolute governments which made the period following the French Revolution fearful of centralized authority and jealous of local and individual independence. The

<sup>18</sup> BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION*, 1780, reprinted by the Clarendon Press, 1879; BENTHAM, *TRAITÉS DE LÉGISLATION* (ed. by Dumont, 1802), English translation by Hildreth, *BENTHAM'S THEORY OF LEGISLATION*, 10 ed. 1904; BENTHAM, *PRINCIPLES OF THE CIVIL CODE*, 1 *WORKS*, 295-364; MILL, *ON LIBERTY*, 1859. For the philosophical side, see ALBEE, *HISTORY OF ENGLISH UTILITARIANISM*; STEPHEN, *THE ENGLISH UTILITARIANS*. For the juristic side, see DICEY, *LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY*, Lect. 6; SOLARI, *L'IDEA INDIVIDUALE E L'IDEA SOCIALE NEL DIRITTO PRIVATO*, §§ 31-36.

<sup>19</sup> On Bentham's life and work reference may be made to ATKINSON, *JEREMY BENTHAM*.

criterion of the greatest good of the greatest number might easily be put in a way that would not be far from recent ideas of justice. Thus, that which serves for the happiness of the greatest number, used as a measure of the conduct of each, might serve as the basis of a social utilitarianism.<sup>20</sup> But Bentham did not question individualism. He vacillated between an idea of utility as the greatest happiness of the individual and an idea of utility as the greatest happiness of the greatest number. In truth he did not need to choose between them since he assumed that the greatest general happiness was to be procured through the greatest individual self-assertion. Hence his fundamental principle was not substantially different from that of the metaphysical jurists.<sup>21</sup> Negatively his program was, unshackle men; allow them to act as freely as possible. And this was the idea of the metaphysical school. Positively his program was, extend the sphere and enforce the obligation of contract. This, we shall see presently, was the idea of the historical school.

Bentham's principle, then, was: Allow the maximum of free individual action consistent with general free individual action. Thus the end of law came to the same thing with him as with the metaphysical jurists, namely, to secure the maximum of individual self-assertion. Bentham's theory of the legal order made a strong appeal to the common-law lawyer. Our Anglo-American legal system had kept much of the individualism of the strict law. The stage of equity and natural law had by no means made it over and the development of equity was not complete in England when English law was received in this country.<sup>22</sup> Moreover, in the classical contests between the courts and the crown in the seventeenth century the common law had been made to stand between the individual and oppressive state-action. Thus the common-law tradition was thoroughly individualist, and this tradition was especially congenial to the Puritan, who was dominant in America down to the time of the Civil War.<sup>23</sup> However much the practising

<sup>20</sup> Cf. TANON, *L'ÉVOLUTION DU DROIT ET LA CONSCIENCE SOCIALE*, 3 ed., 185-89.

<sup>21</sup> Dicey has formulated it thus: "Every person is in the main and as a general rule the best judge of his own happiness. Hence legislation should aim at a removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbors." *LAW AND PUBLIC OPINION IN ENGLAND*, 2 ed., 146.

<sup>22</sup> See Pound, "The Place of Judge Story in the Making of American Law," 48 *AM. L. REV.* 676.

<sup>23</sup> See Pound, "Puritanism and the Common Law," 45 *AM. L. REV.* 811. To be



lawyer might affect to despise philosophical theories of law, he could but be content with a theory that put plausible reasons behind his traditional habits of thought. The one difficulty was the English utilitarian's fondness for legislative lawmaking, which was out of accord with the common-law tradition. But this difficulty presently disappeared.

It is a curious circumstance that while Bentham and Austin believed in legislation and hoped for an ultimate codification, the interpretation of utility as requiring a minimum of interference with the individual led the next generation of English utilitarians to the same position as that of the historical school, namely, that except in a few necessary cases legislation is an evil. The historical school held it an evil because it sought to do what could not be done. The neo-utilitarians held it an evil because that government was best that governed least and left men freest to work out their own destiny. Bentham had already put security as the main end to which the legal order should be directed.<sup>24</sup> A utilitarian version of the nineteenth-century juristic pessimism was deduced from this idea. We could not achieve any positive good by law; we could only avert some evils.<sup>25</sup>

Thus the English utilitarians did not contribute much of moment to the theory of the end of the legal order. They merely strengthened in the minds of lawyers the extreme individualism which the latter had inherited with the common-law tradition. Perhaps their most significant achievement was in definitely driving the eighteenth-

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complete, one should add the influence of the pioneer in nineteenth-century America. See Pound, "The Administration of Justice in the Modern City," 26 HARV. L. REV. 302.

<sup>24</sup> THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE, pt. I, ch. 7. Cf. SHARSWOOD, LEGAL ETHICS, 5 ed., 22.

<sup>25</sup> "The value of law is to be measured not by the happiness which it procures but by the misery from which it preserves us." MARKBY, ELEMENTS OF LAW, 6 ed., § 58. "We shall, therefore, look for happiness in the wrong direction if we expect it to be conferred upon us by the law. Moreover, not only is it impossible for the law to increase the stock of happiness: it is just as impossible for the law to secure an equal distribution of it. Equality may be hindered by the law, it cannot be promoted by it." *Id.*, § 59.

"What is the true province of legislation, ought to be better understood. It is worth while to remark, that in every new and amended state constitution, the Bill of Rights spreads over a larger space; new as well as more stringent restrictions are placed upon legislation. There is no danger of this being carried too far: as Chancellor Kent appears to have apprehended that it might be. There is not much danger of erring upon the side of too little law." SHARSWOOD, LEGAL ETHICS, 5 ed., 22-23.

century natural law out of the English books. For example, in discussing condemnation of private property, Blackstone said that the public was "in nothing so essentially interested as in securing to every individual his private rights."<sup>26</sup> This is the natural-rights idea of the eighteenth century. A little more than a century later Sir George Jessel said:

"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts . . . shall be enforced by courts of justice."<sup>27</sup>

Here we have Bentham's program of unshackling men and extending the sphere of contract. But we have also the individual free-will idea, the individual-liberty idea of the metaphysical jurists. It is worth while to reflect that these words were written in a case involving a contract as to the use of a patent. Not only do we limit the freedom of contract of whole classes of men of full age and competent understanding at every turn in modern labor legislation, but we are not so sure today that whatever contract as to use of his patent a patentee may choose to make is to be upheld at all events.<sup>28</sup>

The historical jurists<sup>29</sup> were more concerned with the nature of law and the content of legal systems than with the end of law. They took their philosophical ideas from the metaphysical school and so agreed in holding individual liberty to be the fundamental idea.<sup>30</sup> This was facilitated by, or perhaps rather it resulted in, their adopting the political interpretation of legal history. For they conceived

<sup>26</sup> 1 COMMENTARIES, 139.

<sup>27</sup> *Printing Co. v. Sampson*, 19 Eq. 462, 465 (1875).

<sup>28</sup> *Bauer v. O'Donnell*, 229 U. S. 1 (1912). See Montague, "The Proposed Patent Law Revision," 26 HARV. L. REV. 128; Abbot, "Patents and the Sherman Act," 12 COL. L. REV. 709.

<sup>29</sup> MAINE, ANCIENT LAW, 1861, new ed. by Pollock, 1906; MAINE, EARLY HISTORY OF INSTITUTIONS, 1874; MAINE, EARLY LAW AND CUSTOM, 1883; MAINE, VILLAGE COMMUNITIES IN THE EAST AND WEST, 1871; PULSZKY, THEORY OF LAW AND CIVIL SOCIETY, 1888; CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION, 1907; PUCHTA, CURSUS DER INSTITUTIONEN, §§ 1-3 (1841); ARNDTS, JURISTISCHE ENCYCLOPÄDIE UND METHODOLOGIE, § 12 (1860); 1 WÄCHTER, PANDEKTEN, § 1 (1880).

<sup>30</sup> "Freedom is the foundation of right, which is the essential principle of all law." PUCHTA, INSTITUTIONEN, § 2 (Hastie's transl.). "In virtue of freedom man is the subject of right and law. His freedom is the foundation of right and all real relations of right and law flow from it." *Id.*, § 4. "Law is consequently the recognition of that jural freedom which is externalized and exhibited in persons and their acts of will and their influence upon objects." *Id.*, § 6.



that the history of law was a history of the gradual acquisition or recognition of individual liberty. This is the central philosophical idea in the writings of Sir Henry Maine.<sup>31</sup> As has been pointed out elsewhere, Maine's doctrine of the progress from status to contract is a political type of idealistic interpretation.<sup>32</sup> For a purely ethical idea of right it substitutes a political idea of individual freedom. It sees in law and in legal history a manifestation and development of this idea. Hence it finds the end of all law in liberty, conceived in the sense of the widest possible individual self-assertion. It teaches that a movement from individual subjection to individual freedom, from status to contract, is the key to social and legal development. It conceives of social progress as an unfolding of the idea of individual liberty by relieving the individual from the constraint of social institutions. It conceives of political progress as a like unfolding of the idea of liberty; as a gradual limitation and direction of state action so as to make possible the maximum of individual self-assertion which is taken to be the maximum realization of the idea of liberty. It conceives of jural progress as a progress from institutions where rights, duties and liabilities are annexed to status or relation to institutions where rights, duties and liabilities flow from voluntary action and are consequences of exertion of the human will.

Maine's teaching was so completely in accord with the individualism which characterized the traditional element of our law for other reasons and accorded so well with the absolute ideas which our law books had inherited from the eighteenth century that it soon got entire possession of the field. Much in American judicial decision with respect to master and servant, liberty of contract and right to pursue a lawful calling, which it has been the fashion of late to refer to class bias of judges or to purely economic influences,<sup>33</sup> is in real-

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<sup>31</sup> "The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which . . . seems to me to be sufficiently ascertained. All the forms of Status taken notice of in the law of persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status . . . to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement *from status to contract*." ANCIENT LAW, ch. 5 *ad fin*.

<sup>32</sup> See my paper, "The Scope and Purpose of Sociological Jurisprudence," 25 HARV. L. REV. 140, 164.

<sup>33</sup> E. g., SMITH, SPIRIT OF AMERICAN GOVERNMENT, ch. 5; ROE, OUR JUDICIAL

ity merely the logical development of traditional principles of the common law by men who, if they had not been so taught, read every day in their scientific law books of the progress from status to contract and the development of law through securing and giving effect to the human will. But in truth, so far as developed systems of law are concerned, Maine's famous generalization is drawn from the Roman law only. The main characteristics of status are that it is a condition which can not be divested voluntarily, and that rights, duties and liabilities flow from or are annexed to this condition of a person rather than his volition. In the maturity of Roman law, in contrast, the theory of natural law had put an end to most of these conditions directly or indirectly, and the law sought to secure the will of the individual against aggression and to give effect to the will to create legal consequences wherever possible. Hence, if we use contract to mean legal transaction, there was in Roman law a progress from status to contract. There was a progress from a situation where legal institutions paid no regard to volition to one where volition was chiefly regarded.

It is by no means so clear that the generalization may be maintained when applied to Anglo-American law. For a fundamental difference between the Roman system and our own system is involved. In the Romanist system the chief rôle is played by the conception of a legal transaction, an act intended to create legal results to which the law, carrying out the will of the actor, gives the intended effect. The central idea in the developed Roman law, shaped by philosophical theories, is to secure and effectuate the will.<sup>34</sup> All things are deduced from or referred to the will of the actor. Arising as the law of the city of Rome when it was a city of

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OLIGARCHY, ch. 5; MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ch. 16.

<sup>34</sup> 1 WINDSCHEID, PANDEKTEN, §§ 37, 47, 69; 1 JHERING, GEIST DES RÖMISCHEN RECHTS, § 10; 3 VOIGT, DAS IUS NATURALE, AEQUUM ET BONUM UND IUS GENTIUM DER RÖMER, §§ 17 ff.

"The department of law where the peculiar genius of the Roman jurists found full scope is the law of obligations . . . ; and here again it is more especially the law relating to those contracts where not merely the expressed but also the unexpressed intention of the parties has to be taken into account (the so-called *negotia bonae fidei*). And in regard to this unexpressed intention which is not, for the greater part, present to the mind of the party himself at the moment of concluding the contract, it was the Roman jurists who discovered it, and discovered it for all times to come, and enunciated the laws which result from its existence." SOHM, INSTITUTES OF ROMAN LAW (Ledlie's transl.), § 15.



patriarchal households, and as a body of rules for keeping the peace among the heads of these households, its problem was to reconcile the conflicting activities of free men, supreme within their households but meeting and dealing with their equals without. Accordingly it held them in penalties for such injuries as they did wilfully, and held them in obligations to such duties or performances as they undertook in legal form. It held them for what they willed and did willingly, and it held them to what they willed and undertook legally. In our law, by contrast, the central idea is rather relation. Thus, in case of agency the civilian thinks of an act, a manifestation of the will, whereby one person confers a power of representation upon another and of a legal giving effect to the will of him who confers it. Accordingly he talks of a contract of mandate<sup>35</sup> or of a legal transaction of substitution.<sup>36</sup> The common-law lawyer, on the other hand, thinks of the relation of principal and agent and of powers, rights, duties and liabilities, not as willed by the parties, but as incident to and involved in the relation. He, therefore, speaks of the relation of principal and agent. So in partnership. The Romanist speaks of the contract of *societas*. He develops all his doctrines from the will of the parties who engaged in the legal transaction of forming the partnership.<sup>37</sup> We speak, instead, of the partnership relation and of the powers and rights and duties which the law attaches to that relation. Again, the Romanist speaks of a letting and hiring of land and of the consequences which are willed by entering into that contract.<sup>38</sup> We speak of the law of landlord and tenant and of the warranties which that relation implies, the duties it involves, and the incidents attached thereto. The Romanist speaks of a *locatio operarum*, a letting of services and of the effects

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<sup>35</sup> 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., §§ 1191-94; 2 CHIRONI, ISTITUZIONI DI DIRITTO CIVILE ITALIANO, 2 ed., § 344.

<sup>36</sup> See, however, the critique of this conception in SCHLOSSMANN, LEHRE VON DER STELLVERTRETUNG, §§ 3, 4, 80. Accordingly the Romanist does not know our doctrine of undisclosed agency. BARON, PANDEKTEN, § 65, II. On his theory, necessarily, if agency is disclosed, a contract with the principal is willed; otherwise not. The common law looks rather to the actual existence of the relation of principal and agent.

<sup>37</sup> 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., §§ 1014-15. This refers only to "civil partnerships." The "commercial partnership," the creature not of the Roman law but of the law merchant, is treated as a juristic person. *Id.*, § 1021. See also 2 CHIRONI, ISTITUZIONI DI DIRITTO CIVILE ITALIANO, 2 ed., §§ 340, 341.

<sup>38</sup> 2 WINDSCHEID, PANDEKTEN, §§ 399-400; 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., §§ 898-903.

which the parties have willed thereby. We speak of the relation of master and servant and of the duty to furnish safe appliances and the assumption of risk which are imposed upon the respective parties thereto. The Romanist speaks of family law. We speak of the law of domestic relations.<sup>39</sup> The double titles of our digests, such as principal and surety, or vendor and purchaser, where the Romanist would use the one word, suretyship or sale, tell the same story.

The idea of relation, and of legal consequences flowing therefrom, pervades every part of Anglo-American law. At law the original type which provided the analogy still persists in the law of landlord and tenant. If one occupies another's land adversely the latter may put him out and may then have his action for mesne profits. But he has no action against the wrongful occupier on the ground that he is enriched unjustly by use and occupation of the land.<sup>40</sup> The action for use and occupation may only be maintained where a relation exists. When the relation does exist, however, a train of legal consequences follows. There is an implied warranty of quiet enjoyment. There is an obligation to pay rent simply because of the relation, which the covenants in the lease only liquidate.<sup>41</sup> Covenants in the lease run with the land; that is, the incidents so created go with the land, not with the person who made them. Again, in case of a conveyance for life there is still the relation of tenure, involving duties of the tenant toward those in reversion and remainder. Hence covenants are said to run with the land, that is, to follow the relation. But in case of a conveyance in fee simple there has been no relation since the statute of *Quia Emptores* in the reign of Edward I, and so the burden of covenants in the conveyance did not run. In the United States, when we first sought to extend the law as to

<sup>39</sup> If it be said that this is a relatively recent phrase in our books, it may be pointed out that the title "baron and feme" goes a long way back and, as contrasted with "law of persons," has the true common law ring.

<sup>40</sup> As to this anomalous doctrine and the historical reasons therefor, see KEENER, *QUASI-CONTRACTS*, 191-92.

<sup>41</sup> Hence the rent follows the reversion, but the assignee of the reversion cannot recover of the covenantor, who agreed to pay, but only of the assignee of the term. *Walker's Case*, 3 Rep. 22 a (1588); *Humble v. Glover*, Cro. Eliz. 328 (1595). Hence also, notwithstanding the covenant to pay rent, if the lessor was not seised at the time of the lease so that no relation was created, there is a legal defense to the covenant. LITTLETON, § 58. Coke explains this as a case of failure of consideration. *Co. Lit.*, 47 b. But it is significant that here, and here only, the failure of consideration might be shown at law against a deed, and that the tenant was not compelled to resort to chancery.



the creation of legal servitudes by permitting such covenants to run, we did not break over the rule expressly, but our courts instead turned for a time to the word "privity," which in its proper use refers to a relation,<sup>42</sup> and thought the result justified by the conjuring up of a fictitious privity.<sup>43</sup> So also in the law of torts the existence of some special relation, to which the law may annex a duty, is often decisive of liability. One may have no duty toward a licensee other than not to injure him wantonly. But gratuitous assumption of the relation of passenger and carrier, although no more than a license to ride in the carrier's wagon, involves liability for ordinary care.<sup>44</sup> Again, if A is drowning and B is sitting upon the bank with a rope and life belt at hand, unless there is some relation between A and B other than that they are both human beings, for all that the law prescribes, B may smoke his cigarette and see A drown.<sup>45</sup> In the absence of a relation that calls for action the duty to be the good Samaritan is moral only. The recent decisions that challenge this doctrine, it is significant to observe, are in cases involving the relation of master and servant.<sup>46</sup> Throughout the law of negligence the common-law judge instinctively tends to seek for some relation between the parties or, as he is likely to put it, some duty of the one to the other.<sup>47</sup>

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<sup>42</sup> See the classification of privity and the examples in *CO. LIT.*, 271 *a*.

<sup>43</sup> *Morse v. Aldrich*, 19 Pick. (Mass.) 449 (1837).

<sup>44</sup> *Harris v. Perry*, [1903] 2 K. B. 219, 225.

<sup>45</sup> *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810 (1900); *Union Ry. Co. v. Cappier*, 66 Kan. 649, 72 Pac. 281 (1903); *Griswold v. Boston R. Co.*, 183 Mass. 434, 67 N. E. 354 (1903); *Stager v. Laundry Co.*, 38 Ore. 480, 489, 63 Pac. 645 (1901); *Ollett v. Railway Co.*, 201 Pa. St. 361, 50 Atl. 1011 (1902); *King v. Interstate R. Co.*, 23 R. I. 583, 51 Atl. 301 (1902).

<sup>46</sup> *Ohio, etc. Ry. Co. v. Early*, 141 Ind. 73, 40 N. E. 257 (1894); *Raasch v. Laundry Co.*, 98 Minn. 357, 108 N. W. 477 (1906); *Hunicke v. Quarry Co.*, 262 Mo. 560, 172 S. W. 43 (1914); *Layne v. Chicago, etc. R. Co.*, 175 Mo. App. 34, 157 S. W. 850 (1913); *Salter v. Telephone Co.*, 79 Neb. 373, 112 N. W. 600 (1907). This has always been recognized in the case of seamen. *The Iroquois*, 194 U. S. 240 (1903); *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796 (1887). In *Depue v. Flatau*, 100 Minn. 299, 111 N. W. 1 (1907), where there was no such relation, it might be urged that defendants were culpable in their affirmative acts. But the court relies on the relation between the parties created by an invitation.

<sup>47</sup> Cf. the well-known statement of Brett, M. R., in *Heaven v. Pender*, 11 Q. B. D. 503, 507 (1883): "The questions which we have to solve in this case are — what is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which imposes on one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property. . . . When two drivers or two ships are approaching each other, such a relation arises between them

Again, in the case of mortgagor and mortgagee we do not ask what the parties agreed, but we apply rules, such as once a mortgage always a mortgage, or such as the rule against clogging the equity of redemption, which defeat intent, in order to enforce the incidents which courts of equity hold involved in the relation. In the case of sale of land it is not our mode of thought to consider that we are carrying out the will of the parties as manifested in their contract. Once the relation of vendor and purchaser is established, we think rather of the rights and duties involved in that relation, of the conversion of the contract right into an equitable ownership, and the turning of the legal title of the vendor into a security for money, not because the parties have so intended, but because the law, sometimes in the face of stipulations for a forfeiture, gives those effects to their relation.<sup>48</sup> Then, too, we have the great category of fiduciary relations, of which trustee and beneficiary is the type. It is true

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when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill under such circumstances there would be such danger. . . . In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property, other phraseology has been used, which it is necessary to consider. If a man opens his shop or warehouse to customers it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to keep his house or warehouse that it may not endanger the person or property of the person invited. This is in a sense an accurate phrase, and as applied to the circumstances a sufficiently accurate phrase. Yet it is not accurate if the word 'invitation' be used in its ordinary sense. By opening a shop you do not really invite, you do not ask A. B. to come in to buy; you intimate to him that if it pleases him to come in he will find things which you are willing to sell. So, in the case of shop, warehouse, road, or premises, the phrase has been used that if you permit a person to enter them you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter and the entry."

See also Cardozo, J., in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382 (1916).

<sup>48</sup> *Setson v. Slade*, 7 Ves. Jr. 264, 274 (1802); *Champion v. Brown*, 6 Johns. Ch. 398 (1822); *In re Dagenham Dock Co.*, 8 Ch. App. 1022 (1873); *Cornwall v. Henson*, [1900] 2 Ch. 298, 304; *Kilmer v. British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319; *Cheney v. Libby*, 134 U. S. 68 (1889).



this category and many of the instances above recounted are the work not of common-law courts but of the courts of equity. But the common-law lawyer was at work in the courts of equity. The clerical chancellors brought about an infusion of morals into the legal system. To prevent dishonest or unconscientious conduct, interposing in part, perhaps, for the welfare of his soul, they forbade the trustee or the fiduciary doing this or that which legally he was at liberty to do. Presently the lawyers came to sit upon the wool-sack. They turned at once to their staple analogy, lord and man, landlord and tenant, and out of the pious interference of the chancellors on general grounds of morals, they built the category of fiduciary relations with rights and duties annexed to them and involved in them, no matter what the parties to them may intend. So completely has this idea taken possession of equity that more than one subject, as, for example, interpleader and bills of peace, is embarrassed by a struggle to find "privity" — a struggle to find some relation to which the right to relief may be annexed.<sup>49</sup>

Our public law, too, is built around this same idea of relation. Magna Charta is recognized as the foundation of Anglo-American public law. But Professor Adams has shown that, as a legal document, Magna Charta is a formulation of the duties involved in the jural relation of the king to his tenants in chief.<sup>50</sup> As the Middle Ages confused sovereignty and property, it was easy enough to draw an instrument declaring the duties incident to the relation of lord and man which, when the former happened to be king, could be made later to serve as defining the duties owing by the king in the relation of king and subject. Political theory sought to explain the duties of rulers and governments by a Romanist juristic theory of contract, a theory of a contract between sovereign and subjects which was devised originally in the contests between church and state to justify the disobedience of the pious subject who resisted a royal contemner of ecclesiastical privileges. We have seen in another connection how the two theories merged in the eighteenth century and the common-law rights of Englishmen, involved in the relation of king and subject, became the natural rights of man deduced from

<sup>49</sup> 2 STORY, EQUITY JURISPRUDENCE, § 120; 4 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1324; *Dilly v. Doig*, 2 Ves. Jr. 486 (1794); *Tribette v. Illinois R. Co.*, 70 Miss. 182, 12 So. 32 (1892). The requirement of privity in interpleader is criticised both by Story and Pomeroy.

<sup>50</sup> ORIGIN OF THE ENGLISH CONSTITUTION, chs. 4, 5.

a social compact. Here it suffices to note that the latter is an alien conception in our law. After working no little mischief in our constitutional law in the nineteenth century, this idea of natural rights resting upon a social compact and merely declared by constitutions is giving way, and there are signs that we shall return to the true common-law conception of a statement of the rights and duties which the law imposes on or annexes to the relation of ruler and ruled.<sup>51</sup>

Because of its origin in the general application to new problems of the analogy of the reciprocal rights and duties of lord and man, I have ventured to call this element of our legal tradition "feudal law."<sup>52</sup> Perhaps it should be called the Germanic element. For in comparing Roman law and Germanic law we are struck at once by differences of treatment of the same institution in the two systems, and these differences turn largely upon their respective use of will and of relation as fundamental notions. Compare, for instance, the Roman *patria potestas*, the power of the head of the household, with the corresponding Germanic institution of the *mundium*. The Roman institution is legally quite one-sided. The *paterfamilias* is legally supreme within the household. He has rights. But whatever duties he may owe are owed without the household, not within.<sup>53</sup> On the other hand the Germanic institution is conceived of as a relation of protection and subjection. But the subjection is not because of a right of the house-father. It is a subjection because of the relation and for the purposes of the protection which the relation involves. Also the right of the house-father grows out of the relation and is a right against the world to exercise his duty of protection.<sup>54</sup> Indeed there is some warrant for the view that Tacitus indicates this idea of relation as a characteristic Germanic institution.<sup>55</sup> At any rate it became the fundamental legal idea in the feudal social organization. Accordingly in Anglo-American law it is a generalization from the results of judicial working out of one problem after

<sup>51</sup> See the observations of Winslow, C. J., in *Borgnis v. Falk Co.*, 147 Wis. 327, 348-50, 133 N. W. 209 (1911).

<sup>52</sup> Pound, "A Feudal Principle in Modern Law," 15 INT. J. OF ETHICS, 1, 20.

<sup>53</sup> MOS. ET ROM. LEG. COLL. IV, 8; GAIUS, I, §§ 117-18, II, § 87, IV, § 75; PAULUS, SENTENTIAE, V, 1, § 1; DIG. XLIV, 7, 9; COD. VIII, 46, 10.

<sup>54</sup> I HEUSLER, INSTITUTIONEN DES DEUTSCHEN PRIVATRECHTS, §§ 20, 23, 24.

<sup>55</sup> GERMANIA, caps. XIII, XIV, XXV. See SCHRÖDER, LEHRBUCH DER DEUTSCHEN RECHTSGESCHICHTE, 4 ed., 32-35.



another by the analogy of the institution with which courts were most familiar and had most to do in the formative period of English law, namely, the relation of lord and tenant.

In the nineteenth century the feudal contribution to the common law was in disfavor. Jurists thought of individuals and contracts rather than of groups and relations. The conception of the abstract individual ruled in legal philosophy. The medieval guilds were gone and the legal position of trade unions and a legal theory of collective bargaining had not yet become problems for the lawyer. Hence the nineteenth-century lawyer thought ill of anything that had the look of the archaic institution of *status*. The Romanist idea of contract became the popular juristic instrument, and attempt was made to Romanize more than one department of Anglo-American law by taking for the central idea the Roman doctrine of a legal giving effect to the individual will.<sup>56</sup> This tendency was in part the result of the confident attempt of the age of enlightenment to explain all things by the light of unaided reason, and so is to be classed with the tendency to invent apocryphal reasons for legal doctrines instead of criticizing them, which marks the decadence of the philosophical method in the last century. But after the historical school had turned the light of history upon legal institutions they kept for some time the color given them by the eighteenth-century light of reason. System in the common law was but beginning. Of necessity those who sought for systematic ideas turned to the Continental treatises on Roman law. The resulting tendency to Roman-

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<sup>56</sup> "The law of contracts in its widest extent may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the continual fulfilment of contracts." 1 PARSONS, CONTRACTS \*3 (1853). Compare also the tendency to Romanize the law of bailments on "the hasty assumption" that the principles of the modern Roman law were universal, referred to by Mr. Justice Holmes, COMMON LAW, Lect. 5.

Another example may be seen in the law of carriers. The nineteenth century books derived this branch of the law from the law of bailment, thinking of the duties of the carrier as "implied terms" of the contract, in Roman fashion. In many law schools even now "Bailments and Carriers" is the title of a course. But this contract-theory of the carrier's obligation has thoroughly broken down. To-day we speak rather of the law of public service and derive the carrier's duties from the general obligations of a public calling in one type of which he is engaged.

As to partnership, see PARSONS, PRINCIPLES OF PARTNERSHIP, §§ 1, 3; Pepper, "What Constitutes a Partnership," 46 AM. L. REG. 137, 142.

ize the theory of Anglo-American law was furthered both in England and in the United States by the general acceptance of Maine's theory of legal progress. But Maine's generalization as it is commonly understood shows only the course of evolution of Roman law.<sup>57</sup> It has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it unless, indeed, we are progressing backward.<sup>58</sup> If it be said that statutes restricting freedom of contract between employer and employee are a legislative phenomenon, and out of the right line of growth of the common law, one may point to the law of public-service companies or to the law of insurance or to the law of surety companies. In each case, and these are relatively recent judicial developments in our law, the common-law idea of relation and of the rights, duties and liabilities involved therein, has prevailed at the expense of the idea of contract.<sup>59</sup> It is significant that progress in our law of public-service companies has taken the form of abandonment of nineteenth-century conceptions for doctrines which may be found in the Year Books.<sup>60</sup>

Even more significant is the legislative development whereby duties and liabilities are imposed on the employer in the relation of employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it. Such is the settled tendency of the present, and it is but a return to the common-law conception of the relation of master and

<sup>57</sup> Perhaps the current view of Maine's doctrine is not wholly just to its author. He expressly limits the meaning of status so as to exclude relations arising from contract. See note 31, *ante*. But the two last paragraphs of chapter 5 of *Ancient Law* seem fairly to justify the usual interpretation of his theory.

<sup>58</sup> Note the difficulties which Miller felt as early as 1884 in attempting to square with this theory legislation which "has apparently reversed the natural order of the growth of legal forms." It must be explained, he says, "on the ground that the persons legislated for are so weak and helpless that they cannot realize their true freedom, or maintain it against others who are so strong or so unjust as to encroach on their rights. One of the first results of a consciousness of freedom will be a demand for the repeal of statutes which restrain this power of self-legislation — a demand for freedom of contract." *LECTURES ON THE PHILOSOPHY OF LAW*, 73. A generation has passed without any abatement in restrictions upon freedom of contract in the relation of master and servant or any sign of the reaction so confidently predicted.

<sup>59</sup> See Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 *HARV. L. REV.* 195, 225.

<sup>60</sup> WYMAN, *PUBLIC SERVICE CORPORATIONS*, §§ 1-14, 20, 27, 34-42. Cf. HOLMES, *COMMON LAW*, Lect. 5. But see Adler, "Business Jurisprudence," 28 *HARV. L. REV.* 135, 147 ff.



servant with reciprocal rights and duties and with liabilities imposed in view of the exigencies of the relation. These statutes have put jurists to much trouble when they have sought to find a place for them in the legal system. Some have said that modern labor legislation creates a *status* of being a laborer, and this has frightened more than one court. For *status* is felt to be an archaic legal institution which we have outgrown. Hence courts have felt bound to inquire what warrant could be found for imposing disabilities upon one whom nature had given a sound mind, disposing judgment and years of discretion.<sup>61</sup> Others have said that the duties and liabilities involved in workmen's compensation were quasi-contractual, which means only that the author did not know what to call them or where to place them.<sup>62</sup> What is clear is that they are not contractual and that they do not accord with the modern principles of the law of torts. Is there, then, an irreconcilable opposition between this legislation and the modern law of torts, so that one or the other must give way? If so, and if we are to adhere to Maine's generalization as furnishing a guide to legal progress, it may go hard with this legislation in the judicial working out of its consequences.<sup>63</sup> But a sounder view of history, taking account of the history of our own law, will show that the common law has a place for it and that it is perfectly possible, without disturbance of our legal system, to administer these statutes and to give them the sympathetic judicial development which all statutes require in order to be effective. For it is not out of line with the common law to deal with causes where the relation of master and servant exists differently from causes where there is no such relation. It is not out of line to deal with such causes by determining the duties and the liabilities which shall flow from the relation. On the contrary, the nineteenth century was out of line with the common law when it sought to treat the relation of master and servant in any other way. In administering these acts the common law may employ its oldest and most fertile legal conception.

Much of the nineteenth-century criticism of the common law as "feudal" wholly misses the point. Austin grafted a Romanist

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<sup>61</sup> *State v. Haun*, 61 Kan. 146, 161, 59 Pac. 340 (1899); *State v. Loomis*, 115 Mo. 307, 315, 22 S. W. 350 (1893).

<sup>62</sup> SALMOND, *TORTS*, 4 ed., 113. Compare POLLOCK, *TORTS*, 9 ed., 110.

<sup>63</sup> See Smith, "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235, 344.

analysis, learned in Germany, upon the political ideas of Hobbes and the ethical ideas of Bentham. Maine's interpretation of legal history was derived from the phenomena of Roman law considered from the standpoint of Savigny. Thus both of the schools of Anglo-American jurists were Romanized. The Romanist idea of a legal transaction, which the nineteenth century sought to apply to all possible situations, was regarded as the institution of the maturity of law. But the conception of the legal transaction regards individuals only. In the pioneer agricultural societies of nineteenth-century America such a conception sufficed. In the industrial and urban society of today classes and groups and relations must be taken account of no less than individuals. Happily the nineteenth century did not wholly lose for us the contribution of the feudal law to our legal tradition. If we cast aside the Romanist prejudices of the nineteenth-century historical school, we may perceive that in the idea of relation, in the characteristic common-law mode of treating legal problems which we derived from the analogy of the incidents of feudal tenure, we have an institution of capital importance for the law of the future, a means of making our received legal tradition a living force for justice in the society of today and of tomorrow.

In truth the nineteenth-century historical school was not historical. It was metaphysical. The reconciliation of the historical with the metaphysical, which was current at the end of the century, may be found in Hegel.<sup>64</sup> Each was heir to the law-of-nature theories of the eighteenth century. Each sought a universal, unchangeable fundamental principle. One studied the unfolding thereof in human experience as manifested in legal institutions and legal doctrines. The other verified the same process *a priori* and unfolded the principle logically. Hence the juristic pessimism of the metaphysical school was fully shared by the historical school.<sup>65</sup>

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<sup>64</sup> "I maintain that the sequence in the systems of philosophy in history is similar to the sequence in the logical deduction of the notion-determinations in the idea. I maintain that if the fundamental conceptions of the systems appearing in the history of philosophy be entirely divested of what regards their outward form . . . the various stages in the determination of the idea are found in their logical notion. Conversely in the logical progression taken for itself there is, so far as its principal elements are concerned, the progression of historical manifestations. . . . This succession undoubtedly separates itself, on the one hand, into the sequence in time of history, and on the other, into succession in the order of ideas." 1 HEGEL, HISTORY OF PHILOSOPHY (transl. by Haldane), 30.

<sup>65</sup> "It was in no attitude of investigation and reflection . . . that the Hegelian



Somewhat later the doctrines as to the end of law which had become fixed in Anglo-American juristic thought under the influence of the historical school were reinforced in America by the influence of the positivists.<sup>66</sup> Spencer's writings had great vogue in America and many cases where judicial opinions show the effect of his ideas might be cited. The earlier positivists thought of the universe as governed by mathematical mechanical laws, and hence of moral and social phenomena as referable to such laws also. The next generation of positivists, influenced by Darwin, thought of evolution as governed by some such mechanical laws. Accordingly the purpose of the positivist jurists was to find laws of morals, laws of social evolution and laws of jural development analogous to gravitation, conservation of energy and the like.<sup>67</sup> These laws were to be found by observation and experience. But observation and experience led them to the same result to which metaphysics had led the nineteenth-century philosophical jurists and history had led the historical jurists.<sup>68</sup> For one thing, they got their data from the

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philosophy even wished to derive the world from its single principle; it only proposed to look on and see how the development followed from the inherent impulse of the idea." LOTZE, *LOGIC*, § 150 (English transl., p. 196).

"[The historical school] had clipped its wings and as it were disarmed itself in declaring that scientifically it could exert no effect upon the phenomenal development of law; it had only to await, to register, to verify." SALEILLES, "L'École historique et droit naturel," 1 *RÉVUE TRIMESTRIELLE DE DROIT CIVIL*, 94.

<sup>66</sup> SPENCER, *PRINCIPLES OF SOCIOLOGY*, Part 2, *The Inductions of Sociology* (1876); SPENCER, *JUSTICE* (1891); ARDIGO, *LA MORALE DEI POSITIVISTI* (1879); GUMPLOWICZ, *GRUNDRISSE DER SOZIOLOGIE* (1885); GUMPLOWICZ, *SOZIOLOGIE UND POLITIK* (1892); VANNI, *LEZIONI DI FILOSOFIA DEL DIRITTO* (1901-02, 3 ed., 1908); LÉVY-BRÜHL, *LA MORALE ET LA SCIENCE DES MOEURS* (1903).

<sup>67</sup> "I always conceive of sovereignty in the abstract as the resultant of several conflicting forces moving in a curve. If law were the will of the strongest, it would be logical and direct. Law is not the will of the strongest, for the will of the strongest is always deflected somewhat from its proper path by resistance. Sovereignty, therefore, is a compromise, as the earth's orbit is a compromise." Brooks Adams, in *CENTRALIZATION AND THE LAW*, 52.

<sup>68</sup> "Hence that which we have to express in a precise way is the liberty of each limited only by the like liberties of all. This we do by saying: — Every man is free to do that which he wills provided he infringes not the equal freedom of any other man." SPENCER, *JUSTICE*, § 27. "They urge that, as throughout civilization the manifest tendency has been continually to extend the liberties of the subject and restrict the functions of the state, there is reason to believe that the ultimate political condition must be one in which personal freedom is the greatest possible; that, namely, in which the freedom of each has no limit but the like freedom of all; while the sole governmental duty is the maintenance of this limit." SPENCER, *FIRST PRINCIPLES*, § 2. Compare SPENCER, *SOCIAL STATICS*, ch. VI, § 1. "Governments are being remanded, if

historical jurists, and so looked at them not independently but through the spectacles of that school.<sup>69</sup> Spencer's formula of justice is a Kantian formula. He had never read Kant.<sup>70</sup> But Kant had become part of the thought of the time so thoroughly that each of the significant nineteenth-century schools — the metaphysical school, the English utilitarians and the positivists — came to his position as to the end of law, though for different reasons and in different ways.<sup>71</sup> Moreover the juristic pessimism of the other schools was fully shared by the positivists.<sup>72</sup>

Juristic radicalism in the nineteenth century took two paths. On the one hand the idea of justice as the maximum of individual self-assertion and the prevailing juristic pessimism led some to develop to its extreme logical consequences the doctrine that law is intrinsically evil in that it restrains liberty.<sup>73</sup> Hence they advocated

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not into the rubbish heap of the world's back yard, yet into a secondary and subordinate place. And whereas men have relied in the past on the sovereign and the statute book for order, safety, prosperity, happiness, they are now fast coming to rely for them simply on themselves." Kimball, "Morals in Politics," in *BROOKLYN ETHICAL SOCIETY, MAN AND THE STATE*, 521-22 (1892). The last statement should be compared with Green (note 15, *supra*), Carter (note 17, *supra*), the utilitarian view as stated by Dicey (note 21, *supra*) and by Markby (note 25, *supra*), Sharswood (note 25, *supra*), and Miller (note 58, *supra*). Purporting to be based purely on induction, it exhibits a curious blindness to the legal and political facts of the time.

<sup>69</sup> Maine's *Ancient Law* is the principal juristic authority used in Spencer's *Justice*. See the table of references (American ed., p. 287 *ff.*). It is hardly a mere coincidence that the idea of the function of law in maintaining the limits within which the freedom of each is to find the widest possible development (SPENCER, *FIRST PRINCIPLES*, § 2, quoted in note 68, *supra*) so closely resembles Savigny's formula: "If free beings are to coexist . . . invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby . . . this free opportunity is secured are the law." 1 *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS*, § 52.

<sup>70</sup> *JUSTICE*, Appendix A.

<sup>71</sup> Cf. CHARMONT, *LA RENAISSANCE DU DROIT NATUREL*, 122. As to Spencer's relation to Kant, see 1 MAITLAND, *COLLECTED PAPERS*, 279-80.

<sup>72</sup> "We are to search out with a genuine humility the rules ordained for us — are to do unflinchingly, without speculating as to consequences, whatsoever these require." SPENCER, *SOCIAL STATICS*, Conclusion, § 8. "If society be, as I assume it to be, an organism operating on mechanical principles, we may perhaps, by pondering upon history, learn enough of those principles to enable us to view, more intelligently than we otherwise should, the social phenomena about us." ADAMS, *THEORY OF SOCIAL REVOLUTIONS*, 203. See the comments of DEL VECCHIO, *FORMAL BASES OF LAW* (transl. by Lisle), § 70.

<sup>73</sup> PROUDHON, *QU'EST-CE QUE LA PROPRIÉTÉ ?* (1840); PROUDHON, *IDÉE GÉNÉRALE DE LA RÉVOLUTION AU DIX-NEUVIÈME SIÈCLE* (1851); PROUDHON, *DE LA JUSTICE DANS LA RÉVOLUTION ET DANS L'ÉGLISE* (1858); STIRNER, *DER EINZIGE UND SEIN EIGEN-*



a régime of individual action by voluntary coöperation, free from coercion by state-enforced rules.<sup>74</sup> As this group argued for a free consensual rather than a legal ordering of society, naturally enough it gave us nothing which is of importance for jurisprudence. On the other hand the idea of law and government as means of achieving individual liberty was taken up by another group,<sup>75</sup> which, rejecting political and juristic pessimism but holding to the idea of individual self-assertion as the end, developed what may fairly be called a social individualism.<sup>76</sup> Where the main current of nineteenth-century juristic thought, following the seventeenth and eighteenth-century tradition, opposed society and the individual and was troubled to reconcile government and liberty, this group sought individual liberty through collective action and called for the maximum of governmental control as the means to a maximum of liberty.<sup>77</sup> On another side in contributing to theories of the social

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THUM (1845); GRAVE, *LA SOCIÉTÉ FUTURE*, 7 ed., 1895. See BASCH, *L'INDIVIDUALISME ANARCHISTE*: MAX STIRNER (1904); 2 BEROLZHEIMER, *SYSTEM DER RECHTS- UND WIRTSCHAFTSPHILOSOPHIE*, § 39; BROWN, *THE UNDERLYING PRINCIPLES OF MODERN LEGISLATION*, Prologue (The Challenge of Anarchy).

<sup>74</sup> "Free association, liberty, which is confined to the maintaining of equality in the means of production and of equivalence in exchanges, is the only possible just and true form of society. Politics is the science of liberty; under whatever name it may be disguised, the government of man by man is oppression. The highest form of society is found in the union of order and anarchy." PROUDHON, *QU'EST-CE QUE LA PROPRIÉTÉ?*, 1 *OEUVRES COMPLÈTES* (1873 ed.), 224. So Stirner argues that the "liberty" of the metaphysical school is but a negative idea; put positively, the end is: "Be your own; live for yourself, according to your individuality." Accordingly the only justification for society is to contribute to the development of the individual and "permit a larger extension of his powers without demanding restrictions upon his personality beyond what already exist as natural conditions of life in the environment in which he is found." GRAVE, *LA SOCIÉTÉ FUTURE*, 157.

<sup>75</sup> Here we are concerned with the socialists only in their relation to nineteenth-century juristic thought as to the end of law. Reference may be made to 2 BEROLZHEIMER, *SYSTEM DER RECHTS- UND WIRTSCHAFTSPHILOSOPHIE*, § 38.

<sup>76</sup> "Socialism in all its forms leaves intact the individualistic ends, but resorts to collective action as a new method of attaining them. That socialism is through and through individualistic in tendency, with emotional fraternalism superadded, is the point I would especially emphasize." Adler, "The Conception of Social Welfare," *PROCEEDINGS OF THE CONFERENCE ON LEGAL AND SOCIAL PHILOSOPHY*, 1913, 9.

<sup>77</sup> "It is the function of the state to further the development of the human race to a state of freedom. . . . It is the education and evolution of the human race to a state of freedom." LASSALLE, *ARBEITERPROGRAM* (1863), 1 *WERKE* (ed. by Blum), 156, 200. "I take it that the régime of a socialist administration will involve an enormous change of attitude in dealing with crime. Firstly, it will without doubt reduce to the minimum the number of actions characterized by the law as crimes. Secondly, it

interest in the individual life and in developing the Hegelian idea of a culture-state as distinguished from the Kantian law-state, the nineteenth-century socialists mark the beginnings of a transition to a new conception of the end of law. But this aspect must be considered in another connection.

In the nineteenth century, the idea of justice as the maximum of individual self-assertion, which begins to appear at the end of the sixteenth century, reached its highest development. But at the same time the actual course of legal rules and doctrines began to turn toward a new idea of the end of law and the forerunners of that idea appeared in juristic thought.

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will certainly regard the greatest possible consideration for the criminal compatible with the maintenance of social existence at all, as its first duty in the matter." BAX, *THE ETHICS OF SOCIALISM*, 3 ed., 57 (1893). It should be noted that the first prophecy is not borne out by modern social legislation.



## CONTINGENT REMAINDERS

AN act recently passed in Massachusetts puts an end there to the rule of the common law whereby a contingent remainder failed if it did not vest during the continuance of the particular estate or at the instant when that estate determined. The act also provides that such remainders shall be governed as regards remoteness by the rule against perpetuities, to the exclusion of any such rule as that laid down in *Whitby v. Mitchell*,<sup>1</sup> respecting limitations to successive generations.<sup>2</sup>

The common law rule had been previously modified by statute in 1836 to the extent that a contingent remainder would not be defeated by the destruction of the precedent estate by disseisin, forfeiture, surrender, or merger,<sup>3</sup> but it would still have failed if it was not ready to take effect upon the natural termination of the preceding estate. The commissioners who recommended this statutory provision pointed out how unjust and absurd it was that the intention of a testator or grantor should be defeated if the preceding estate determined before the happening of the contingency upon which the remainder depended. But the remedy they provided extended only to the case where the preceding estate deter-

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<sup>1</sup> 42 Ch. D. 494 (1889); 44 Ch. D. 85 (1890).

<sup>2</sup> ACTS 1916, c. 108. By § 1, "A contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner in which it would have taken effect if it had been an executory devise or a springing or shifting use, and shall, as well as such limitations, be subject to the rule respecting remoteness known as the rule against perpetuities, exclusively of any other supposed rule respecting limitations to successive generations or double possibilities." The application of the act is limited by § 2 to instruments executed after its passage and wills and codicils thereafter revived or confirmed.

<sup>3</sup> REV. STAT. 1836, c. 59, § 7; REV. LAWS 1902, c. 134, § 8. *Purefoy v. Rogers*, 2 Saund. 380, 387, 388 (1670), is an instance of a contingent remainder defeated by the premature determination of the particular estate. A testator had devised lands to his wife for her life and, if she should have a son and call it by his name, he gave them to him after her life. She afterwards married again and she and her husband purchased the reversion from the testator's heir before she had a son. Her estate for life was held to be merged in the reversion, and the contingent remainder to her son destroyed. See also 2 BL. COMM. 171.

mined prematurely, and not to the case where it determined naturally by its own limitation, before the contingency happened.

A similar course was pursued in England, where an act was passed in 1845,<sup>4</sup> containing, among other things, a provision regarding contingent remainders substantially the same as that in the Massachusetts statute of 1836.

In the previous year however an act had been passed in England which dealt more completely with the mischief incident to contingent remainders. A section of this act provided that every estate which previously would have taken effect as a contingent remainder should thereafter take effect, if in a will, as an executory devise, or, if in a deed, as an executory estate of the same nature as an executory devise, and provision was also made against the destruction of existing contingent remainders by the premature determination of the preceding estate.<sup>5</sup> This act, which contained other provisions for simplifying the transfer of property, met with much criticism.<sup>6</sup> As to the section relating to contingent remainders, one writer described it in the *Law Magazine* as "a most alarming clause,"<sup>7</sup> while another, Mr. Bellenden Ker, in a diffuse letter to the Lord Chancellor, undertook to show the difficulties of understanding or applying the clause. The shallowness of his objections was afterwards exposed by an eminent conveyancer, who in an article published in the *Jurist* pronounced the section to be "per-

<sup>4</sup> 8 & 9 VICT. c. 106, § 8.

<sup>5</sup> 7 & 8 VICT. c. 76. It was provided by § 8, "That after the Time at which this Act shall come into operation no Estate in Land shall be created by way of contingent Remainder; but every Estate which before that Time would have taken effect as a contingent Remainder shall take effect (if in a Will or Codicil) as an executory Devise and (if in a Deed) as an executory Estate of the same Nature and having the same Properties as an executory Devise; and contingent Remainders existing under Deeds, Wills, or Instruments executed or made before the Time when this Act shall come into operation shall not fail, or be destroyed or barred, merely by reason of the Destruction or Merger of any preceding Estate, or its Determination by any other Means than the natural Effluxion of the Time of such preceding Estate, or some Event on which it was in its Creation limited to determine."

<sup>6</sup> 8 JUR., pt. 2, pp. 289, 361, 407; 32 LAW MAG. 159-61; 9 JUR., pt. 2, pp. 2, 228; 10 JUR., pt. 2, pp. 2, 14.

<sup>7</sup> The writer in the *LAW MAGAZINE* was disturbed chiefly because the clause, as he read it, made it impossible to create a contingent remainder, and yet made it equally impossible to create an executory estate without creating a contingent remainder; and, again, because it provided that a contingent remainder should take effect as an executory devise, although by the rules governing an executory devise, it might be void (32 LAW MAG. 160). His criticism was sufficiently answered in 9 JUR., pt. 2, p. 2.



haps the plainest enactment that ever appeared on the statute book."<sup>8</sup> But the opposition led to the passing of the act of the following session, repealing this section and substituting for it a provision which only saved a contingent remainder from destruction by reason of the forfeiture, surrender, or merger of any preceding estate.<sup>9</sup> If however this section of the act of 1844 had not been so repealed, most of the misfortunes that have since been experienced in regard to contingent remainders would have been averted.

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<sup>8</sup> 10 JUR., pt. 2, pp. 14-16. This article is signed with the initials "G. S." and it may fairly be inferred that the author was the late George Sweet. The following specimen is there quoted from Mr. Ker's letter: "As a contingent devise or use, though by way of remainder, is necessarily unexecuted (while an executory devise or use is not necessarily contingent), the term 'executory' does not, in strictness, ascertain the peculiar species of limitation with which, by this enactment, all contingent remainders, whether created at the common law or by way of use or devise, are intended to be identified. The executory devise or estate to which reference is intended to be made is, of course, a contingent devise or use, so limited as to be incapable of taking effect as a remainder; and the true interpretation, therefore, of the enactment is, that 'a contingent limitation by way of remainder, whether created at the common law or under the Statute of Uses, or by devise, shall take effect in the very same manner as a contingent use or devise not limited by way of remainder.' Now, in order to satisfy the terms of this enactment, it appears to be necessary that we should, in the first place, apply the learning of contingent remainders, for the purpose of ascertaining whether the given limitation would, under the old law, have taken effect as a contingent remainder or not; and, in the next place, apply the learning of executory devises or uses for the purpose of inventing an hypothesis adequate to give that limitation all the effect of an executory devise or use. And we must, if possible, so work out this process, as that, while we attribute to the limitation (for this the enactment expressly requires) all the peculiar qualities of an executory devise or use, none of the beneficial properties which the same limitation, taking effect as a remainder, would have possessed, may be sacrificed. But, having ascertained that the given limitation would have been valid as a contingent remainder, then, as it is of the very essence of an executory devise or use to have (in contradistinction to a remainder) a substantive self-dependent existence, and to be incapable of taking effect as a remainder, we are compelled to disconnect the limitation, in construction or supposition of law, from the particular estate." The whole of this letter is printed in several of the early editions of DAVIDSON, *CONCISE PRECEDENTS* (2-5 ed.). It would have been more useful to have printed Mr. Sweet's answer to it, in which, after saying that, as the text of the act conveys its meaning much more shortly and with greater perspicuity than Mr. Ker's commentary, the latter must be regarded as a piece of mere mystification, he proceeds to discuss the provisions of the act and to show how groundless were the difficulties imagined by Mr. Ker (10 JUR., pt. 2, pp. 14-16).

<sup>9</sup> In SWEET, *CONVEYANCING STATUTES OF 8 & 9 VICT.* (1845), p. 1, the author says of the later act: "The last-mentioned statute has effected a retrograde step in law reform; it has repealed some useful provisions of the act of the preceding session, and, without settling any of the doubts which exist as to the construction of that act, has substituted for many of its clauses others not better in design and much more inaccurate in expression." See also 61 L. T. 335 (1876).

In 1843, shortly before these statutes, the case of *Festing v. Allen*<sup>10</sup> had been decided. There a testator had devised his lands to certain persons and their heirs to the use of his granddaughter during her life and after her decease to the use of all her children who should attain the age of twenty-one years, as tenants in common, and their heirs. The granddaughter survived the testator and died leaving three minor children. As there was no gift except to children who attained twenty-one and there was no child answering that description when the granddaughter's estate determined, it was held that the remainder was necessarily defeated. This case must have been present to the minds of the authors of the act of 1844, and under its provisions no such calamity could ever have happened in the case of any future will or deed. Under the act of 1845 the same thing was very likely to happen and actually did happen.

The difference between a contingent remainder and an executory estate (*i. e.*, a springing or shifting use or an executory devise) was that a contingent remainder depended upon the continued existence of a preceding estate of freehold until it vested, while an executory estate was entirely independent of the existence of any previous estate or interest.

This rule regarding contingent remainders was a result of the simplicity of the forms of conveyance allowed by the common law. The owner of a present estate of freehold could convey the land only by a feoffment with livery of seisin, which meant an actual delivery of the feudal possession of the land.<sup>11</sup> He could not convey it for an estate to commence in the future and retain the land in the meantime, because that was inconsistent with the present delivery of the seisin. The only occasion on which a future estate could be created was when a present feoffment was made with livery of seisin to someone for an estate less than a fee simple. A provision might then be added that upon the determination of that estate the land, instead of reverting to the feoffor, should *remain* to another for some other estate. The future estate during which the land was so to remain away from the feoffor was called a *remainder*.<sup>12</sup> It was not admissible that there should be any inter-

<sup>10</sup> 12 M. & W. 279, 300 (1843); WILLIAMS, SEISIN, 200.

<sup>11</sup> 2 BL. COMM. 310-14; 2 POLLOCK & MAITLAND, ENG. LAW, 82-84; WILLIAMS, REAL PROPERTY, 13 ed., 143 (the last edition prepared by the author).

<sup>12</sup> Mr. Maitland has shown that the word *remainder* is not applied to the estate because it is a remnant or part of the feoffor's estate that is left over when a particular



val between the present estate and the remainder, for, if there were, the land could not at the end of the present estate remain to the new owner, but would immediately revert to the feoffor, or, if there was a subsequent vested remainder, it would go to the remainderman. When the time arrived afterwards for the future estate to take effect, the land could not then *remain* to the person for whom it was intended, because it would have already reverted to the feoffor, or passed to the owner of the vested remainder, and the law provided no means whereby it could be got away from him without a new conveyance.<sup>13</sup> Accordingly, if a contingent remainder was still contingent when the previous estate came to an end, it failed entirely.

Executory estates derived their origin from uses, which required at common law a seisin in some person other than the one that had the use. They might therefore be created and transferred independently of the seisin. The owner of a piece of land might enfeoff one person to the use of another upon a contingent event, either disposing of the use in the meantime or leaving it wholly or partly undisposed of. So far as the use was not disposed of, it would

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estate has been taken out, but that it derives its meaning from the language of the conveyance, which was that the land, after the determination of the particular estate, should *remain* to another for a specified estate. Any remnant of the feoffor's estate not disposed of was called the *reversion*. 2 MAITLAND, COLL. PAPERS, 178, 180 (6 L. QUART. REV. 25); 2 POLLOCK & MAITLAND, ENG. LAW, 21; FLETCHER, CONTINGENT REM. 7. The Latin word employed in conveyances was *remanere*, but Lord Coke's connection of the word with *remnant* seems to have been a fanciful one and not in accord with the use of *remanere* in conveyances (CO. LIT. 143 a). The following is a form of feoffment with remainders in MADOX, FORMULARE ANGLICANUM, 409: "Know &c. that we [the feoffors] have delivered, enfeoffed, and by this present charter confirmed to Mary Howard our manor of Peldon, &c. To have and to hold all the said manor &c. to the said Mary for the term of her life; And after the decease of the said Mary the said manor &c. shall *remain* (*remaneat*) to John Teye and the heirs of his body lawfully begotten; And if it happen that the said John Teye die without heir of his body lawfully begotten then the said manor &c. shall *remain* to Robert Teye and the heirs of his body lawfully begotten; And if it happen that the said Robert Teye die without heir of his body lawfully begotten then the said manor &c. shall *remain* to Grace and Constance daughters of J. T. and the heirs of their bodies lawfully begotten; And if it happen that the said Grace and Constance die without heir of their bodies lawfully begotten then the said manor &c. shall wholly *revert* (*revertantur*) to us the said [feoffors] and our heirs and assigns forever; In witness &c." [25 HEN. 6]. See also other forms, *id.*, pp. 401-12. In making a feoffment the verb "enfeoff" (*feoffare*) was seldom employed, and the usual phrase was "give and grant" (*dare et concedere*) (2 POLLOCK & MAITLAND, ENG. LAW, 82). It is unnecessary to provide for the *reversion*, but it was often done (*Id.*, 7).

<sup>13</sup> WMS. R. P., 13 ed., 271-73; FEARNE, CON. REM. 281, 504-505.

result to the feoffor, and when the contingent event happened, the feoffee would hold the land to the use that would then spring up. If the use was disposed of until the contingent event, then it would shift upon the happening of the event. The owner might also, without parting with the seisin, create a future use by a bargain and sale of the land from a future time or contingent event,<sup>14</sup> or by a covenant that he would thereafter stand seised of the land to the use of another.<sup>15</sup> In all these cases the persons that had the seisin were bound to deal with the land in accordance with the wishes of those that had the use.

The Statute of Uses<sup>16</sup> transferred the seisin and possession from the persons in whom it was vested to the persons entitled to the use for the like estate as they had in the use, but it did not attempt to interfere with the creation of uses. Land might still be limited to uses in the same manner as before the passage of the act and the uses would become by force of the statute legal interests. A future use would become a future legal interest, and would be valid although there might be no preceding estate. But where a use for a freehold interest was preceded by an estate that would support a contingent remainder, the common law courts gave to the legal estate into which the use was converted the same effect as if it had been limited, as at common law, by way of remainder after the preceding estate without any mention of uses. A feoffment to the use of one for life and after his death to the use of his children who should attain the age of twenty-one years, in equal shares, had accordingly the same effect as if the feoffment had been made to the same person for life with remainder to his children attaining that age in like manner. The future use, having become a legal estate, had the incidents of the like estate at common law, and, if it was still contingent when the preceding estate determined, it failed to take effect at all. Accordingly it was an established rule of law "that no limitation shall be construed to be an executory or shifting use which can by possibility take effect by way of remainder."<sup>17</sup> It was plain that

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<sup>14</sup> 1 SANDERS, USES, 142; 7 BACON'S WKS. (Spedding's ed.), USES, 440; Davis v. Speed, 12 Mod. 39 (1694); GRAY, PERPETUITIES, 3 ed., § 56.

<sup>15</sup> CO. LIT. 271 b, Butler's note, VI, 1; GILBERT, USES (Sugden's ed.), 92, 108.

<sup>16</sup> 27 HEN. VIII, c. 10.

<sup>17</sup> Cole v. Sewall, 4 Dr. & War. 1, 27 (1843); 2 CON. & LAW. 344, 359; Carwardine v. Carwardine, 1 Eden 27, 34 (1757); GILBERT, USES (Sugden's ed.), 176; FEARNE, CON. REM. 392; BURTON, COMPENDIUM, 7 ed., 261.



this rule disregarded the intention of the settlor, for it was never doubted that it was intended in such cases as that just mentioned that all the children should be entitled whenever they attained the specified age. But at common law effect could not be given to this intention, unless they had attained that age when the preceding estate determined. And when the statute turned the use into a legal estate, the courts of law applied to it the same rules that had previously governed legal estates, if the estate was one that could have been created at common law. It was only in the case of springing and shifting uses, which did not correspond to any common law estates, that the rules of the Court of Chancery continued to be applicable.<sup>18</sup>

Executory devises were formed on the model of springing uses.<sup>19</sup> At common law there was no power of disposing of land by will, except in some places by custom.<sup>20</sup> But the purpose of a will was accomplished by a feoffment to the use of the feoffor and his heirs or to the uses of his will, and the Court of Chancery, which allowed a devise of the use, would compel the feoffees to deal with the land according to the will.<sup>21</sup> When however the Statute of Uses turned the use into a legal estate, it became property that the owner had no power to devise.<sup>22</sup> The inconvenience of thus taking away a power to which people had become accustomed soon led to the passing of the Statute of Wills.<sup>23</sup> After this statute, by an indulgence in favor of wills, a testator was permitted to make a devise directly and without the interposition of a third person for any interest that might previously have been created by a springing or shifting use, and such a limitation was called an executory devise.<sup>24</sup>

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<sup>18</sup> *White v. Summers*, [1908] 2 Ch. 256, 262-65.

<sup>19</sup> BURTON, COMPENDIUM, 7 ed., 104; *Purefoy v. Rogers*, 2 Saund. 388, note.

<sup>20</sup> 2 BL. COMM. 374; BURTON, COMPENDIUM, 7 ed., 91; WMS. R. P., 13 ed., 205.

<sup>21</sup> MADOX, FORMULARE ANGLICANUM, 438, gives a form of will (2 HEN. 7) in which, after reciting a feoffment to the use of the testatrix and her heirs and to perform and fulfill her will, she proceeded to declare the manner in which the feoffees should deal with the lands. For examples of bills to enforce the uses, see SELECT CASES IN CHANCERY (Selden Soc.), cases 118, 127.

<sup>22</sup> 2 BL. COMM. 375; BURTON, COMPENDIUM, 7 ed., 91; WMS. R. P., 13 ed., 205. But see BACON, USES (Rowe's ed., 1806), 140, note 80.

<sup>23</sup> 32 HEN. VIII, c. 1; 34 HEN. VIII, c. 5; 2 BL. COMM. 375; BURTON, COMPENDIUM, 7 ed., 91; WMS. R. P., 13 ed., 205.

<sup>24</sup> FEARNE, CON. REM. 386; BURTON, COMPENDIUM, 7 ed., 104; WMS. R. P., 13 ed., 316-17; *Purefoy v. Rogers*, 2 Saund. 388, note.

In all other respects, executory devises followed the analogy of springing and shifting uses. And the like maxim was established regarding them, that, whenever an estate can take effect as a contingent remainder, it shall never be construed as an executory devise.<sup>25</sup>

The consequences of this rule are shown by considering its application to a case in which land is limited to the use of a living person for his life and after his death to the use of his children attaining twenty-one in equal shares in fee simple, or a devise directly to such persons for similar estates. The estate limited to the children is a contingent remainder, whether it is limited to them directly or as a use, for it is an estate that might have taken effect as a remainder if it had been limited to them at common law. If at the death of the life tenant none of his children has attained twenty-one, then the estate limited to them fails entirely.<sup>26</sup> If one or more of them has attained twenty-one, the remainder would have vested in them successively as they attained that age, and they take the whole at the death of the life tenant to the exclusion of any others who may then be under that age.<sup>27</sup> The rule would be applicable in the same way if the remainder were limited to such children as should attain the age of twenty-five.<sup>28</sup> But the result would be entirely different if the land were limited to trustees in trust for the same persons for like interests. The legal estate would be vested in the trustees, who would have a continuing seisin, and the ground of the rule of the common law would not exist. In the case of such a trust for children attaining twenty-one, all that attained that age at any time, either before or after the death of the tenant for life, would be entitled, and, if there were children and none of them had attained twenty-one at that time, the beneficial interest would result in the meantime, just as a use would have done before the Statute of Uses. If the trust were for such children as should attain twenty-five, then it would be wholly invalid, for the children might not be ascer-

<sup>25</sup> *Purefoy v. Rogers*, 2 Saund. 380, 388; *Goodtitle v. Billington*, 2 Doug. 753, 758 (1781); *FEARNE, CON. REM.* 267, 386. This rule was often laid down in *Massachusetts*; *Nightingale v. Burrell*, 15 Pick. 104, 110 (1833) (Shaw, C. J.); *Terry v. Briggs*, 12 Met. 17, 22 (1846) (Wilde, J.); *Hall v. Priest*, 6 Gray 18, 20 (1856) (Bigelow, J.).

<sup>26</sup> *Festing v. Allen*, 12 M. & W. 279, 300 (1843); 1 JARM., WILLS, 6 ed. (1910), 328; 1 ed., 229.

<sup>27</sup> *FEARNE, CON. REM.* 312; *Festing v. Allen*, 12 M. & W. 279, 301 (1843).

<sup>28</sup> *Symes v. Symes*, [1896] 1 Ch. 272; 1 JARM., WILLS, 6 ed., 328; 1 ed., 230.



tained within the time allowed by the rule against perpetuities, and none of them could take any interest under it.<sup>29</sup>

In the case of *Cunliffe v. Brancker*,<sup>30</sup> which was decided in 1876, a testator, who died in 1817, had devised certain lands to two persons and their heirs and assigns to the use of themselves for the term of one hundred and twenty years, if his niece Sarah Cunliffe should so long live, upon trust to pay her the rents and profits for her separate use, and from the expiration of that term and subject thereto to the use of her husband John Cunliffe during his life, and after his decease to the use of all the children of Sarah Cunliffe who should be living at the decease of the survivor of the husband and wife, and the issue then living of such of them as should be then dead, and their heirs and assigns, as tenants in common, the issue taking their parents' share, with remainders over in default of any child or issue then living. The husband died in the lifetime of his wife, and upon her death leaving several children the question arose whether the limitation to the children failed for want of a particular estate of freehold to support it after the death of the husband.<sup>31</sup> Jessel, M. R., said:

"This is a case in which, according to my view, the intention of the testator fails on account of a feudal rule of law which, in my humble judgment, ought to have been abolished long ago. I mean the rule of law requiring that, in order to support a contingent remainder, there must be an estate of freehold in existence at the time the contingent remainder becomes vested, so that if until the time of the determination or cesser of the prior estates of freehold the remainder has not vested, it fails in spite of the intention of the settlor or testator. This has nothing to do with the intention. It always disappoints the intention, because every settlor, or testator, intends the contingent remainder to take effect. This is an arbitrary feudal rule, one of the legacies of the Middle Ages which has come down to our times, and which, not having been interfered

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<sup>29</sup> *Abbiss v. Burney*, 17 Ch. D. 211 (1881). See also *Pearks v. Moseley*, 5 A. C. 714 (1880); *Hall v. Hall*, 123 Mass. 120, 124 (1877).

<sup>30</sup> 3 Ch. D. 393, 399, 401.

<sup>31</sup> The term of years determinable on the death of the wife was still subsisting, but a term of years cannot support a contingent remainder. 2 BL. COMM. 171; CHALLIS, R. P., 1 ed., 93; 3 ed., 119. If Sarah Cunliffe had died before her husband, his life estate would have supported the contingent remainders until they vested at his death, as in the case of another devise in the same will in precisely the same terms, substituting the names of Mary Ann Grundy and her husband for those of Sarah Cunliffe and her husband (3 Ch. D. 394, 398).

with by the Legislature, I cannot interfere with. . . . No children are to take except children of *Sarah* who should be living at her decease. . . . It is quite true that the testator probably never heard of this rule of law, but I think his conveyancer did who drew the will, for it is a will drawn by a lawyer, and the conveyancer made a mistake, he overlooked the fact that if *John Cunliffe* died before his wife there would be no freehold to support the contingent remainders."

He therefore declared that he was bound by the rule to disappoint the intention by holding that the contingent remainder failed for want of a sufficient estate to support it, and his decision was affirmed by the Court of Appeal (James, Mellish, and Baggallay, L. JJ.).

The effect of the rule might generally be avoided by adding an alternative limitation that could only take effect as an executory estate in favor of those who would otherwise be disappointed. For example, in *In re Lechmere and Lloyd*,<sup>32</sup> there was a devise to a granddaughter for her life and after her death to such children of hers then living and such issue then living of her children then deceased, as either *before* or *after* her decease should attain twenty-one or, in the case of females, marry, in fee simple as tenants in common. The granddaughter died leaving children some of whom had attained twenty-one and others were infants and unmarried. Jessel, M. R., held that there were two distinct classes as objects of the devise, one being the children ascertained at the death of the tenant for life, and the other being children ascertained after her death. As to the former class the gift might take effect as a remainder, but as regards the latter class it could not possibly take effect except as an executory devise. Consequently the children who had attained twenty-one took vested interests liable to open and let in the others on their fulfilling the conditions. The same principle was afterwards applied by Kay, J., in *Miles v. Jarvis*,<sup>33</sup> and by Chitty, J., in *Dean v. Dean*.<sup>34</sup> But the court cannot supply the alternative limitation if it is not expressed, although the devise might have been so divided by the testator that it would operate as a contingent remainder in some events or as to some of the persons described, and as an executory devise in other events or as to other persons.<sup>35</sup>

<sup>32</sup> 18 Ch. D. 524 (1881).

<sup>33</sup> 24 Ch. D. 633 (1883).

<sup>34</sup> [1891] 3 Ch. 150.

<sup>35</sup> For other illustrations of the rule regarding alternative limitations, see *Evers v. Challis*, 7 H. L. Cas. 531, 547, 550, 552, 555 (1859); *Doe v. Selby*, 2 B. & C. 926, 930 (1824); *Miles v. Harford*, 12 Ch. D. 691, 702-04; *Hancock v. Watson*, [1902] A. C. 14; *Gray v. Whittemore*, 192 Mass. 367, 372, 78 N. E. 422 (1906).



Accordingly in *White v. Summers*,<sup>36</sup> where there was a devise to John Bowen for life, and after his decease "to the use of the eldest or other son of the body of my nephew James Summers . . . who shall first attain or have attained the age of twenty-one years" in tail, and at the death of the tenant for life the eldest son of James Summers had not attained that age, Parker, J., held that the devise to the son was a contingent remainder and failed. The devise, he said, was clearly intended to take effect if the son attained twenty-one, whenever that event happened, but the contingency was such that it might happen before the determination of the preceding estate, and as there was nothing from which he could infer an intention to create an alternative gift not to take effect upon the determination of the estate, the devise must be held to be a contingent remainder, although the intention of the testator would be thereby defeated.<sup>36</sup>

It is said that the decision in *Cunliffe v. Brancker* led to the passing of the Contingent Remainders Act in 1877.<sup>37</sup> This act provided that a contingent remainder which would have been valid as a springing or shifting use or executory devise, had it not had a sufficient estate to support it, should, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect as if it had originally been created as a springing or shifting use or executory devise.<sup>38</sup> Before the bill on which the act was founded was brought in, and very shortly after the decision in *Cunliffe v. Brancker*, a bill was prepared by Joshua Williams, by which he proposed that a contingent remainder should take effect, notwithstanding the want of a particular estate to support it, in the same manner as if it were an equitable estate, and should be governed by the rules as to invalidity by reason of remoteness which govern equitable estates.<sup>39</sup> His bill however was not adopted. As he pointed out, the act which was passed did not apply to a gift of land to one for life with remainder to his children who should attain twenty-five, for the remainder would be void for remoteness as an executory limitation, if there had not been a partic-

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<sup>36</sup> *White v. Summers*, [1908] 2 Ch. 256. A leading article on this case appeared in the *SOLICITORS' JOURNAL* of 11th April, 1908 (52 SOL. J. 408).

<sup>37</sup> CHALLIS, R. P., 1 ed., 112; 3 ed., 141; 61 L. T. 335, 371 (1876); 22 SOL. J. 332 (1878).

<sup>38</sup> 40 & 41 VICT. c. 33; WMS., SEISIN, 205.

<sup>39</sup> The bill is printed in WMS., SEISIN, 207, and 62 L. T. 312. See also 61 *Id.* 371.

ular estate to support it. Accordingly, if one or more of the children attained twenty-five before the death of the tenant for life, they would take the whole to the exclusion of others afterwards attaining twenty-five who were intended to take equally with them. Mr. Williams also asserted that, if a remainder was limited to the children of the tenant for life who should attain twenty-one and some of his children attained that age in his lifetime and others after his death, the remainder would vest wholly in those that had attained twenty-one at his death and the others would be excluded, because the act applied only in the event of the particular estate determining "before the contingent remainder vests."<sup>40</sup> But the Solicitors' Journal said of this criticism: "If that is so, the Act is a failure, for the inconvenience it was intended to remedy seldom arose except under gifts to classes," and this opinion was echoed by the Law Times,<sup>41</sup> which added that such a vesting was not the vesting spoken of by the act, and that, when it referred to the particular estate determining before the contingent remainder vests, it was speaking of those who but for the act would have been disappointed and in interpreting the statute the old law and the mischief to be provided against ought to be borne constantly in mind. A series of letters in the Solicitors' Journal followed, in which Mr. Williams's eminent contemporary, George Sweet, took part and maintained that the words of the act referred to the case of the particular estate determining before the contingent remainder had vested in all the persons in whom it would have vested if the particular estate had not determined, and that they were not limited to the case where there had been no vesting in any of them.<sup>42</sup> This question has not yet been judicially determined. It was lately raised in the case of *In re Robson*,<sup>43</sup> before Astbury, J., where a testator had devised a house to his daughter for life and after her decease to such of her children as should attain twenty-one, as tenants in common, in fee simple. Two of her children had attained twenty-one at her death and two others were still minors. The judge pointed out that, if the children had all been infants at the death of the life tenant, there would have been no difficulty, but,

<sup>40</sup> WMS., SEISIN, 206-07.

<sup>41</sup> 22 SOL. J. 332 (23 Feb., 1878); 64 L. T. 328 (9 March, 1878).

<sup>42</sup> The letters are as follows: 22 SOL. J. 544 (A. P. Whately); 562 (G. Sweet); 601, 622 (J. Williams); 640 (G. Sweet); 661 (J. Williams).

<sup>43</sup> [1916] 1 Ch. 116.



as two had attained twenty-one there was a question whether the contingent interests of the infants would be saved by the statute. He did not decide this point because the Land Transfer Act, 1897, vested the real estate of the testator in his personal representatives as trustees for the persons beneficially entitled to it, and so he held that the interests of the children were equitable ones, to which the rule of the common law did not apply.<sup>44</sup>

Another evil attending contingent remainders was the rule, established in England in *Whitby v. Mitchell*,<sup>45</sup> that a contingent remainder could not be limited to the issue of an unborn person after a limitation to that person for his life, even though it was so limited that it must vest, if at all, within the period allowed by the rule against perpetuities. The rule was in that case laid down only as regards legal estates, but it was afterwards extended to similar equitable estates by *In re Nash*.<sup>46</sup> It was sometimes said to have originated in a rule against a possibility upon a possibility, but in the decision of the latter case the use of this phrase was disapproved. It is often spoken of as a rule against limiting land to unborn generations in succession. It was said to have become a fixed rule regarding legal estates in land, before the creation of executory interests showed the need for the rule against perpetuities to keep them within proper limits. But there was no useful purpose in having such a rule after the rule against perpetuities relating to the same matter had become established as to other interests. There is no case in this country, so far as the present writer knows, in which the existence of such a rule has been considered or mentioned in any judicial decision, but it has been discussed by Mr. Gray in his book on Perpetuities.<sup>47</sup> The rule however did not extend to executory limitations, as is shown by the decision of the House of Lords in *Cadell v. Palmer*,<sup>48</sup> where a series of executory devises of a long term of years to several successive generations of unborn persons was held to be

<sup>44</sup> This construction of the provisions of the Land Transfer Act, 1897, is criticised in a note in 32 L. QUART. REV. 3, which appears by the appended initials to have been written by Mr. Charles Sweet, and in an article on Assent by Executors in 60 SOL. J. 426.

<sup>45</sup> 42 Ch. D. 494 (1889); 44 Ch. D. 85 (1890).

<sup>46</sup> [1910] 1 Ch. 1; [1909] 2 Ch. 450.

<sup>47</sup> GRAY, PERPETUITIES, 3 ed., §§ 298 a, 931.

<sup>48</sup> 1 Cl. & Fin. 372 (1833). The rule laid down in that case prevails in Massachusetts. *Brattle Square Church Case*, 3 Gray 142, 152 (1855); *Odell v. Odell*, 10 Allen 1, 5 (1865).

valid, as the vesting was confined to lives in being at the death of the testator and twenty-one years after. Accordingly, if the provision in the act of 1844 by which contingent remainders were turned into executory limitations<sup>49</sup> had not been so hastily repealed in the following year, there would not have been any such case as *Whitby v. Mitchell* or *In re Nash*, or any of the cases dependent on them. The limitations in question in those cases would have been converted into executory limitations, and their validity as regards remoteness would have been determined by the rule against perpetuities, by which other executory limitations are governed. There would have been no question of any other rule affecting their validity on the ground that they involved double possibilities or conferred interests on successive unborn generations.

In Massachusetts a case of *Simonds v. Simonds*<sup>50</sup> was decided in 1908, which involved the question whether a limitation to a class of persons after an estate for life could vest in any members of the class who were not ascertained when the particular estate determined. There was a conveyance by deed to Charles Simonds and his heirs and assigns to the use of himself during his life and after his death to the use of such of his children as should attain the age of twenty-one years, as tenants in common, and their heirs and assigns.<sup>51</sup> He had five children, two of whom attained twenty-one in his lifetime, and one of the others attained that age after his death and two were

<sup>49</sup> 7 & 8 VICT. c. 76, § 8, *supra*, p. 227. See 61 L. T. 335.

<sup>50</sup> 199 Mass. 552, 85 N. E. 860 (1908). This case is criticised in GRAY, PERPETUITIES, 3 ed., § 927.

<sup>51</sup> A grant to A. in fee simple to the use of himself for life has the same effect as a grant to another in fee simple to the use of A. for life, although in the former case A. is in for life by the common law, and in the latter case by the statute. In each case subsequent uses for other persons are executed by the statute. Bacon says: "if I give land to I. S. and his heirs, to the use of himself for life, or for years, and then to the use of I. D. or his heirs, I. S. is in of an estate for life, or for years, by way of abridgment of estate, in course of possession, and I. D. in of the fee-simple by the statute." 7 BACON'S WKS. (Spedding's ed.), USES, 440. See, to the same effect, 1 PRESTON, ESTATES, 176; GILBERT, USES (Sugden's ed.), 152; BURTON, COMPENDIUM, 7 ed., 47. The limitation to Charles Simonds in fee simple to the use of himself for life, vested in him the legal estate in fee simple at common law, but, as the use was confined to his life, the legal estate stayed in him only during that period. The subsequent use vested in his children as they attained 21 successively, until the class was closed, and the statute transferred the legal estate to them according to their respective estates in the use. His estate and that of his children were thus precisely the same as if the conveyance had been made to a third person and his heirs to the same uses. See also *Doe v. Passingham*, 6 B. & C. 305 (1827); 2 DAV., CONV., 3 ed., 176-77.



still minors at the time of the proceedings. The question was whether these three children were excluded from any interest because they had not attained twenty-one at the death of the tenant for life. It was held that the meaning was that, after the death of the tenant for life, the land should go to all his children who should reach the age of twenty-one years, regardless of the time when any of them might attain that age, and as only two of those who might ultimately attain twenty-one were then certain, effect might be given to the intention by way of a shifting use in favor of those who finally answered the description.<sup>52</sup> The correctness of the interpretation given to the deed is beyond question and it cannot be doubted that the intention was carried out by the decision, but whether it could be so carried out consistently with the rule of law is a different matter. It is plain that the limitation to all the children who should attain twenty-one, whenever they might attain that age, was one that might have taken effect as a contingent remainder. It is also plain that there was not an alternative or separable limitation to those who should attain twenty-one after the death of the tenant for life, which could not have taken effect as a contingent remainder, or otherwise than as a springing or shifting use. The judgment disclaimed any intention of deciding anything at variance with what it described as the well-settled rule that a limitation, if it could so operate, was to be construed as a remainder, even if the rule applied with equal force to springing and shifting uses. The decision is put wholly upon the intention that the land should go to all the children who should ultimately attain twenty-one, and it certainly gave effect to that intention. The rule that was invoked to defeat the intention has now been done away with by the statute mentioned at the commencement of this article and there can be no question how any similar limitation in the future would be dealt with, although the case might be one in which resort could not be had to the Statute of Uses.

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BOSTON, MASS.

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<sup>52</sup> The case of *White v. Summers*, [1908] 2 Ch. 256 (*supra*, p. 236), in which the same questions were considered by Parker, J., six months previously, seems not to have been brought to the attention of the court.

TORT AND ABSOLUTE LIABILITY—SUGGESTED  
CHANGES IN CLASSIFICATION

IT is proposed to suggest some changes in the prevailing classification and nomenclature of the outlines of substantive law upon the general subjects, (1) of so-called torts, and (2) of cases of "absolute" liability where there is neither contract nor fault. And the attempt will be made to do this uninfluenced by two causes: one, the phraseology and doctrine of the old law of procedure, especially the old law as to forms of action;<sup>1</sup> the other, legal fictions and fiction phrases.

We are not now attempting to suggest the alteration of the substantive law, but rather the alteration of the mode of stating and classifying legal doctrines relating to certain topics. It will not be here contended that the actual results (the final decisions) which are now usually reached by courts upon these topics are often incorrect. But it will be contended that, although these results are generally correct, yet the prevailing classification and nomenclature are antiquated and misleading, and that a restatement will promote ease and clearness of apprehension. It may be said that the arrangement of topics, the division of the law into various subjects, "constitutes no part of the law itself" ("does not affect the law itself"), and that hence questions of arrangement or classification are "not of prime importance."<sup>2</sup> But it is certain that a good arrangement of topics will make the law more easily comprehended by students and less likely to be misunderstood or misapplied by lawyers and judges.

We cherish no illusions as to the speedy adoption of any suggested changes in classification. Even if the best members of the profession are convinced of the correctness of a proposed new system, yet an immediate change from a former system is not likely. The

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<sup>1</sup> In a later part of this article, we quote the emphatic assertions of Maitland and Salmond to the effect that the old forms of action still influence modern statements of the existing substantive law.

<sup>2</sup> See BISHOP, *CONTRACTS*, 2 ed., § 183, note 1; BISHOP, *NON-CONTRACT LAW*, § 1. And compare 2 AUSTIN, *JURISPRUDENCE*, 3 ed., 685.



"dislocation of established associations," the confusion incident to a transition period, the practical inconvenience of adopting a new arrangement of topics differing from that found in the leading textbooks, are all considerations calculated to retard, if not entirely prevent, a change. Some of the ablest and most original legal authors of the present day have, in effect, said that the object to be aimed at in legal classification is practical convenience, not logical or scientific order, and that changes from the existing arrangement or nomenclature should be made only for very weighty reasons.<sup>3</sup> But a grouping or arrangement of topics which is preferable from the point of view of "the index-maker or the practitioner" may not always be preferable "from the point of view of the jurist" who desires to go down to foundations. What may be called a juristic classification, based upon existing decisions may tend to remove difficulties and inconsistencies inherent in the hitherto established methods of arrangement. If so, it should at least be conspicuously mentioned in the textbooks as an alternative classification, and attention should be called to its advantages.

As to the views about to be set forth, no claim of originality is made. The suggested changes are based upon distinctions already recognized in some legal treatises. Our inquiry is, whether these distinctions should not be allowed more effect than has hitherto generally been the case, in the consideration of questions relating to legal nomenclature and classification.

The term "causes of personal action" is a very broad one, embracing a good deal of matter that cannot be classed under tort.<sup>4</sup> How has the law classified or divided causes of personal action (other than suits to obtain possession of specific articles of property), and what names have usually been given to the separate classes?

In recent times it has been commonly assumed that there are only two great divisions of causes of personal action, contract and tort, and that there can be no cause of personal action unless it can be classed under one of these two heads.<sup>5</sup> "No intermediate

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<sup>3</sup> See *post*, quotations from Pollock and Salmond.

<sup>4</sup> While legislatures, or courts, may undertake to abolish forms of action, yet they cannot abolish distinctions between causes of action. In the nature of things such distinctions must continue to exist. See 2 ODGERS, COMMON LAW OF ENGLAND, 1245.

<sup>5</sup> See Lord Chancellor Haldane, in *Sinclair v. Brougham*, [1914] A. C. 398, 415.

class was known to the law of procedure."<sup>6</sup> In *Bryant v. Herbert*<sup>7</sup> the controversy arose under a statute making a distinction as to costs between actions founded on contract and actions founded on tort. Bramwell, L. J., said, page 390: "One may observe there is no middle term; the statute supposes all actions are founded either in contract or tort. So that it is tort if not contract, contract if not tort."<sup>8</sup>

At the present time we think it should be recognized that there are three great divisions of causes of personal action:

1. Breach of genuine contract.
2. Tort, in the sense of fault.
3. So-called "Absolute Liability" imposed by courts, where there is neither breach of genuine contract nor fault.<sup>9</sup>

Under this classification, the application of the term tort should be restricted to class 2.

The third class can be subdivided as follows: (a) Cases where recovery has heretofore been enforced in an action of tort; (b) cases where recovery has heretofore been enforced in an action of contract.<sup>10</sup>

What practical benefit from adopting the new classification and

<sup>6</sup> HEPBURN, DEVELOPMENT OF CODE PLEADING, § 26. Compare Professor Maitland's note in POLLOCK, TORTS, 10 ed., 587-94, Appendix A.

<sup>7</sup> 3 C. P. Div. 389 (1878).

<sup>8</sup> By the present Pleading and Practice Act of Massachusetts, 1902, REV. LAWS, Ch. 173, § 1: "There shall be only three divisions of personal actions:

"First, Contract . . .

"Second, Tort, which shall include actions formerly known as trespass, trespass on the case, trover and actions for penalties.

"Third, Replevin."

The above is a substantial reenactment of a statute originally passed in 1851 (LAWS OF 1851, ch. 233, § 1) in accordance with the report of a very strong legal commission, of which Benjamin R. Curtis was chairman.

<sup>9</sup> Those who prefer an arrangement of the law based upon rights, instead of upon duties or liabilities, might substitute for "Absolute Liability" the phrase "Violations of Absolute Right," or "Infringements of Absolute Right." Rights and duties are very generally correlative to each other.

<sup>10</sup> We have said that the existence of the three divisions should be recognized "at the present time." Will their existence permanently continue? With a better idea of the essence of fault, will many cases now classed under 3 (a) be placed under 2? Will modern legislation (e. g., the Workmen's Compensation Acts) have such an effect upon public and judicial opinion as to induce the courts to repudiate the modern common law doctrine that fault is generally requisite to liability, and go back to the ancient doctrine that an innocent actor must answer for harm caused by his non-culpable conduct? See 27 HARV. L. REV. 365-68, and later discussion in this paper.



nomenclature above suggested? What disadvantage, what practical harm, from continuing to use the old division and nomenclature?

Two considerations may be mentioned:

1. The separation into class 2 and class 3 (*a*), instead of including both classes under the general head of tort, will necessitate searching inquiry into the essence of fault as a ground of liability, and also an inquiry into the reasons of policy for imposing liability in the absence of fault. These questions have not hitherto received the attention which their importance deserves.

2. No useful definition of tort can be framed if that term is used to cover all the cases under all the sub-topics formerly enumerated under this general head; in other words, if tort is used as including not only class 2, but also class 3 (*a*). The insufficiency of previous attempts to define tort, when used in this sense, is admitted by good authorities.

If the above classification — the separation of causes of personal action into three divisions — is correct, why has it not been generally adopted at an earlier date? The answer is found in the history of the law.

Formerly the law of procedure almost monopolized attention, so that questions of substantive law received very scant consideration. The form of procedure was considered the principal thing, and the substantive law was viewed as a mere incident to procedure.<sup>11</sup> "The forms of action are given, the causes of action must be deduced therefrom."<sup>12</sup> "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure."<sup>13</sup> Certain forms of personal action were recognized by the courts. A plaintiff had no remedy unless his case would fit into one of these forms.<sup>14</sup> The relief afforded under the Statute of Westminster II was "only partial."<sup>15</sup> Not only were forms of action rigid, but each procedural form contained its own rules of substantive law, which had grown up "independently of the law

<sup>11</sup> See 1 *ENCYCLOPÆDIA LAWS OF ENGLAND*, 2 ed., Pollock's Introduction, 4.

<sup>12</sup> *MAITLAND, EQUITY AND THE FORMS OF ACTION*, 300.

<sup>13</sup> *MAINE, EARLY LAW AND CUSTOM*, Eng. ed., 1883, 389.

<sup>14</sup> See *MAITLAND, EQUITY AND FORMS OF ACTION*, 298-99; *ODGERS, PRINCIPLES OF PLEADING*, 5 ed., 185-86; Sir F. Pollock, 11 *HARV. L. REV.* 424; Professor Bohlen, 59 *U. PA. L. REV.* 306; *HEPBURN, DEVELOPMENT OF CODE PLEADING*, § 21.

<sup>15</sup> See *HEPBURN, DEVELOPMENT OF CODE PLEADING*, 68, 24.

administered in other forms."<sup>16</sup> "There were rules relating to each form of action, but no general law of torts."<sup>17</sup>

Sometimes "old formulæ of actions were adapted to new cases by means of *fictions*."<sup>18</sup> But while the legal fiction may, for the time being, have "served a useful function," we agree with Professor Hepburn (§ 27) that "the price paid for it was very high." The use of fictions has (along with other bad results) constituted an obstacle to systematic classification of legal doctrines.<sup>19</sup>

Forms of action are now abolished in many jurisdictions; while in some others a few simple forms are substituted for the old ones. Yet the ideas and phrases connected with the old forms still exert an influence.

"The forms of action we have buried, but they still rule us from their graves."<sup>20</sup>

". . . The substantive obligations imposed by law are still influenced by the old forms."<sup>21</sup>

"Forms of action are dead, but their ghosts still haunt the precincts of the law. In their life they were powers of evil, and even in death they have not wholly ceased from troubling. In earlier days they filled the law with formalism and fiction, confusion and complexity, and though most of the mischief which they did has been buried with them, some portion of it remains inherent in the law of the present day. Thus if we open a book on the law of torts, howsoever modern and rationalized, we can still hear the echoes of the old controversies concerning the contents and boundaries of trespass and detinue and trover and case, and we are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when forms of action and of pleading held the legal system in their clutches."<sup>22</sup>

Professor Wigmore calls attention to

"the necessity, every day drawing nearer, of adjusting the treatment of our substantive law to the abolition, already largely accomplished, of the forms of action and classes of writs in tort. . . ."<sup>23</sup>

<sup>16</sup> See MAITLAND, 298. Compare Professor Williston, 24 HARV. L. REV. 415.

<sup>17</sup> Prof. Geo. D. Watrous, in TWO CENTURIES GROWTH OF AMERICAN LAW, 86.

<sup>18</sup> See HEPBURN, §§ 24, 25.

<sup>19</sup> "Now legal fictions are the greatest of obstacles to a symmetrical classification." MAINE, ANCIENT LAW, 1 Eng. ed., 27.

<sup>20</sup> MAITLAND, EQUITY AND FORMS OF ACTIONS, 296.

<sup>21</sup> ROBERT CAMPBELL, PRINCIPLES OF ENGLISH LAW, 425 (1907).

<sup>22</sup> Prof. John W. Salmond, 21 L. QUART. REV. 43. <sup>23</sup> 8 HARV. L. REV. 209.



Professor Maitland says that now

"the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law."<sup>24</sup>

In the former days when substantive law was dominated by procedure,<sup>25</sup> the leading doctrines of substantive law were evolved very slowly; and this was especially true as to the subject of torts. In a very recent work, it is said that, in tort, "the generalizing process" "has as yet developed much less than in the corresponding department of Contract."<sup>26</sup>

Professor Burdick, speaking of a book published in 1720, says "that the rules of English law relating to torts had not then been systematized, and that neither the bench nor the bar had any conception of a Law of torts."<sup>27</sup>

Judge Doe says:

"Formerly, in England, there seems to have been no well-defined test of an actionable tort. . . . There were precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject."<sup>28</sup>

In 1895 Judge Jaggard, in the Preface to his work on Torts,<sup>29</sup> says: "Specific Torts were among the earliest subjects of judicial cognizance." "But only within very recent times has the process of generalization been applied to them."

In 1886 Sir Frederick Pollock, in the Introduction to the first edition of his work on Torts (after stating that "the purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts"), says:<sup>30</sup>

"It is not surprising in any case, that a complete theory of Torts is yet to seek, for the subject is altogether modern. . . . The really scientific treatment of principles begins only with the decisions of the last fifty years. . . ."

<sup>24</sup> MAITLAND, *EQUITY AND FORMS OF ACTIONS*, 375.

<sup>25</sup> "During the period when the substantive law was controlled by the forms of procedure. . . ." Professor Corbin, 21 *YALE L. J.* 536.

<sup>26</sup> JENKS, *DIGEST OF ENGLISH LAW*, Book II, Part 3, Preface, p. xi.

<sup>27</sup> BURDICK, *TORTS*, 2 ed., 2.

<sup>28</sup> *Brown v. Collins*, 53 N. H. 442, 445 (1873).

<sup>29</sup> Pages v and vi.

<sup>30</sup> Page vii.

Elsewhere Pollock says:

"In England the general scope of the law of torts has never been formulated by authority, the law having in fact been developed by a series of disconnected experiments with the various forms of action which seemed from time to time to promise the widest and most useful remedies."<sup>31</sup>

So late as 1853 Dr. Joel P. Bishop, who had just achieved a high reputation as a legal author, could find no law-book publisher in the United States willing to bring out a book on the Law of Torts. The publishers all said "that there was no call for a work on that subject, and there could be no sale for it."<sup>32</sup>

As to the existing classifications and definitions of tort:

When courts and lawyers were professedly proceeding on the assumption that all causes of personal action (except contract) should be placed under the head of tort, what was the usual method of subdividing the various causes of action thus grouped under that general head?

Holland, using the term "wrongful acts" in its literal sense as including breaking of contract,<sup>33</sup> says:

"Wrongful acts may be, and are, classified on five different principles at least."<sup>34</sup>

To the five different methods of classification there enumerated, at least two more may be added.

<sup>31</sup> 2<sup>d</sup> ENCYCL. BRIT., 11 ed., 64.

<sup>32</sup> But whether any definition can be given of a tort beyond the restrictive and negative one that it is a cause of action (that is, of a 'personal' action as above noted) which can be sued on in a court of common law without alleging a real or supposed contract, and what, if any, are the common positive characters of the causes of action that can be so sued upon: — these are matters on which our books, ransack them as we will, refuse to utter any certain sound whatever. If the collection of rules which we call the law of torts is founded on any general principles of duty and liability, those principles have nowhere been stated with authority. And, what is yet more remarkable, the want of authoritative principles appears to have been felt as a want by hardly anyone." POLLOCK, TORTS, 2 ed., 4, 5.

<sup>33</sup> BISHOP, NON-CONTRACT LAW, published in 1889, § 3, note 2.

<sup>34</sup> "To break a contract is an unlawful act, or in the language of Lord Watson in *Allen v. Flood* ([1898] A. C., at p. 96), 'a breach of contract is in itself a legal wrong.'" Lord Lindley, [1905] A. C. 253.

<sup>35</sup> HOLLAND, JURISPRUDENCE, 8 ed., 291-92.



Pollock says:

"The classification of actionable wrongs is perplexing, not because it is difficult to find a scheme of division, but because it is easier to find many than to adhere to any one of them."<sup>35</sup>

The two methods most frequently pursued were:

1. (Originally the sole method.) Classification according to the forms of action under which remedies were enforced. In effect, "a purely procedural classification."<sup>36</sup>

2. Classifying specific kinds of torts according to the nature of the right invaded or the nature of the harm inflicted.<sup>37</sup>

Various other methods were suggested, including a division according to the nature of defendant's conduct. This last method, if fully carried out, would result in separation into two distinct classes: (1) liability imposed on the ground of fault; (2) liability imposed in the absence of fault. But this method was not usually made prominent. The order in which particular torts were dealt with (at least in the earlier books) "is not made to depend upon the motive, intent, or state of mind of the wrongdoer."<sup>38</sup>

In very early times there was no occasion to discuss the essential elements of a tort or wrong. Wrong was then not essential to liability. It was enough that the defendant's conduct, although perfectly blameless, had occasioned harm to the plaintiff.<sup>39</sup>

Later it began to be suggested that in certain instances (in certain classes of cases) there was no liability unless there was fault. But even then there was very little inquiry as to the substantive law respecting the necessity of showing fault. The attention of the courts was mainly given to questions of procedure, *e. g.*, the scope of the old forms of action.

Leaving out of view the comparatively recent suggestion that the term "tort" should be confined to cases of actual fault, the situa-

<sup>35</sup> 27 ENCYCL. BRIT., 11 ed., 65.

<sup>36</sup> See BOHLEN, *CASES ON TORTS*, ed. 1915, Preface, iii.

<sup>37</sup> This may be a convenient method for arranging the order in which to consider specific subtopics. But it is not a division upon fundamental grounds. It does not call for a discussion of the reasons for actionability: or of the real essence of a tort. If courts are to use this as the only method of classification, they will not be so likely to inquire into the fundamental reasons for imposing liability.

<sup>38</sup> BURDICK, *TORTS*, Preface to First Edition. See POLLOCK, *TORTS*, 9 ed., 8; Edward Jenks, 26 L. QUART. REV. 166.

<sup>39</sup> See 27 HARV. L. REV. 239; 22 HARV. L. REV. 99; 59 U. PA. L. REV. 309. Compare 1 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW*, 2 ed., 54.

tion (as set forth in books of good repute) may fairly be described as follows:

The term "tort," although originally synonymous with wrong, "has become specialized in its application" as a technical term in law.<sup>40</sup> "Tort," taken in its broad literal sense of wrong, would include wrongs which are exclusively subjects of criminal jurisdiction, also breaches of contract and breaches of trust. But instead of including these, its application in law has been restricted to certain classes of wrongs (other than mere breaches of contract) which give rise to an action for damages in courts of common law. Under, or by means of, actions of tort, the courts were accustomed to allow the remedy of pecuniary satisfaction "for invasions of the three elementary rights of civilized society — the right of personal liberty and security, the right of reputation, and the right of property."<sup>41</sup> But an action of tort was not a remedy under which *all* invasions of these rights could be a subject of recovery.

The definitions of tort hitherto commonly given are admitted to be unsatisfactory.<sup>42</sup>

Those definitions which are most frequently given are, in part, merely procedural; and, so far as they relate to substantive law, are of a negative character. It is now proposed to state various common definitions, to consider the objections to them, and to see whether the difficulties can be obviated by a different system of classification, resulting in a better definition.

The following are common definitions of tort:

"A tort is usually said to be 'A wrong independent of contract,' *i. e.*, the violation of a right independent of contract."<sup>43</sup>

<sup>40</sup> SALMOND, TORTS, 4 ed., 7, note 4.

<sup>41</sup> CLERK & LINDSELL, TORTS, 6 ed., 4.

<sup>42</sup> Of course it is impossible to frame a short definition of tort whereby a lawyer can instantly solve all the legal questions arising upon any conceivable set of facts. To do this would require a full statement of legal rights and legal duties. In speaking of a definition of tort, we now have in mind only the framing of a general statement or outline, marking out the essential issues to be investigated. Thus, if the definition makes fault a requisite element, it is necessary to inquire in each particular case whether there has been a violation of some legal right or legal duty. But the definition of tort does not undertake to tell us what are the legal rights or duties in each particular case. Compare ADDISON, TORTS, 8 ed., 1.

<sup>43</sup> INNES, TORTS, § 6. And see titles to forms of declarations and pleas in the Common Law Procedure Act of 1852, 15 & 16 VICT., chap. 76; Schedule B, pp. 725, 727.

As to this definition, Judge Innes makes the following comment: "... the rights,



"A tort may be described as a wrong independent of contract, for which the appropriate remedy is a common law action."<sup>44</sup>

"A tort is an act or omission giving rise, in virtue of the common law jurisdiction of the Court, to a civil remedy which is not an action of contract."<sup>45</sup>

"A tort is a breach of duty (other than a contractual or quasi-contractual duty) creating an obligation, and giving rise to an action for damages."<sup>46</sup>

"Now, a 'tort' in English law means, practically, any cause of action formerly recognized by the Courts of common law, not capable of being dealt with as a breach of contract."<sup>47</sup>

The foregoing propositions, so far as they profess to state any rules of substantive law, are of a negative nature; and even in that point of view, are not "comprehensive," being subject to an artificial restriction as to the method of procedure (the jurisdiction of courts).

These definitions tell us "what a tort is not."<sup>48</sup> Moreover, by the qualification as to recovery by common law action, the scope of the term "tort" is confined by the limits within which the common law courts exercise their jurisdiction. But important liabilities, enforced by various other courts, lie outside of that jurisdiction. "According to the common understanding of words, breach of trust is a wrong, adultery is a wrong, refusal to pay just compensation for saving a vessel in distress is a wrong." Remedies in such cases have been enforced, respectively, in a Court of Equity, in an Ecclesiastical Court, or in an Admiralty Court. "But that which

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of which a tort is a violation, *are*, in fact, distinct from those arising out of contract. But they are also . . . *distinct from a vast array of other rights*; so that the usual definition is as defective as would be a definition of the horse as '*A class of animal independent of horned cattle.*'" In 1 JAGGARD, TORTS, 5, the author says: "Such a definition is like a definition of a horse as a quadruped."

<sup>44</sup> CLERK & LINDSELL, TORTS, 6 ed., 1.

The learned authors add: "In order, therefore, to discover what a tort is, we must examine the various kinds of action which the law has from time to time recognized, not on any systematic theory, but according to the dictates of experience and convenience, and eliminate from the list those which are dependent on contract."

<sup>45</sup> POLLOCK, TORTS, 2 ed., 4. "Many attempts have been made with varying success to define a 'tort.' The above definition of Mr. Pollock, while a negative one, seems to be least unsuccessful and unsatisfactory." 1 JAGGARD, TORTS, 2.

<sup>46</sup> JENKS, DIGEST OF ENGLISH CIVIL LAW, Book II, Part 3, § 722.

<sup>47</sup> MONAHAN, THE METHOD OF LAW, 106.

<sup>48</sup> "To that extent we know what a tort is not." POLLOCK, TORTS, 2 ed., 4.

is remedied in each case is not a tort" within the foregoing definitions.<sup>49</sup>

Other definitions are also open to criticism.

Sometimes the test is laid down, that "every tort involves an affirmative act"; "that to avoid committing a tort we need only to forbear." But this is not universally true. There may be torts of omission, as distinguished from torts of commission.<sup>50</sup>

Several authors have defined a tort as an infringement of a right *in rem*, as distinguished from a right *in personam* — a right *in rem* denoting a right which the possessor has and may enforce against the entire community, while a right *in personam* may be enforced against particular individuals only.<sup>51</sup>

But this is not a correct description of all torts. Professor Burdick says that, while "many, perhaps most, torts" are violations of a right *in rem*, yet "on the other hand many a tort is a violation of a right *in personam*."<sup>52</sup>

"By some writers a tort has been defined as the violation of a right *in rem*, giving rise to an obligation to pay damages. There is a tempting simplicity and neatness in this application of the distinction between right *in rem* and *in personam*, but it may be gravely doubted whether it does in truth conform to the actual contents of the English law of torts. Most torts undoubtedly are violations of rights *in rem*, because most rights *in personam* are created by contract. But there are rights *in personam* which are not contractual, and the violation of which, if it gives rise to an action for damages, must be classed as a tort. The refusal of an innkeeper to receive a guest is a tort, yet it is merely the breach of a non-contractual right *in personam*."<sup>53</sup>

So as to the right inherent in all members of the community to enjoy transportation by a common carrier. The right to be accommodated

<sup>49</sup> POLLOCK, TORTS, 10 ed., 5. See also 1 JAGGARD, TORTS, 5, 6, 12. SALMOND, TORTS, 4 ed., 2, 7.

<sup>50</sup> See BURDICK, TORTS, 2 ed., 4, 5; Professor Langdell, 1 HARV. L. REV. 131; Professor Corbin, 21 YALE L. J. 552-53; SALMOND, TORTS, 4 ed., §§ 162, 160, p. 558.

<sup>51</sup> FRASER, TORTS, 8 ed., 1; COLLETT, TORTS, 7 ed., 1; INNES, TORTS, § 6. See WALTER D. SMITH, MANUAL OF ELEMENTARY LAW, §§ 127, 128; 1 AUSTIN, JURISPRUDENCE, 3 ed., 46, 389, and vol. 2, 964.

<sup>52</sup> BURDICK, TORTS, 2 ed., 6. Compare PIGGOTT, TORTS, 5, 6, 12-14.

<sup>53</sup> SALMOND, JURISPRUDENCE, ed. 1910, 437. As to the action of tort against an innkeeper or carrier for breach of duty to keep goods safely; see BURDICK, TORTS, 2 ed., 7, 8.



at an inn, or to receive transportation at the hands of a common carrier, is not a right which is available against the world at large. It is enforceable only against certain determinate persons, *viz.*, those persons who profess to carry on these occupations.

"Thus we have a duty attached to the mere profession of the employment, and antecedent to the formation of any contract, and if the duty is broken, there is not a breach of contract but a tort, for which the remedy under the common law forms of pleading is an action on the case. In effect refusing to enter into the appropriate contract is of itself a tort."<sup>54</sup>

The difficulty in applying to this subject the tests of right *in rem* and right *in personam* is, that these phrases usually relate only to the number of persons *against whom* a right is enforceable. They do not describe the number of persons who possess the right; the number who can claim to enforce the right, the number to whom a duty is due. In the typical instance of the contract right of a promisee against a promisor, the right is vested only in a certain determinate person and is enforceable only against a certain other determinate person. But a right, though enforceable only against certain determinate persons, may be vested in (may be enforceable by) all other persons (all members of the community who manifest their desire to exercise it). Such a right may not be a right *in rem*. But Mr. Piggott well says that

"duties imposed on determinate persons toward the whole of the rest of the community" "may aptly be termed duties *in rem*."<sup>55</sup>

The violation of such "duties *in rem*" may constitute a tort, though the right violated is not a right *in rem*.<sup>56</sup>

The unsatisfactory nature of the common definitions of tort has repeatedly been conceded. They do not state what are "the common positive characteristics of the causes of action" that can be sued upon as a tort. And the reason for this failure is obvious.

<sup>54</sup> POLLOCK, TORTS, 10 ed., 556-57. And see BEALE, INNKEEPERS, §§ 281-82, § 70; and HUTCHINSON, CARRIERS, 3 ed., §§ 62, 963.

<sup>55</sup> PIGGOTT, TORTS, 14.

<sup>56</sup> The phrase "General Rights" (see *post*, quotation from Professor Wigmore) might be understood as including all rights which inhere in the community generally, whether such rights are available against all the world or only against certain determinate persons.

Assuming, as has been customary, that the general subject of tort is to include all the cases under all the sub-topics usually enumerated under this general head in the books, it must be admitted that there are no common affirmative characteristics.

Sir William Markby says:

"It seems to me impossible to escape from the conclusion that the word 'torts' is used in English law to cover a number of acts, having no quality which is at once common and distinctive. In other words, I believe the classification to be a false one."<sup>57</sup>

Mr. Monahan<sup>58</sup> says:

"Indeed, no one supposes that the heterogeneous topics grouped together in our law books under the heading 'torts' have any generic connexion."

In Clerk and Lindsell on Torts,<sup>59</sup> the learned authors say:

"It is impossible to define the general term otherwise than by an enumeration of particulars." ". . . It is impossible to lay down any general principle to which all actions of tort may be referred."

In Jenks' Digest, it is said:

"A tort, in English Law, can only be defined in terms which really tell us nothing. . . . To put it briefly, there is no English Law of Tort; there is merely an English Law of Torts, *i. e.*, a list of acts and omissions, which, in certain conditions, are actionable. Any attempt to generalize further, however interesting from a speculative standpoint, would be profoundly unsafe as a practical guide. . . . Particular torts are the only torts which there are; the typical or normal tort does not exist. . . . Evil as this state of affairs undoubtedly is, the evils of premature generalization might be even greater. English Law stumbled on her definition of contract by an accident of genius; for six hundred years she has been seeking in vain for a definition of tort."<sup>60</sup>

In the Harvard Law Review for November, 1916,<sup>61</sup> Mr. Jenks says:

"But of any substantive definition of a tort English Law is still innocent. It is at present only in the preliminary stage, in which it says, this act or that is a tort, this or that is not."

<sup>57</sup> MARKBY, *ELEMENTS OF LAW*, 3 ed., § 713.

<sup>58</sup> *THE METHOD OF LAW*, 106.

<sup>59</sup> 6 ed., I, 4.

<sup>60</sup> JENKS, *DIGEST OF ENGLISH LAW*, Book II, Part 3, Continued, Preface, xiv, xv (1910).

<sup>61</sup> Vol. 30, pp. 8, 9.



Professor Wigmore, impressed with the difficulties of definition, would drop the term "tort" as the title of the subject. He says:

"The first wish is that we might proscribe, expel, and banish the obnoxious term 'Tort' as the title of the subject. Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a Contract. As if a man were to define Chemistry by pointing out that it is not Physics nor Mathematics. No half-way measures will do; the name must go."

"Names enough could be found. Let us agree for the moment on 'General Rights.'"<sup>62</sup>

How can these difficulties of definition be obviated?

1. By discarding the former custom of grouping together under the general head of tort cases of fault and cases of liability without fault.

2. By recognizing the existence of the modern common law rule — that, generally, fault on the part of defendant is requisite to constitute a tort. If this view is carried out to its logical result, the use of the term tort would be confined to cases of fault, and cases of liability without fault would be classed under the distinct head of absolute liability. Then it would be possible to state a common affirmative characteristic of actionable torts.

The modern view as to the requisites of a tort has been stated distinctly and briefly by Professor Ames.

"The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in certain cases based upon public policy, asks the further question, 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."<sup>63</sup>

"We have seen how in the law of crimes and torts the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor."<sup>64</sup>

The theory of torts is elaborately discussed in chapters 3 and 4 of Holmes on the Common Law. The old doctrine — that a man acts always at his peril and is always liable, irrespective of fault, for all consequences — the learned author treats as obsolete. He practi-

<sup>62</sup> 1 WIGMORE, SELECTED CASES ON TORTS, Preface, viii. Dated Sept. 1, 1911.

<sup>63</sup> 22 HARV. L. REV. 99.

<sup>64</sup> *Ibid.*, 100.

cally concedes that the general notion upon which liability is now founded "is fault or blameworthiness in some sense."<sup>65</sup> In other words, "the law does, in general, determine liability by blameworthiness."<sup>66</sup> The author also recognizes the fact that, in various situations, the modern law treats a man as acting at his peril; but he regards these cases as constituting exceptions to the modern general rule of non-liability in the absence of fault.<sup>67</sup>

Dr. Kenny, in his *Cases on Torts*,<sup>68</sup> in a note to the case of *Stanley v. Powell*,<sup>69</sup> says:

"This judgment in *Stanley v. Powell* affords elaborate illustration of the change which has passed over the English conception of the legal liability for Tort . . . at the present day, the idea of Culpability has become judicially associated with that of Liability for Torts. . . ."

Professor Whittier says that

"our law of tort has been changed from one of absolute liability to one in which for the most part recovery is based on culpability."<sup>70</sup>

Professor E. R. Thayer<sup>71</sup> speaks of

"the fundamental proposition of the common law which links liability to fault."<sup>72</sup>

Even those who think that the change from the old law was not completed until a quite recent date practically admit that it is now settled doctrine in the courts.<sup>73</sup>

Those who adopt the modern rule that fault is, generally, requisite to a tort, admit that in some exceptional cases the law, acting upon considerations of public policy, imposes liability where

<sup>65</sup> Page 107.

<sup>66</sup> Page 108.

<sup>67</sup> Pages 112, 115-19, 145, 158, 159, 161.

<sup>68</sup> Page 146.

<sup>69</sup> [1891] 1 Q. B. 86.

<sup>70</sup> 15 HARV. L. REV. 336.

<sup>71</sup> 29 HARV. L. REV. 815.

<sup>72</sup> Mr. Austin's view amounts to this: that unlawful intention or unlawful inadvertence is a necessary ingredient in injury or wrong; that legal liability ought only to be based upon fault. 1 AUSTIN, JURISPRUDENCE, 3 ed., chapters XXIV, XXV, XXVI: especially pp. 474, 484, 485, 492, 504, 515.

See Judge Holmes' explanation of the reason why Mr. Austin adopted the above view. HOLMES, COMMON LAW, 81, 82.

<sup>73</sup> See 27 HARV. L. REV. 239, referring to Prof. J. P. Hall, 19 JOURNAL POL. ECON. 698.



there is no fault. But it does not follow that such exceptional cases should be classed under the general head of tort. Jurists, who adopt the theory that fault is requisite to a tort and carry it out to its logical result, would no longer divide all causes of personal action into contract and tort, including under tort everything that is not contract. On the contrary they would divide causes of personal action into three main classes. (1) Breach of genuine contracts. (2) Tort in the sense of fault.<sup>74</sup> (3) A third class comprising cases of so-called "absolute liability," *i. e.*, cases where there is neither breach of genuine contract or fault, and yet liability.<sup>75</sup>

The above suggested third class would not be made up entirely of (would not include only) cases heretofore placed under the general head of torts, but which can no longer be so classified if tort is to be regarded as requiring fault. Such cases would be placed at one end of the third class. At the other end would be the cases heretofore frequently spoken of as though they belonged under contract rather than tort; cases where, under the old forms of action, a remedy, with the help of fiction, was allowed under an action of contract, and many of which were often described by the unfortunate name of quasi-contracts.

"Absolute," the term used by Salmond, is not literally correct. Pollock<sup>76</sup> uses the expression "all but absolute." Professor Wigmore<sup>77</sup> says that the principle of acting at peril

"has certain limitations; and a special group of cases attempt to determine how far extraordinary catastrophes or the acts of third persons relieve from responsibility one who would ordinarily be 'acting at peril.'" <sup>78</sup>

Why not describe "the third class" as "liability imposed or created by law"? Because *all* liabilities that are not statutory (*i. e.*, founded on breach of statute) are "imposed by law" in the sense of being imposed by decisions of courts. This statement is not confined to tort liability. Professor Langdell<sup>79</sup> says:

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<sup>74</sup> The law does not allow an action in *all* cases of fault. In exceptional instances the law grants immunity, notwithstanding the presence of fault.

<sup>75</sup> Dr. Bishop might say that one practical result of the recognition of this third class is, that the term tort, instead of including everything that is not a breach of contract, becomes a sub-title "in the non-contract law." See BISHOP, NON-CONTRACT LAW, § 5.

<sup>76</sup> ESSAYS IN JURISPRUDENCE AND ETHICS, 119; TORTS, 10 ed., 518.

<sup>77</sup> 8 HARV. L. REV. 389.

<sup>78</sup> Compare POLLOCK, TORTS, 10 ed., 513 *et seq.*

<sup>79</sup> 1 HARV. L. REV. 56, note 1.

"Strictly, every obligation is created by the law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation."

And Professor Corbin says:

"All enforceable obligations are created by the law."<sup>80</sup>

It is reasonably certain that the former separation of causes of personal action into only two divisions (contract and tort) does not represent the state of the law at the present time. It may safely be asserted that the differences or distinctions heretofore pointed out between class 2 (Tort in the sense of fault) and class 3 (Absolute Liability) actually exist. The question is, whether the existence of these differences should be formally recognized in legal nomenclature and classification.<sup>81</sup>

Mr. Salmond, in his work on Torts, states it as the general rule that fault is requisite to liability for tort. But he follows the old method of classifying under the general head of torts the exceptional cases where the law imposes liability in the absence of fault, instead of placing them in a "third class" such as we have suggested.

Mr. Salmond's general views appear in the extracts quoted in the note below.<sup>82</sup>

<sup>80</sup> 21 YALE L. J. 552.

<sup>81</sup> The separation between the two classes is clearly brought out in Pollock's "analytical classification of the grounds of liability in torts." POLLOCK, TORTS, 10 ed., 19-20. In three of his five divisions (*a*, *b*, and *d*) fault is an essential element. In the other two (*c* and *e*) it is not so.

Sir Frederick Pollock, in the article on torts, in 14 ENCYCLOPÆDIA OF LAWS OF ENGLAND, 2 ed., 140 (after giving classification by categories of rights), says: "Liabilities in tort may also be divided, from the defendant's point of view, into those which arise from a wilful act (this is by no means the same as a consciously wrongful act) such as trespass, or the omission of a positive duty; those which arise from want of due care and caution in the doing of something not unlawful in itself by the defendant, or by a person for whose acts he is answerable; and those which are imposed, irrespective of any particular act or default of the defendant or his servants, by some special rule of law."

Robert Campbell, in PRINCIPLES OF ENGLISH LAW, 416 (1907), classifies Obligations *Ex Delicto* (Torts) as follows: "1. The obligation absolute to avoid causing damage to another. 2. The obligation to take care so as to avoid causing damage to another. 3. The obligation to refrain from intentional acts which cause damage to another."

<sup>82</sup> "Section 2. — The General Conditions of Liability.

"1. In general, though subject to important exceptions, a tort consists in some act done by the defendant, whereby he has wilfully or negligently caused some form of



In the subsequent discussion as to what will constitute "fault" (*i. e.*, the fault which the foregoing authorities regard as generally a requisite element in an actionable tort), we are assuming the existence of damage. In other words, we assume that the defendant's conduct has caused to plaintiff damage of a kind that the law will notice, damage for which the law will afford redress whenever the person inflicting it can be deemed a tortfeasor. We are not concerned here to consider the exact nature of the damage which the law will notice. The two questions of damage and of responsibility for damage — (1) Has there been damage? (2) If so, was that damage tortiously inflicted? — are entirely distinct from each other.<sup>83</sup>

If the term tort is to be used only in the sense of fault, and cases of acting at peril, etc., are no longer to be grouped under tort, but are to be placed in the third class, how shall we define fault? What is the test of the fault which would then be requisite to constitute an actionable tort?<sup>84</sup>

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harm to the plaintiff. That is to say, liability for a tort is commonly based on the co-existence of two conditions: (a) damage suffered by the plaintiff from the act of the defendant; (b) wrongful intent or culpable negligence on the part of the defendant." SALMOND, TORTS, 4 ed., 8.

"Section 3. — Absolute Liability.

"1. The rule that *mens rea* in one or other of its two forms — wrongful intent or negligence — is an essential condition of civil liability for a tort, is subject to important exceptions. These exceptional cases in which liability is independent of intention or negligence may be conveniently distinguished as cases of *absolute liability*. . . .

"All cases of absolute liability may be divided into three classes:

- (a) Liability for inevitable accident;
- (b) Liability for inevitable mistake;
- (c) Vicarious liability for the wrongful acts of others." SALMOND, TORTS, 4 ed.,

14-15.

<sup>83</sup> See 1 SHEARMAN & REDFIELD, NEGLIGENCE, 6 ed., § 4. Professor Wigmore, 8 HARV. L. REV. 203.

<sup>84</sup> "To be of any service as a test of liability, fault must be used in its actual, its subjective meaning of some conduct repugnant to accepted moral or ethical ideals or some act or omission falling below the standard of conduct required by society of its members. It is possible to state all liabilities in terms of fault, to say that one is legally, if not morally or socially, in fault, wherever the law holds him liable. But this is reasoning in a vicious circle. It involves as the premise, the assumption of the very point in dispute, that legal liability cannot exist without fault. The reasoning is this, there can be no legal liability without fault, the defendant is liable, therefore he is at fault, if not actually at least legally. Not only is such reasoning vicious as reasoning, but, by confounding liability and fault, it destroys all value of fault as an element determinative

What conduct will constitute a *primâ facie* tort, i. e., a tort, unless a justification is made out? <sup>85</sup>

Our description of the fault which is a requisite of "tort in the sense of fault" is — conduct which involves either culpable intention or culpable inadvertence. <sup>86</sup>

Assuming the above definition of fault, our definition of tort, so far as concerns the ethical quality of the defendant's conduct, closely resembles Mr. Austin's view. He says, in substance, that, to constitute a tort, there must be either culpable intention or culpable inadvertence. <sup>87</sup>

For a fuller definition, including the two elements of wrong and damage (at least something which the law will regard as damage), we should say:

There is a *primâ facie* tort (that is, a tort in the absence of special circumstances establishing a so-called justification):

If defendant by his conduct (other than mere breach of contract) (1) intentionally or negligently inflicts actual damage on plaintiff, <sup>88</sup> or (2) intentionally infringes a right of plaintiff without causing actual pecuniary damage. <sup>89</sup>

of liability." Professor Bohlen, 59 U. PA. L. REV. 313. And compare BOHLEN, CASES ON TORTS, Preface, v.

<sup>85</sup> When a defendant in an action of tort is said to have proved a justification, he has in reality proved, not that he has committed an excusable wrong, but that he has not committed any wrong at all. Speaking literally, "there is no justification for a tort. The so-called justification is an exceptional fact which shows that no tort was committed." Stevenson, V. C., in *Booth v. Burgess*, 72 N. J. Eq. 181, 188, 65 Atl. 226 (1906). Compare Prof. A. V. Dicey, quoted in 20 HARV. L. REV. 356.

<sup>86</sup> In HEPBURN, CASES ON TORTS, Introduction, 21, 22, the learned editor divides torts into two classes: (1) "Torts through Acts of Absolute Liability; (2) Torts through Acts of Conditional Liability." (1) Includes "Trespasses and Absolute Torts other than Trespasses." (2) Includes "Torts through Negligence, and Torts through Act of Intentional Harm."

<sup>87</sup> See *ante*, n. 72, references to AUSTIN, JURISPRUDENCE.

<sup>88</sup> I. e., actual damage of a kind recoverable in a court of common law jurisdiction.

<sup>89</sup> The intentional infringement of a right, though not causing actual pecuniary damage, may sometimes afford ground for an action of tort. The plaintiff recovers only nominal damages, and the real purpose of the suit is generally to establish his legal right. See MARKBY, ELEMENTS OF LAW, 3 ed., § 706, note 3, and § 762; HOLMES, COMMON LAW, 98, 153-54; POLLOCK, TORTS, 10 ed., 13-16.

"But this principle is not, as a rule, applicable to actions for negligence: which are not brought to establish a bare right, but to recover compensation for substantial injury." Bowen, L. J., in *Brunsdon v. Humphrey*, 14 Q. B. Div. 141, 150 (1884). "In cases of negligence there is no such invasion of rights as to entitle a plaintiff to recover



That the intentional infliction of damage constitutes a *primâ facie* tort is a position strongly sustained by the following citations:

"At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse."<sup>90</sup>

"Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse."<sup>91</sup>

"X, who intentionally causes *damage* to A, has *primâ facie* done an *injury* or wrong to A, and if X can show no legal justification for the damage he has thus intentionally done to A he is liable to an action by A."<sup>92</sup>

"It has been considered that, *primâ facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."<sup>93</sup>

"It is submitted that the discussion would be materially simplified if it were understood that all damage wilfully done to one's neighbor is actionable unless it can be justified or excused."<sup>94</sup>

"The wilful causing of damage to another by a positive act, . . . is a tort unless there was just cause for inflicting the damage. . . ."<sup>95</sup>

at least nominal damages. . . ." Sheldon, J., in *Sullivan v. Old Colony Street R.*, 200 Mass. 303, 308, 86 N. E. 511 (1908). One who unintentionally, though carelessly, interferes with plaintiff does not do so under an assertion of a right. It is generally held that negligent conduct is not actionable, unless it has occasioned actual damage. See SALMOND, *TORTS*, 4 ed., 186; POLLOCK, *TORTS*, 10 ed., 194; 1 SEDGWICK, *DAMAGES*, 9 ed., § 96 *et seq.*; 15 COL. L. REV. 8, 9; 20 HARV. L. REV. 262-63, 356; 2 AMES & SMITH, *CASES ON TORTS*, ed. 1909-10, chap. IV, § VII; 21 HALSBURY, *LAW OF ENGLAND*, 481.

<sup>90</sup> Bowen, L. J., *Skinner v. Shew*, [1893] 1 Ch. 413, 422.

<sup>91</sup> Bowen, L. J., *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613 (1889).

<sup>92</sup> Prof. A. V. Dicey, 18 L. QUART. REV. 4.

<sup>93</sup> Holmes, J., *Aikens v. Wisconsin*, 195 U. S. 194, 204 (1904). And see Judge Holmes, in 8 HARV. L. REV. 9.

<sup>94</sup> POLLOCK, *TORTS*, 7 ed., 319. See also 22 L. QUART. REV. 118.

<sup>95</sup> Professor Ames, 18 HARV. L. REV. 412.

"In our judgment the Common Law is coming, if it has not already come, to hold that a man who wilfully or negligently causes temporal damage of any kind is liable unless he can show justification or excuse. The real difficulty is not to find a verbal definition of tort in general, but to define the substantial principles of justification and excuse and the limits of their application." 26 L. QUART. REV. 421.

Compare *Stevenson, V. C.*, in *Booth v. Burgess*, 72 N. J. Eq. 181, 198, 65 Atl. 226 (1906).

As to the distinction between intent and motive, see the discussion in a former paper by the present writer.<sup>96</sup>

If the term tort is used to describe only cases of fault, will it include *all* cases of damage caused by negligence in the legal sense of that term?

Negligence — in the sense of failure to use due care under the circumstances — generally implies fault on the part of the defendant. But there is an exceptional situation, where it is possible for a man to be held negligent in law, although personally he is not in fault.

The courts have established an arbitrary standard of care, an external standard, *viz.*, the care which would be exercised under similar circumstances by an average reasonable man, a man of average prudence. If a man, without being *non compos* or without being subject to certain kinds of distinct incapacity, is yet below the average so that he cannot exercise the foresight and care of an average reasonable man, he is held liable for damage due to his failure to exercise such foresight and care, although he has, in fact, done the best he knew how. The courts "decline to take his personal equation into account"; in other words, the law "leaves his idiosyncrasies out of account." This view is fully stated in Holmes on the Common Law.<sup>97</sup> "The rule," says Judge Holmes,<sup>98</sup> "that the law does, in general, determine liability by blameworthiness,

<sup>96</sup> "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 253, 256-59. In one "specific tort," Malicious Prosecution, proof of intentional infliction of damage is not enough to make out a *prima facie* case. Plaintiff must go further and prove bad motive on defendant's part. As to the reason for this exceptional rule, see Lord Herschell, *Allen v. Flood*, [1898] A. C. 1, 125. Whether an act, otherwise lawful, becomes actionable by proceeding from a bad motive, is a subject much discussed of late years. The question is sometimes stated in the following form: Whether the existence of bad motive will destroy an otherwise sufficient justification, grounded on self-interest?

See elaborate discussion by Professor Ames, in 18 HARV. L. REV. 411-22: "How far an act may be a Tort because of the Wrongful Motive of the Actor." Compare views expressed by the present writer, more favorable to defendants, in 20 HARV. L. REV. 453-55.

In 27 ENCYCL. BRIT., 11 ed., 65, Sir F. Pollock, as to the general proposition that motive is immaterial, says: "Only two exceptions are known to the present writer — malicious prosecution, and the misuse of a" (conditionally?) "privileged occasion."

<sup>97</sup> Pages 108-11. See also Holmes, J., in *Comm. v. Pierce*, 138 Mass. 165, 176 (1884); HOLLAND, JURISPRUDENCE, 8 ed., 98-101; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 96.

<sup>98</sup> THE COMMON LAW, 108.



is subject to the limitation that minute differences of character are not allowed for."

The decisions in an infinite majority of the cases where men are held liable for negligence are undoubtedly based on personal shortcoming, *i. e.*, actual fault on the part of the defendant. The instances are believed to be very rare where a man who had exercised all the care of which he was capable has been found negligent on the ground that he did not exercise an amount of care which he was incapable of exercising; in other words, that he was unable to attain the external standard established by the law.<sup>99</sup> We think it best that *all* cases of liability for negligence, in the legal sense, should be classed under tort, with the accompanying explanation that, in a few exceptional cases placed under this head, liability is imposed in the absence of personal fault.

*(To be continued.)*

*Jeremiah Smith.*

CAMBRIDGE, MASS.

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<sup>99</sup> The record, as usually made up, would not show when liability was imposed upon this ground.

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INCORPORATION BY IMPLICATION UNDER THE SHERMAN ACT. — The much interpreted Sherman Act<sup>1</sup> has lately appeared in the guise of an incorporating statute, for such is the effect of a recent decision of the Circuit Court of Appeals for the Eighth Circuit holding an unincorporated labor union a suable entity under it.<sup>2</sup> The statute after prohibiting the commission of certain enumerated acts by any "person" or "persons" declares: "That the word 'person' or 'persons' wherever used in the Act shall be deemed to include corporations and associations existing

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<sup>1</sup> An Act to Protect Trade and Commerce Against Unlawful Restraints, 26 STAT. AT L. 209, 7 FED. STAT. ANNOT. 336.

<sup>2</sup> *Dowd v. United Mine Workers of America*, 235 Fed. 1. Cf. *U. S. v. Coal Dealers' Ass'n.*, 85 Fed. 252, 260, where appear intimations to the contrary. In *U. S. v. Joint Traffic Ass'n.*, 171 U. S. 505, *U. S. v. Trans-Missouri Freight Ass'n.*, 166 U. S. 290, and *Eastern States Retail Lumber Dealers' Ass'n. v. U. S.*, 234 U. S. 600, the point was not raised.

The principal case was begun before the passage of the Amendment of Oct. 15, 1914 (Clayton Act), 38 STAT. AT L. 730, 1916 SUPPL. FED. STAT. ANNOT. 267, and this latter statute was apparently not considered to have any bearing on the case. But if, as has been generally supposed, the Clayton Act exempts labor unions from the Anti-Trust Laws, *quere* whether it might not bar the action in the principal case. On the effect of repeal of a penal statute upon pending prosecutions, see WHARTON, CRIMINAL LAW, 11 ed., 513. The exact effect of the Clayton Act on labor unions, however, is a matter much in doubt. The important sections are 1, 6, 20, and 22. See "Labor is not a Commodity," THE NEW REPUBLIC for Dec. 2, 1916, p. 112, and a reply in the issue for Dec. 9, 1916, p. 152.



under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any state, or the laws of any foreign country." The precise meaning of this clause is somewhat conjectural. Does it extend to so-called voluntary associations,<sup>3</sup> which obviously are associations existing under or authorized by the laws of any state, etc., or was the legislative intent to confine it to those organizations which have been actually incorporated under a statute? The fact that organizations which are in reality corporations have been designated "associations"<sup>4</sup> by certain sovereigns lends color to the latter suggestion. The principal case, however, takes the broader view, which is certainly not capricious in the light of the language used.<sup>5</sup>

Assuming, then, that a voluntary association is included in the statute's prohibition, it follows by necessary implication that a remedy was intended against it as an entity, and not merely an action against the individual members; for they are suable without special words, and the inclusion of voluntary associations in the statute would on such a construction be rendered meaningless. The conclusion seems inevitable that for the purposes of the Sherman Act a labor union or any other species of voluntary association may be treated as a legal unit apart from its members — sued as such, judgment rendered against it, and its property<sup>6</sup> now or hereafter owned taken on execution.

The law recognizes but two kinds of units, *viz.*, human beings and corporations. Hence a corporation may comprehensively be defined as a legal unit not a human being. If this definition be correct, then it follows from the foregoing analysis that the Sherman Act has incorporated all voluntary associations for the purposes of prosecutions thereunder — manifestly a decided change in the status of voluntary associations, for the proposition that a voluntary association, having no legal existence apart from its members, cannot be sued is firmly imbedded in the common law.<sup>7</sup>

A corporation possessing these volatile, fly-by-night attributes might seem an alarming creature, and yet it stands apparently unassailable. The conception of a corporation for a single purpose is of very ancient origin.<sup>8</sup> Nor is the indirectness and informality of the incorporating

<sup>3</sup> For a criticism of this terminology, see WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS, I.

<sup>4</sup> See *Andrews Bros. Co. v. Youngstown Coke Co.*, 58 U. S. Ap. 444.

<sup>5</sup> For a similar interpretation of similar words, see opinion of Bradley, J., in *Liverpool Ins. Co. v. Mass.*, 10 Wall. (U. S.) 566, 576.

<sup>6</sup> It is to be noticed that the legal title to property normally referred to as property of the association is not vested in the association as an entity but in all the members as co-owners, or more commonly in a few trustees in trust for members for associate purposes. See WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS, 239; also 25 HARV. L. REV. 582. The effect of the Sherman Act is, it is submitted, to vest the title to the associate property in the new entity, which it has created, for the purposes of executions pursuant to proceedings under the Sherman Act. (For if the judgment runs against the association as an entity, there would be no warrant for taking property belonging to the members.)

<sup>7</sup> *St. Paul Typothetæ v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N. W. 725. Other cases collected in 2 L. R. A. (N. S.) 789 and 1 B. R. C. 852.

<sup>8</sup> See KYD, CORPORATIONS, 29, where reference is made to the church wardens, who were clothed with corporate capacity for receiving and holding chattels (but not realty or *choses* in action) to the use of the parishioners.

process here unsupported by precedent.<sup>9</sup> Nor can it now be doubted that the Federal Constitution enables Congress to create corporations where reasonably necessary to the proper exercise of its other powers.<sup>10</sup> The requisite consent on the part of the members to incorporation is furnished by their continuance in the association.<sup>11</sup>

Voluntary associations are to-day an enormous factor in commercial enterprise, while in general the law is still clinging to clumsy, antiquated methods of laying hold of them. Equity, it is true, has appreciated the difficulty of corraling all the members of a large association even with the aid of statutes permitting substituted and constructive service of process, and has accordingly invented the device of a so-called representative suit,<sup>12</sup> in which a few members only are made parties and a decree rendered binding all; but this practice has never been taken over by the law courts. The result achieved in the principal case seems to the writer not only unobjectionable in point of principle, but a particularly timely contribution to the law.

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CIVIL CONSCRIPTION IN THE UNITED STATES. — That the state may, in case of necessity, compel its citizens to do military service, is consonant with our ideas both of common and of constitutional law. That the satisfaction of any civil need of the state may likewise be compelled, however, is a conception new to us, and one that will be regarded by most lawyers with instinctive hostility. But this compulsion, which, in lieu of a better term, may be called civil conscription, is, it is submitted, settled in practice and sound in principle. The service, both military and civil,<sup>1</sup> which the feudal system exacted, had a larger warrant than any theory of land tenure could give,<sup>2</sup> in the inherent right of the state to safety and to preservation.<sup>3</sup> The real basis of the conscription is the

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<sup>9</sup> *Buckland v. Fowcher*, 2 H. 7, 13 *a, b*, where R.'s mere license from the king to grant rent in succession to a chaplain was held to confer a corporate capacity on the chaplain and his successors. This case is cited and discussed in 10 Co. 27 *a* and *Kyd, CORPORATIONS*, 52, 62. See also *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426; discussed in 15 HARV. L. REV. 310.

<sup>10</sup> See MORAWETZ, *CORPORATIONS*, 11.

<sup>11</sup> Assent to incorporation need not be express but may be inferred from acts. See MORAWETZ, *CORPORATIONS*, 23.

<sup>12</sup> For a more detailed analysis, see STORY, *EQUITY PLEADING*, § 94 *et seq.*; cases collected in 1 B. R. C. 854.

<sup>1</sup> For the heavy civil duties attached to villein tenure, see POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, 2 ed., 370, 372.

<sup>2</sup> Military service was exacted even of those who held no land. MAITLAND, *CONSTITUTIONAL HISTORY OF ENGLAND*, 162.

<sup>3</sup> This right has been consistently recognized both in England and in the United States. See *Rex v. Larwood*, 1 Salk. 167, 168: "The King hath an interest in every subject, and a right to his services." Cf. *Lanahan v. Birge*, 30 Conn. 438, 443: "It is a fundamental principle of national law, essential to national life, that every citizen . . . is under obligation to serve and defend the constituted authorities of the state and nation . . . when such service is lawfully required."

In 1642 Parliament and King Charles disputed concerning the King's right to conscript without Parliament's consent. See A DECLARATION OF THE LORDS AND COMMONS ASSEMBLED IN PARLIAMENT UPON THE STATUTE OF 5 H. 4, WHEREBY THE COMMISSION OF ARRAY IS SUPPOSED TO BE WARRANTED: TOGETHER WITH DIVERS OTHER STATUTES . . . AS ALSO HIS MAJESTIES LETTER TO THE SHERIF OF LEICESTERSHIRE



necessity of the state, and accordingly the considerations of liberty of the individual, and of equality of treatment, must be wholly subordinated to that. Thus, even a capricious and sometimes deliberately unequal conscription has been lawfully practiced in England for centuries, in impressment for the navy.<sup>4</sup> That the state may need civil service equally as much as military is obvious. Both kinds of service are essentially alike, for both sacrifice the individual to the nation's welfare with the same clear purpose. And not only are military conscription and civil conscription identical in nature, but also the difference in form between them may be imperceptible.<sup>5</sup> The common law is, then, that any service whatever, whether military or civil, which the state requires, it may exact of its citizens.<sup>6</sup>

It is, however, true that comparatively few instances of civil conscription are recorded in the books.<sup>7</sup> The classic example is the holding of public office. The resignation of any public officer is effective only at the will of the sovereign.<sup>8</sup> And one duly elected to office may be compelled to accept the place and to perform its duties.<sup>9</sup> A recent California case<sup>10</sup> suggests the possibility of a still further infringement on the liberty of the individual, raising the problem, whether the state may compel a man to run for office after he has been nominated,<sup>11</sup> and the even more import-

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TO EXECUTE THE SAID COMMISSION ACCORDING TO HIS MAJESTIES PROCLAMATION. This contains a full inquiry into the early military conscriptions. Said King Charles (p. 20): "And considering that in ancient time the *Militia* of the Kingdom was ever disposed of by Commissions of Array . . . Wee have thought fit to refer it to that ancient legall way . . . authorizing you to Array and traine our People, and to apportion and asseesse such persons as have estates and are not able to beare Armes, to find Armes for other men . . . and to conduct them so Arraid. . . ." To which Parliament replied (p. 9) that the Petition of Right forbade the King to impose any "tax or charge" upon the people without Parliament's consent.

<sup>4</sup> 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, 137-40. Cf. with the necessity for compensation, note 24, *infra*. For the formation of contracts of labor by persons without means of support, which English statutes compelled as late as 1875, see FREUND, THE POLICE POWER, § 448.

<sup>5</sup> Is the "home service" conscription now being instituted by Germany, military or civil in form? And how are we to class the conscription provided for by the British "man-power" bill, at the present moment under debate by Parliament? Cf. the operation of the railways of France by the railway employees in their capacity of conscripts, which was threatened by the French government in 1910, to avert a strike. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, 8395 (12 Octobre, 1910); ROUCHY, LES GRÈVES DANS LES CHEMINS DE FER, 61; see 96 OUTLOOK 474 (October 29, 1910).

<sup>6</sup> See the great opinion of Shope, J., in *People ex rel. German Ins. Co. v. Williams*, 145 Ill. 573, 582, 583, 33 N. E. 849, 852, approved in 7 HARV. L. REV. 186. Cf. 1 BLACKSTONE, COMMENTARIES (Sharswood), \* 138, to the effect that the sovereign may require of the subject anything that does not necessitate the subject's exile from the realm.

<sup>7</sup> See FREUND, THE POLICE POWER, § 613.

<sup>8</sup> *Edwards v. United States*, 103 U. S. 471. This common law principle prevails in the United States despite the fact that here "public offices are sought rather than shunned." A recent English *dictum* stands alone in questioning the application of this principle to statutory offices. See Bray, J., in *Rex v. Sunderland Corporation*, [1911] 2 K. B. 458, 464.

<sup>9</sup> *People ex rel. German Ins. Co. v. Williams*, *supra*. Not only will *mandamus* lie against the person elected, to compel the performance of the duties of the office, but also his failure to accept the office constitutes an indictable offense.

<sup>10</sup> *Bordwell v. Williams*, 52 Cal. Dec. 267, 159 Pac. 869, discussed in 5 CAL. L. REV. 77.

<sup>11</sup> The candidate cannot withdraw after nomination, under most primary statutes. Cf. *State ex rel. Donnelley v. Hamilton*, 33 Nev. 418, 111 Pac. 1026, with *Elswick v.*

ant question, whether it may compel him to seek the nomination in the party primaries which statutes have now generally established.<sup>12</sup> It is submitted that in both of these cases such compulsion may be lawful, since there well may be a public interest sufficient to warrant it.<sup>13</sup> The Conscript Fathers may be conscript in fact. Another continuing public duty whose compulsory performance has been urged<sup>14</sup> is the exercise of the suffrage. The only attempt that has yet been made in any common law jurisdiction to establish compulsory voting has been held unconstitutional as a compulsion of an act of sovereignty.<sup>15</sup> Compulsory jury service has existed almost as long as juries have.<sup>16</sup> So, too, witnesses have been compelled to appear;<sup>17</sup> and labor upon public roads has been conscripted,<sup>18</sup> from the beginnings of the common law until the present

Ratliff, 166 Ky. 149, 179 S. W. 11. It is submitted that such statutory prohibitions are merely expressive of the state's need, and not enlargements of the common law.

It should be noticed that withdrawal, like resignation from office, may be considered to involve another element than state conscription, in the individual's prior consent to hold the office or to have his name upon the ballot. That, however, is not the real ground of these decisions.

<sup>12</sup> There are apparently no cases as yet which squarely decide this point. For the candidate's power to withdraw after his name has gone on the primary ballot, under statutes with similar and rather technical provisions, see *Bordwell v. Williams*, *supra*, and *State ex rel. Thatcher v. Brodigan*, 37 Nev. 458, 142 Pac. 520.

<sup>13</sup> The public interest which may warrant the conscription of candidates is the identical interest which has established the direct primary. The primary statutes make the nominee even in form a public officer, and the nomination a public office. *Johnston v. Board of Elections of Wake County*, 90 S. E. 143 (N. C.). See also 26 HARV. L. REV. 351. It would seem that candidacy, even before it has ripened into nomination, also might be a public office.

<sup>14</sup> Former Attorney-General Wickersham, in his address before the Chester County Historical Society, September 28, 1912, on "The Individual and the Community." See also Mr. Wickersham's letter in THE SUN, New York, October 6, 1912. It would appear that compulsory voting is quite generally established in civil law countries.

<sup>15</sup> *Kansas City v. Whipple*, 136 Mo. 475, 38 S. W. 295. In this unique case a provision in the charter of Kansas City which made failure to vote a penal offense, in effect, was held unconstitutional as an attempt to force the sovereign's act, since the electorate in voting act in the capacity of the sovereign. The court admitted that there was a duty to vote, but denied that performance of the duty could be compelled. Said Brace, C. J.: "It is not service at all, but an act of sovereignty."

It is submitted that the choosing, and not the expressing of the choice (which was all the charter compelled) is the act of sovereignty; but conceding that voting is an act of sovereignty, the error in the court's reasoning is its failure to perceive that it is the sovereign who is forcing the performance of this sovereign act by the electorate. It is (to carry out the court's fictitious conception) as though the sovereign compelled his arm to write, or his judges to make the round of assizes.

For a sharp and undeserved criticism of this case, see 10 HARV. L. REV. 439.

<sup>16</sup> See *Kansas City v. Whipple*, *supra*. It is difficult to see that jury service is less a sovereign act than voting is.

<sup>17</sup> *Israel v. State*, 8 Ind. 467. Of all these cases of conscription it should be observed that they are not isolated compulsions, but merely examples of the state's exercise of its general conscriptive power. So, here, the compulsion is said to be warranted by "the general interest and public concern."

The Sixth Amendment to the Constitution of the United States provides that in certain cases the defendant shall be entitled to compulsory process to secure the appearance of witnesses in his favor.

<sup>18</sup> See *Dennis v. Simon*, 51 Ohio St. 233, 36 N. E. 832; *In re Dassler*, 35 Kan. 678, 12 Pac. 130. Here also statutes authorizing the compulsion are not enlargements of the common law, but merely declarations of the state's need. See *Butler v. Perry*, 240 U. S. 328.

For the constitutionality of these road-building statutes, see *infra*.



time. Wherever there is need the state may, at common law, conscript citizens to form a posse, to assist in making arrests, to report cases of contagious disease, to extinguish conflagrations,<sup>19</sup> and even to serve in a permanent fire department.<sup>20</sup> Attorneys may be compelled to defend poor persons in courts of law.<sup>21</sup> It is clear that in any emergency, whether one that has arisen in the past or not, citizens may be conscripted to avert danger to the state.<sup>22</sup> Compulsory arbitration, involving conscription for a limited period, may likewise be instituted, as has been done by recent legislation in this country.<sup>23</sup> Nor is there any need for compensation, at common law, for any service thus compelled by the state.<sup>24</sup>

There are, indeed, no limitations upon the state's conscripting power at common law other than the state's need for, or, more accurately, benefit from the conscription. The benefit must, of course, be so great as to outweigh the detriment to the state that interference with the individual will necessarily cause. In determining the benefit that will flow from the conscription, and hence its legality, the possibility of a species of *sabotage* should be considered seriously. The man compelled to serve may work positive injury to the state while ostensibly he is serving it; or (and this is a more likely contingency) he may either neglect entirely or perform inefficiently the duties which have thus been thrust upon him. It may be urged that, although the state may conscript for what is historically a governmental purpose, it cannot do so for purposes of a (historically) non-governmental business in which the state may have engaged. Such a distinction, however, would be fundamentally unsound, for if the public interest warrants the carrying on of the business by the state, it may also warrant the state's conscription to support it.<sup>25</sup>

The limitations on civil conscription which are peculiar to the United States are likewise few.<sup>26</sup> The Sixth Amendment to the Constitution of

<sup>19</sup> For these four emergency services, see FREUND, *THE POLICE POWER*, § 614.

<sup>20</sup> See *Kansas City v. Whipple*, *supra*.

<sup>21</sup> FREUND, *THE POLICE POWER*, § 613.

<sup>22</sup> For example, work upon a Mississippi levee could certainly be compelled.

At the time of the great coal strike of 1902-03, it was ably argued that the state (having taken over the coal mines) could conscript men to run them. T. A. Sherwood, "Power of the State to Operate Coal Mines and Conscript Men for that Purpose when Necessary to Avert a Public Calamity," 57 *CENT. L. J.* 25, 28. Mr. Sherwood rightly bases the power to conscript upon the state's "inherent power to prevent its own destruction."

<sup>23</sup> Colorado has forbidden employees in "any industry affected with a public interest" to strike "prior to or during an investigation, hearing, or arbitration" of the dispute by the State's arbitration commission. 1915 *SESSION LAWS OF COLORADO*, 578. Cf. the strong recommendations of compulsory arbitration of railway disputes in the President's Message to Congress, December 5, 1916. So, also, employees may be restrained from quitting labor at a time when injury to the state will ensue. 2 WILLOUGHBY, *CONSTITUTIONAL LAW OF THE UNITED STATES*, § 459. In many states statutes provide that railway employees shall not quit work, on a strike, elsewhere than at a place of destination. FREUND, *THE POLICE POWER*, § 333.

<sup>24</sup> "Since in all these cases the duty is general, no compensation is due." FREUND, *THE POLICE POWER*, § 614. See also § 613. For cases where the rights of private property must yield to the general interest, without compensation, see 2 KENT, *COMMENTARIES ON AMERICAN LAW*, 12 ed. (Holmes), \* 339.

<sup>25</sup> Cf. the conscription to run the railways of France, both state-owned and privately-owned, in note 5, *supra*. It is but a short time since this country was confronted with a similar situation, which was, however, met in a different way. See 30 *HARV. L. REV.* 63.

<sup>26</sup> Perhaps here it should be observed that the institution of a system of probation in

the United States expressly provides for compulsory witness service in certain cases.<sup>27</sup> Conscription to serve the state's needs is neither slavery nor involuntary servitude, within the meaning of the Thirteenth Amendment.<sup>28</sup> And although a citizen's right to dispose of his own labor as he desires has been construed to be included both in "liberty"<sup>29</sup> and in "property,"<sup>30</sup> as used in the Fourteenth Amendment, yet conscription by the state has never been regarded as a deprivation<sup>31</sup> of either liberty or property (since it is a general burden, and inures to the general welfare). A more intricate question than these is raised by the possibility of conscription by a State<sup>32</sup> for a purpose not in harmony with the interests of the United States. The most incisive example of such a State conscription is the military conscription instituted by Alabama, Mississippi, and other States<sup>33</sup> in the course of the Civil War.<sup>34</sup> Such a conscription is, of course, unconstitutional. The converse of this situation is presented when the United States conscripts to the injury of a State. In such a case, if the conscription is for the national welfare (as it would have to be to be otherwise lawful), it should be lawful notwithstanding the injury to the State.<sup>35</sup> Even in the United States, the certain limit to

criminal proceedings may permit, and in some cases already has permitted, trial courts to enforce conscription, both military and civil. The constitutionality of such judge-imposed compulsions has not yet been attacked, although the policy of the military conscriptions has been vehemently assailed. See frequent comment in the issues of the ARMY AND NAVY JOURNAL, 1915 and 1916. It should be noticed that although the probation may be both cruel and unusual (*cf.* BOSTON EVENING TRANSCRIPT, November 24, 1916, for a court order to hear Billy Sunday preach), it is not a punishment, but merely the condition of withholding punishment. Conscription through a probation order thus differs from other conscriptions in that it is made effective through an independent threat.

<sup>27</sup> See note 17, *supra*.

<sup>28</sup> *Butler v. Perry*, *supra*. In this case a Florida statute requiring labor for two days in each year upon the public roads was held constitutional. The court said (p. 333) that the Thirteenth Amendment "introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, or on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of its essential powers." See also *Robertson v. Baldwin*, 165 U. S. 275, especially the dissenting opinion of Harlan, J., at p. 298.

*Cf.* *Dennis v. Simon*, *supra*, where conscription to build the public roads was held not to be such involuntary servitude as the State bill of rights prohibited.

<sup>29</sup> *Allgeyer v. Louisiana*, 165 U. S. 578.

<sup>30</sup> *Adair v. United States*, 208 U. S. 161, 172. See *Coppage v. Kansas*, 236 U. S. 1, 14;

2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, § 474.

<sup>31</sup> *Butler v. Perry*, *supra*, at p. 333; FREUND, THE POLICE POWER, § 614.

<sup>32</sup> A State is certainly enough of a sovereign to conscript, for a proper purpose. See *Lanahan v. Birge*, note 3, *supra*.

<sup>33</sup> Although no position was consistently taken by the Supreme Court of the United States, the view whose soundness force has warranted is that the States of the South, having no power to secede, were at all times members of the United States. *Texas v. White*, 7 Wall. (U. S.) 700; *Keith v. Clark*, 97 U. S. 454.

<sup>34</sup> See 1 DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT, c. xiv, p. 510.

<sup>35</sup> Thus, the State courts under the Confederacy held repeatedly that the conscription of the Confederacy prevailed over even a prior conscription of the same citizen by his State. *State ex rel. Graham, In re Emerson*, 39 Ala. 437; *Ex parte Bolling, In re Watts*, 39 Ala. 609; *Simmons v. Miller*, 40 Miss. 19. In *Simmons v. Miller* (at p. 24) the Confederate Constitution is construed in terms of the Constitution of the United States, which it closely followed.



the individual's liberty is the state's necessity. And "necessity" may be in the future, as it has been in the past, translated into terms of policy.

**MUNICIPAL LIABILITY FOR TORT.** — In attempting to state the principles upon which the tort liability of municipal corporations is to-day based it is difficult to discover any formula adequate to explain the cases. The rule generally professed by the decisions denies liability for the performance of a governmental function, and allows recovery where the function is municipal, *i. e.*, non-governmental. This distinction is doubtless based upon an analogy to the non-liability of the state for torts.<sup>1</sup> It was natural enough to hold a city exempt when performing functions which in its small sphere corresponded to those handled by the state. But the municipality being a smaller and more adaptable unit has outstripped the state in entering into the economic life of the people. In taking up enterprises formerly conducted by private business the analogy of governmental immunity has been inapplicable, and here the liability of a private person has been imposed. Non-liability for governmental acts has in the main achieved just results because the considerations of policy underlying the immunity of the state have also been present in many of the so-called governmental functions of the city. One weakness, however, has been the failure to realize that the rule, being based upon an analogy, is properly to be used only where the situation is fundamentally similar. The application of the rule has often been too broad and indiscriminating.<sup>2</sup> The chief defect, however, is that the test is not self-defining, and is therefore no true test at all. The state aims to secure to its people a certain minimum of well-being. The extent of this minimum varies with time, place, and circumstance; it is relative and continually changing. To speak of a governmental function, therefore, means little in itself. The test, moreover, purports to be a permanent one; but being in fact ever changing it is ill adapted to the end of setting precedents. Thus if states extend their activities as far as have the cities into the domain of business — as seems very likely to happen under the present tendency — the conception of governmental, if properly applied, would cover all activities of the city. Otherwise it would become a mere historical commentary.

A more specific examination of the present state of the law is now necessary. Classed as governmental are the police,<sup>3</sup> school,<sup>4</sup> health,<sup>5</sup> charities,<sup>6</sup>

<sup>1</sup> See GOODNOW, *MUNICIPAL HOME RULE*, 180.

<sup>2</sup> For examples of excessive applications of this sort of an exemption, as, for instance, to common carriers transporting mail, see John M. Maguire, "State Liability for Tort," 30 *HARV. L. REV.* 20, 27. So independent contractors constructing county roads have been exempted. 29 *HARV. L. REV.* 323.

<sup>3</sup> See 4 DILLON, *MUNICIPAL CORPORATIONS*, 5 ed., § 1656.

<sup>4</sup> *Hill v. City of Boston*, 122 Mass. 344; 4 DILLON, § 1658.

<sup>5</sup> *Valentine v. City of Englewood*, 76 N. J. L. 509, 71 Atl. 344; *Mitchell v. City of Rockland*, 52 Me. 118; 4 DILLON, § 1661.

<sup>6</sup> *Maximilian v. Mayor*, etc. of New York, 62 N. Y. 160. Here, as in many other cases of exemption, the decision states that the particular tortfeasor, though appointed, paid, controlled, etc., by the city, is the agent not of the city but of the public. This seems to be only a method of making the result of non-liability appear more conclusive.

and fire departments.<sup>7</sup> On the other hand, water works, gas and electric plants,<sup>8</sup> and toll wharves<sup>9</sup> are everywhere recognized as municipal. Highways one would expect to be governmental; yet outside of New England most American jurisdictions impose a common law tort liability here.<sup>10</sup> Sewers would seem to be equally governmental, and in addition to be closely related to the health service; yet for a failure to repair there is tort liability.<sup>11</sup> The management of parks would similarly seem to be governmental, especially in the larger cities; on parks the authorities are divided.<sup>12</sup> So also as to street cleaning and removal of ashes and garbage there is a split in the cases.<sup>13</sup> Although the repair of sewers is corporate, the maintenance of a city hall is governmental.<sup>14</sup> But there may be liability during the erection of the hall;<sup>15</sup> and the maintenance of a courthouse is apparently municipal.<sup>16</sup> If part of a city hall be rented, there is the liability of a private owner for the condition of the premises;<sup>17</sup> but if it be occupied in part by non-governmental departments, such as those of water and sewers, there is no liability.<sup>18</sup> It is evident that the application to the facts of the distinction between governmental and municipal has been both difficult and obscure.

What, then, should be the test of liability? Where there is a financial return from a municipal enterprise there is at present tort liability — as in the case of city-owned public utilities. But to set up financial return as the test, and grant exemption in all other cases, would not be satisfactory. True it could be applied with greater exactitude than the governmental function test. And it is said the charges for tort claims are more properly made a part of the cost of operation when that cost is paid by the enjoyers of the particular paid service than when it is added to the general tax budget. The argument fails in many of the cases sought to be supported by it, for when, as frequently, the municipal public service is paid for partly by tax money, the extra burden is likely to be on the taxpayer anyway. And whether a particular claim is prop-

<sup>7</sup> *Judson v. Borough of Winsted*, 80 Conn. 384, 68 Atl. 999. *Terhune v. Mayor, etc. of New York*, 88 N. Y. 247. In *Mayor, etc. of Paterson v. Erie R. Co.*, 78 N. J. L. 592, 75 Atl. 922, this exemption was carried so far that a town suing for negligent collision with its fire engine was held not to be barred by the engine driver's contributory negligence.

<sup>8</sup> *Rhobidas v. Concord*, 70 N. H. 90, 47 Atl. 82; 4 DILLON, § 1670.

<sup>9</sup> *City of Petersburg v. Applegarth*, 28 Gratt. (Va.) 321; *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93.

<sup>10</sup> 4 DILLON, §§ 1687, 1708 *et seq.*

<sup>11</sup> 4 DILLON, §§ 1741, 1742.

<sup>12</sup> *Weber v. Harrisburg*, 216 Pa. St. 117, 64 Atl. 905; *Clark v. Inhabitants of Waltham*, 128 Mass. 567; 4 DILLON, § 1659. A recent Kansas case has held that the keeping of a zoo in a public park is a governmental function, and that the city is not liable when a visiting child is bitten by one of the zoo animals. *Hibbard v. City of Wichita*, 159 Pac. 399. But *cf. Gartland v. New York Zoölogical Society*, 135 App. Div. 163, 120 N. Y. Supp. 24.

<sup>13</sup> *Missano v. Mayor, etc. of New York*, 160 N. Y. 123, 54 N. E. 744; *Condict v. Mayor, etc. of Jersey City*, 46 N. J. L. 157; 4 DILLON, § 1662; 13 HARV. L. REV. 59.

<sup>14</sup> *Eastman v. Meredith*, 36 N. H. 284; *Moest v. City of Buffalo*, 116 App. Div. 657, 101 N. Y. Supp. 996.

<sup>15</sup> *City of Chicago v. Dermody*, 61 Ill. 431; *McCaughy v. Tripp*, 12 R. I. 449.

<sup>16</sup> *Galvin v. Mayor, etc. of New York*, 112 N. Y. 223, 19 N. E. 675.

<sup>17</sup> *Worden v. City of New Bedford*, 131 Mass. 23.

<sup>18</sup> *Kelley v. City of Boston*, 186 Mass. 165, 71 N. E. 299.



erly a part of cost or not cannot depend on who is to pay the cost. For instance, damage from the negligent digging of a ditch is no more properly charged up to the ditch if it is intended for a water pipe than if it is to hold a sewer.<sup>19</sup> There is then no reason in economic fairness why this particular element of cost should be singled out from others for exemption. To argue that since at present there is no liability this cannot be reckoned among the cost items is to assume the very point in issue, which is, ought it to be so reckoned? Nor is such compensation objectionable as taxation for a private purpose; it is analogous to a payment to the owner deprived of his land by eminent domain. It is often said, in decisions refusing recovery, that the particular activity in question was being carried on for the benefit of the public, in contrast to those cases where it is said to be for the benefit of the municipality — as where a charge is made for services. Rarely if ever, however, does a city reap any net profit from an enterprise. In any case the activity must be for the benefit of the whole community; otherwise, by the prevailing rule, a municipality is constitutionally prohibited from engaging therein.<sup>20</sup> To apply the benefit test logically would mean that a municipal corporation would never be liable.

A municipal corporation, like a private corporation, is a creature of the state and subject to the laws. Its exemption from liability does not rest as does that of the sovereign on the impossibility of being sued at common law, but on grounds of policy.<sup>21</sup> *Primâ facie*, then, a city should be under precisely the same duties and liabilities as to the ownership of property and employment of agents as is the private person similarly situated. This duty arises not through a statute authorizing or commanding a certain activity,<sup>22</sup> but because the very ownership of property or use of agents imposes a relationship or duty to the surrounding world. Two important considerations favor recovery. There is the justice of compensating the plaintiff for his injury.<sup>23</sup> And there is the care- and efficiency-inciting effect that recovery will exercise on the city as to the character and conduct of its employees and the condition of its property.<sup>24</sup> But as in the general law of torts the presence of certain countervailing interests constitutes a justification, defeating recovery, so where a municipal corporation is the defendant there may be in certain cases special considerations calling for exemption. Thus the exigencies of maintain-

<sup>19</sup> Of course, for things happening in the course of sewer work municipalities are liable, but on the test now under consideration they would not be.

<sup>20</sup> *Loan Ass'n. v. Topeka*, 20 Wall. (U. S.) 655; *Lowell v. City of Boston*, 111 Mass. 454; *Allen v. Inhabitants of Jay*, 60 Me. 124.

<sup>21</sup> This is recognized in *Workman v. New York City*, 179 U. S. 552, where recovery was allowed in admiralty for the negligent act of a municipal fire boat while attempting to reach a fire. It was admitted that the local law denied recovery, yet since the law might vary from state to state recovery was allowed for the sake of uniformity in maritime law.

<sup>22</sup> That this difference in the form of the statute, often spoken of as material to the question of tort liability, is really immaterial, see *Tindley v. City of Salem*, 137 Mass. 171, 175.

<sup>23</sup> This consideration is receiving increasing emphasis to-day. The tendency is to shift the burden, particularly of a bodily injury, to the community. Workmen's compensation acts, old age, sickness, and unemployment insurance, and the increasing strictness of the common carrier's liability are examples that come readily to mind.

<sup>24</sup> See 4 DILLON, § 1714.

ing law and order may well demand that a policeman in the exercise of his duty be unhampered by the apprehension of possible lawsuits against either himself or the city. So also there may be a strong public interest in sending the fire engine to the scene of the fire as soon as possible, unchecked by thought of liability for what happens *en route*.<sup>25</sup> But unless the presence of some public interest can be affirmatively shown to require a denial of recovery, the municipal corporation should not be granted exemption. It is difficult to find any useful purpose furthered by exempting for the trespass of the fire horse that casually wanders from his stable,<sup>26</sup> or for the condition of the town hall, or the acts of its janitor in removing snow from the roof.<sup>27</sup> To restate the law of municipal liability according to this view calls for a return to first principles through a careful, conscientious analysis of the underlying interests in each case. On analogy to general tort principles such a process is entirely sound; and it is necessary if this branch of the law is to be shaped into a consistent, satisfactory system.<sup>28</sup>

**JURISDICTION OF EQUITY TO GRANT A RECEIVER WHERE NO OTHER RELIEF IS SOUGHT.**—A Pennsylvania County Court has granted a receiver for the property of an individual, upon the petition of unsecured creditors who sought no other relief to which a receivership would properly be ancillary. *Thompson's Receivership*, 44 Pa. County Court, 518.<sup>1</sup> The decision is a novel one. It is a generally accepted rule that equity has no jurisdiction without statute<sup>2</sup> to appoint a receiver for a fully capable legal person,<sup>3</sup> in a case where such appointment is the sole object of

<sup>25</sup> *Wilcox v. City of Chicago*, 107 Ill. 334.

<sup>26</sup> See 19 HARV. L. REV. 386.

<sup>27</sup> *Kelley v. City of Boston*, 186 Mass. 165, 71 N. E. 299.

<sup>28</sup> On the principles here advocated there would be liability in most, if not all cases arising from property ownership. See JONES, NEGLIGENCE OF MUNICIPAL CORPORATIONS, 36. *Miles v. City of Worcester*, 154 Mass. 511, 28 N. E. 676; *Briegel v. City of Philadelphia*, 135 Pa. St. 451, 19 Atl. 1038. (But cf. *Ham v. Mayor, etc. of New York*, 70 N. Y. 459.) Recovery should be granted where the dangerous condition of a fire engine injures a workman engaged in repairing the same. *City of Lafayette v. Allen*, 81 Ind. 166. So also for negligence in building a cistern for the use of the fire department. *Mulcairns v. City of Janesville*, 67 Wis. 24, 29 N. W. 565. And streets and sewers would cease to be the anomalous exceptions to the rules regulating liability that they are at present.

<sup>1</sup> For a fuller statement of the facts, see RECENT CASES, p. 289. An ancillary receiver was appointed in the Federal District Court in West Virginia, but on appeal the Circuit Court of Appeals held this appointment void. (Not yet reported.) Application has been made to the Supreme Court for a writ of *certiorari* to review this last decision.

<sup>2</sup> Where a statute provides for the appointment of a receiver for a corporation which is insolvent or in danger of insolvency, the courts in some cases have apparently considered that the statute meant that a receiver could be appointed where this was the sole object of the suit. *Hall v. Nieuirkirk*, 12 Idaho 33, 85 Pac. 485; *In re Lewis*, 52 Kan. 660, 35 Pac. 287; *Mauch Chunk Bank v. U. S. Encaustic Tile Co.*, 105 Ind. 227, 4 N. E. 846. It is questionable even in these cases, however, whether the receivership is not really ancillary to some other suit.

<sup>3</sup> Courts of equity have from earliest times had power to protect the property of infants and lunatics. As to the nature and origin of this power, see 3 POMEROY, EQUITY JURISPRUDENCE, §§ 1304-07, 1311 *et seq.*; BISHAM, EQUITY, §§ 541-43, 551-52. As a result of this "particular" jurisdiction the court will always appoint a receiver for an infant or a lunatic in a proper case, although the receiver is the sole object of the suit. *Ex parte Whitfield*, 2 Atk. 315; *Jones v. Bank of Leadville*, 10 Colo. 464, 17 Pac.



the suit.<sup>4</sup> This doctrine apparently exists as a supposed logical conclusion from the basic nature of common law courts either of equity or law, as tribunals whose sole function is to adjudicate and give effect to remedial rights arising from some past or threatened injury.<sup>5</sup> On the theory of the cases, the appointment of a receiver where there is no suit for another remedy pending is an extension of the functions of the court beyond this sphere, an exercise of administrative powers savoring of a delegated *pater patriae* jurisdiction, which certainly courts have never possessed. The premise, and this proposition as to the basic nature of common law courts, are undoubtedly correct, but we question the logical necessity of the conclusion.

Where a receiver is asked for the mere purpose of handling the property of a capable legal person and taking care of his affairs, here clearly equity would be acting purely in a guardianship capacity, which it has no power to do.<sup>6</sup> Any such extension of equity's jurisdiction must come from the legislature. But in many cases where a receiver *sole* is sought, the situation is quite different. In *Thompson's Receivership*, for instance, the petitioners are unsecured creditors of Thompson. There are other secured creditors who are in a position to realize on their securities. If this is done, the petitioners will lose all chance of recovery; if on the other hand the secured creditors stay their hand, Thompson will in all probability be able to satisfy all parties. The petitioners come into equity. Their bill asserts the existence of certain legal rights in the petitioners; that the satisfaction of those rights will be jeopardized by the action of other creditors in enforcing their legal rights; that there are circumstances which make such action of the other creditors inequitable, and prays the court to grant relief. In other words, it clearly claims a remedial right to the prevention of an injury, and seeks to have this right adjudicated and made effective by the appointment of a receiver.<sup>7</sup> Whether or not, on the

272; *Baker v. Backus*, 32 Ill. 79. Also where there is a dispute as to the administration of the estate of a decedent, and no one to handle the property, the court will appoint a receiver, though ancillary to no other relief. *Atkinson v. Henshaw*, 2 Ves. & B. 85; *Flagler v. Blunt*, 32 N. J. Eq. 518.

<sup>4</sup> *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805; *State v. Ross*, 122 Mo. 435, 25 S. W. 947; *Stockholders of Jefferson County Agricultural Ass'n. v. Jefferson County Agricultural Ass'n.*, 155 Ia. 634, 136 N. W. 672; *Vila v. Grand Island Electric Light, etc. Co.*, 68 Neb. 222, 94 N. W. 136.

<sup>5</sup> See *State v. Ross*, 122 Mo. 435, 457, 25 S. W. 947, 952; *Jones v. Bank of Leadville*, 10 Colo. 464, 473, 17 Pac. 272, 276.

It has been suggested that the fundamental reason for the doctrine that equity will not grant a receiver where that is the sole object of the suit lies not in the fact that there is no "case" presented, but rather in the fact that a receiver is a most dangerous and extraordinary remedy, use of which should be restricted. The suggestion is evidently one that deserves consideration, and one that should weigh with courts in determining whether or not, in particular cases, a receiver should be granted. But the cases make no mention of such a reason as a ground for lack of jurisdiction, and it is not entirely clear that it will cut down the number of cases in which the power exists. For in any case where a receiver *sole* would properly be granted under our view, a receiver would properly be granted as ancillary to the suit, if it had been brought for general relief or for some specific relief other than a receiver. To lay down the rule flatly therefore does not limit the states of fact in which receivers may be granted, but merely requires parties, in order to get the relief that they most need, to ask for some other to which they also have a right.

<sup>6</sup> For such a case, see *Mabon v. Ongley Electric Co.*, 156 N. Y. 196, 50 N. E. 805.

<sup>7</sup> For other cases where a remedial right is really claimed in a suit for a receiver alone,

facts, the petitioners have a remedial right is another question,<sup>8</sup> but they clearly come into court claiming one and seeking its effectuation. Where this is true, there is no lack of jurisdiction on the ground that judicial tribunals exist only to try "cases" and that this is not a "case."

But the courts, in general, make no distinction between such a case as this and one where a mere guardianship is sought. Looking hard at the formal remedy, which does indeed smack of guardianship, they have formulated a general rule and refuse relief indiscriminately in all cases where a receiver is the sole object of the suit.<sup>9</sup> Unfortunately for a realization and correction of the error, the result reached is many times a just one upon a balance of the equities, for in almost all such cases the plaintiff is seeking to stay the enforcement of a legal right, and he should show a strong case to move equity to act.<sup>10</sup>

The view that we have advocated has some sanction of authority. Three United States courts have granted receivers for railroad corporations in embarrassed circumstances, where the receiver was the only relief sought.<sup>11</sup> The opinions stress the great inconvenience to the public if the railroads be forced out of business, and on this ground invoke a strong public policy in support of granting the relief. But such a consideration goes merely to the balance of the conveniences in determining the equities of the plaintiff's claim, and could not give a court power to go beyond its sphere as a trier of "cases." These cases then must be taken to decide that there was a real "case"<sup>12</sup> involved and that the court had jurisdiction to act in the premises.<sup>13</sup> Again some courts have granted a receiver

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see *Stockholders of Jefferson County Agricultural Ass'n. v. Jefferson County Agricultural Ass'n.*, 155 Ia. 634, 136 N. W. 672; *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 581, 101 N. W. 253; *Baltimore Bargain House v. St. Clair*, 58 W. Va. 565, 52 S. E. 660. Where the plaintiff claims a receiver for his own property, he may equally be claiming a remedial right, the difference lying solely in the nature of the injury. For a case of this sort, see *Central Trust Co. v. Wabash, etc. Ry. Co.*, 29 Fed. 618.

<sup>8</sup> See *infra*, note 17. The existence of a remedial right in Thompson's Receivership seems open to grave doubt. The secured creditors are after all only enforcing legal rights, and the danger of losing a remedy by the sacrifice of property upon foreclosure is a danger that the petitioners share, though here in an extraordinary degree, with all unsecured creditors.

<sup>9</sup> See cases in note 4.

<sup>10</sup> Indeed some of the cases apparently fail to distinguish between the questions whether or not the plaintiff has a "case" within judicial cognizance, and whether or not he has a good case, and adduce considerations bearing upon the latter for the determination of the former. See *Smiley v. Sioux Beet Sugar Co.*, 71 Neb. 518, 589 *et seq.*, 101 N. W. 253, 254; *Baltimore Bargain House v. St. Clair*, 58 W. Va. 565, 571, 52 S. E. 660, 662. The seriousness of such a confusion becomes apparent when it is remembered that if there is no "case" a court has no jurisdiction to act at all, and its decree can be attacked collaterally. See *State v. Ross*, 122 Mo. 435, 461, 25 S. W. 947.

<sup>11</sup> *Brassey v. N. Y. & N. E. R. Co.*, 19 Fed. 663; *Central Trust Co. v. Wabash, etc. Ry. Co.*, 29 Fed. 618; *Clark v. Central R. & Banking Co. of Georgia*, 54 Fed. 556. The question has never been presented to the Supreme Court of the United States. See, however, *Quincy, Mississippi & Pacific R. Co. v. Humphreys*, 145 U. S. 82; and *St. Joseph & St. Louis R. Co. v. Humphreys*, 145 U. S. 105, in both of which Fuller, C. J., makes some reference to this doctrine.

<sup>12</sup> In the *Wabash* case, for instance, the suit upon analysis appears to be a bill by the railroad in a fiduciary capacity as to the stockholders, seeking help in carrying out the fiduciary duties. It has in addition a certain likeness to a bill of peace, in that it seeks relief from a multiplicity of foreclosure suits in various jurisdictions.

<sup>13</sup> See *Brassey v. N. Y. & N. E. R. Co.*, 19 Fed. 663, 669. The appointment of a receiver in a suit solely for that purpose, in cases where a public utility is involved, may



sole over mortgaged property upon suit of the mortgagee, before the mortgage debt is due and when the property is in danger of being dissipated.<sup>14</sup> These cases have been differentiated from those of unsecured creditors on the ground that the plaintiff here has a property interest. But this also merely strengthens the equity of the plaintiff's case, and the courts, in reaching their result, must be deciding that there is a "case" involved, despite the fact that a receiver is the only relief sought.<sup>15</sup>

On the other hand, the same courts, if these particular facts are not present, will apply the general rule though the plaintiff is just as clearly claiming a remedial right and seeking its adjudication. This inconsistency can only be explained on the ground that courts, chary of overturning precedents, have felt moved to do so only in cases where the plaintiff's claim was peculiarly strong.<sup>16</sup> Their conservatism in this respect is to be deplored and the initiative of the court in *Thompson's Receivership* to be commended. Where the plaintiff has a true remedial right<sup>17</sup> and a receiver is a convenient method of relief,<sup>18</sup> a court should not refuse to take jurisdiction because of a traditional rule which is clearly wider than its reason.<sup>19</sup>

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RAISING FREIGHT RATES OF INTERSTATE RAILROADS AFTER ELIMINATION OF WATER COMPETITION. — Section 3 of the Interstate Commerce Act requires that no undue preference in freight rates shall be given by a carrier to one locality over another.<sup>1</sup> The first part of section 4 provides

perhaps be upheld by a resort to the visitatorial jurisdiction, even if the case is one of mere guardianship. For a discussion of the visitatorial power of chancery over public institutions, see 1 BLACKSTONE, COMMENTARIES, 480-81; 2 KENT, COMMENTARIES, 300-03. Such an explanation of these cases has been hinted at by a modern text-writer. BEACH, RECEIVERS, 2 ed., 75.

<sup>14</sup> *Rose v. Bevan*, 10 Md. 466; *Long Dock Co. v. Mallory*, 12 N. J. Eq. 431.

<sup>15</sup> See *Davis v. Alton, Jacksonville & Peoria Ry. Co.*, 180 Ill. App. 1, where the court, though refusing to grant a receiver upon other grounds, expressly recognizes that the fact that there is no other relief sought to which the appointment of a receiver is incidental is not necessarily fatal to the court's jurisdiction.

For another situation in which courts have granted a receiver where no other relief was sought, see *American Freehold Land Mortgage Co. v. Turner*, 95 Ala. 272, 11 So. 211.

<sup>16</sup> As in the case of public service corporations, where the plaintiff could invoke a strong public policy, and in the mortgage cases, where he has a lien interest in the property.

<sup>17</sup> Whether or not the plaintiff has stated a case in which equity should act must be determined by a balancing of the considerations on both sides, in the particular case, on ordinary principles.

<sup>18</sup> Once establish the right to relief, and it cannot be questioned that the principal case is one where the use of the extraordinary remedy of a receivership is proper. It is indeed the only method by which the situation can be adequately handled. See HIGH, RECEIVERS, § 7; BEACH, RECEIVERS, 2 ed., § 48.

<sup>19</sup> Whether or not jurisdiction of the parties whose action the plaintiff is seeking to prevent by the receivership should be necessary, since their rights are in a sense being adjudicated, is an arguable question. There is no personal decree against them. The decree runs against the property and is enforced *in rem*. The property is merely taken under the protection of the court for a time. In so far as it does adjudicate any rights of parties not before the court, the only result of such adjudication is the temporary postponement of the enforcement of a legal right. It would seem that a service by publication at most should be sufficient. See the remarks of the court in the principal case, 44 Pa. County Court, 518, 532.

<sup>1</sup> U. S. COMP. STAT. 1913, § 8565, in part provides: "It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unrea-

(really as a particular application of section 3) that, except in special cases which the Commission permits, a carrier shall not charge lower rates for a longer haul of freight than for a shorter haul over the same route.<sup>2</sup> In determining whether under section 3 a preference is proper or undue, the existence of competition is a decided argument for its propriety.<sup>3</sup> Also the existence of competition may constitute grounds for the Commission to make one of the special exceptions to the long and short haul clause of section 4.<sup>4</sup> Consequently it may well be that, because of water competition a rate to a certain place is unimpeachable; and that yet, if the competition ends, the rate will become unduly preferential under section 3 and unjustifiably violative of the long and short haul clause of section 4. One of the main purposes of the Act is to prevent unjust discrimination by carriers.<sup>5</sup> If this purpose is to be completely carried out, wherever the cessation of competition causes a discrimination under either of the above provisions, the Commission must give the appropriate relief. The circumstances may be such that the only appropriate relief would be for the rates at the preferred point to be raised.<sup>6</sup> But the Act itself to some extent prevents such a course. The last paragraph of section 4 provides that, if a "railroad shall in competition with a water route . . . reduce" its rates and the competition shall cease, the road "shall not be permitted" to increase them unless the Commission finds that the increase depends on some other change of conditions besides "the elimination of water competition."<sup>7</sup> This inhibition apparently applies both where the rates as they stand create an undue preference under section 3 and where they violate the long and short haul clause of section 4. Thus the general policy of the Act is under these circumstances expressly dispensed with, in order to penalize the railroad by depriving it of the greater revenues that would come with increased rates. This penalty, in turn, was imposed to discourage a common practice among railroads of

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sonable preference or advantage to any particular . . . locality in any respect whatsoever, or to subject any particular . . . locality . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

<sup>2</sup> U. S. COMP. STAT. 1913, § 8566, in part provides: "It shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation . . . of like kind of property for a shorter than a longer distance over the same line or route in the same direction, the shorter being included within the longer distance . . . : Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for the longer than for the shorter distances for the transportation of . . . property."

<sup>3</sup> *East Tennessee, etc. R. Co. v. I. C. C.*, 181 U. S. 1; *I. C. C. v. Cincinnati, etc. R. Co.*, 124 Fed. 624.

<sup>4</sup> *Commodity Rates to Pacific Coast Terminals*, 32 Int. Com. Rep. 611.

<sup>5</sup> See 1 *DRINKER, INTERSTATE COMMERCE ACT*, § 19.

<sup>6</sup> Raising the terminal rates would seem to be the only appropriate relief where, for example, the rates to the intermediate points were as low as they could reasonably be and hence could not well be lowered.

<sup>7</sup> The entire last paragraph of U. S. COMP. STAT. 1913, § 8566, reads: "Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."



destroying competition by undue reduction of rates and then taking advantage of the destruction by raising the rates again.<sup>8</sup>

The water competition provision, upon analysis, raises several questions of construction, which mere examination of the language will not answer. These must be decided with a proper regard for the purpose of the provision and for its relation to the rest of the Act. First of all, it may be questioned whether the provision applies where the railroad originally reduced the rates only after approval by the Commission, or applies merely where it reduced them without such approval. There is the possible contention that the approval of the Commission would purge the reduction of any unfairness to competitors and that therefore, where there is such approval, no penalty should be imposed on the railroad. But clearly the water competition provision of section 4 was intended to apply to rates reduced under the rest of section 4. And under this section the special exception of a lower rate for a longer haul can be made by the carrier only on application to the Commission.<sup>9</sup> Since this case must be included, if at all, within the general terms of the provision, it would seem that the provision always applies, although the original reduction was made on application to the Commission. Another question is whether the provision prevents action by the Commission, where, after the competition is eliminated, the application to have the rates advanced is made, not by the railroads but by the places injuriously affected by the reduced rates. The words of the Act, "it [the railroad] shall not be *permitted*<sup>10</sup> to increase such rates," would more naturally, though not necessarily, cover only the case where the *railroad* is seeking to raise the rates. Moreover, unless the provision were so construed it would really penalize the shippers and not the railroads. But such is a likely consequence of any restraint on the Commission's power to prevent discrimination. And in these cases, unless the shippers were so penalized, the railroads might freely reduce the rates and destroy water competition, secure in the knowledge that almost surely an application for advanced rates will be made by and granted to points harmed by the lower competitive rate. On the whole, it seems a more reasonable construction to deny the application of these points. The word "elimination" in the provision gives rise to still another question. Literally the Act might be considered to apply, whatever cause there was for the elimination of water competition. But where the competition has been destroyed by something other than low railroad rates, there is no reason at all for penalizing the railroad by making it maintain its low rates. No more reason is there for preventing prejudiced shippers from having the rates raised. In view of this it seems preferable to give "elimination" a construction favored by the context, to hold the provision applicable only where the competition has been eliminated by the reduced railroad rates.<sup>11</sup> In a recent case<sup>12</sup> before the

<sup>8</sup> See RIPLEY, *RAILROADS: RATES AND REGULATIONS*, 566.

<sup>9</sup> See JUDSON, *INTERSTATE COMMERCE*, 3 ed., § 342.

<sup>10</sup> Italics ours.

<sup>11</sup> Cases which permit railroads to establish higher rates to competitive points during winter months have been put, not on this ground, but on the ground that this temporary suspension of competition is not an elimination of it. Such cases are *American, etc. Co. v. Chicago, etc. Ry. Co.*, 26 Int. Com. Rep. 415; *New York Produce Exchange v. New York, etc. R. Co.*, 32 Int. Com. Rep. 212, 215.

<sup>12</sup> In the matter of Reopening Fourth Section Applications, 40 Int. Com. Rep. 35. For a fuller statement, see RECENT CASES, p. 291.

Commission, after the railroads on application to the Commission under the long and short haul clause had reduced their rates to a competitive port, and after the water competition subsequently ceased because the water routes were blocked, the Commission favored an application of intermediate cities to have the terminal rates raised. The best explanation of this case, it is submitted, lies not in the fact that the Commission supervised the original reduction of the rate, nor in the fact that a shipper and not the railroad sought the advance of rates, but in the fact that the destruction of the water competition was not due to the reduced railroad rates.<sup>13</sup>

THE BRITISH BLACK LIST. — On December 23, 1915, Great Britain passed "an Act to provide for the Extension of the Restrictions relating to Trading with the Enemy," to the following effect: "His Majesty may by Proclamation prohibit all persons . . . resident, carrying on business, or being in the United Kingdom from trading with any persons . . . whenever by reason of the enemy nationality or enemy association of such persons . . . it appears to His Majesty expedient so to do. . . ."<sup>1</sup> A Black List of neutral firms with which English firms and steamship lines have been forbidden to deal is the result of the proclamations issued as provided by the act, and reënforced by applications of the Order in Council for November 10, 1915, requiring licenses for British steamers over five hundred tons to trade from one foreign port to another. The consequences have been financially serious for many of such blacklisted neutral firms, because most of the international trade is now being carried on British bottoms. Protest has been made by the United States, and a diplomatic correspondence has followed.<sup>2</sup> Complaints in this country have been specially bitter owing to suspicions that the use of the Black List has not been confined to belligerent purposes, but that it has been used to keep American firms out of that part of the South American trade which Germany shared with Great Britain before the war.<sup>3</sup>

<sup>13</sup> The decision, however, was put principally on the grounds (1) that the rates in the absence of competition were unduly preferential, and (2) that raising of the rates would tend to encourage competition again and thus accomplish the purpose of the provision. The first reason is not a sound one, for, as we have shown, the provision is an exception to the policy of the Act in preventing undue preferences. Nor is the second reason more valid; for the same reason might be urged in any case where the provision was to be applied, and, if sound, it would render the provision nugatory.

<sup>1</sup> Trading with the Enemy (Extension of Powers) Act 1915, 5 & 6 GEORGE 5, c. 98.

<sup>2</sup> On January 25, 1916, Secretary Lansing sent a note expressing the disapprobation of the United States and reserving a protest, which was answered on February 16 by a brief explanation of the purposes and scope of the act. On July 26 the United States sent a formal protest, denying the legality of the measure and qualifying it as "inconsistent with that true justice, sincere amity, and impartial fairness which should characterize the dealings of friendly governments with one another." On October 12, Ambassador Page received a formal defense from Viscount Grey. This correspondence will be found in the White Book published by the State Department. This so far covers only up to April 16, 1916, but the British defense, the most important of the documents, will be found in the NEW YORK TIMES of November 15, 1916.

<sup>3</sup> See the allusion in paragraph eight of the British note in October, and also the remarks of Congressman Bennet of New York in 53 CONGRESSIONAL RECORD, No. 197, pp. 14299-304.



To be properly understood, this act must be considered as Great Britain's part in the Allies' coöperative economic policy relating to trade with the enemy, which received official recognition in the Recommendations of the Economic Conference of the Allied Governments.<sup>4</sup> Shortly after the outbreak of the war, both the French and the British governments issued proclamations forbidding trade with the enemy. Following the Anglo-American doctrine that domicile alone was the proper test, the Official Announcement in explanation of the Proclamation of August 5, 1914, provided that "for the purpose of deciding what transactions with foreign traders are permitted, the important thing is to consider where the foreign trader resides and carries on business, and not the nationality of the foreign trader."<sup>5</sup> Following the French doctrine that nationality is also a test, the French Decree of September 27, 1914, forbade "all trade with the subjects of the German and Austro-Hungarian Empire or the persons there resident."<sup>6</sup> It was to make the British prohibitions coextensive with those of her ally, and so to secure coöperation in law as well as in arms, that the Act of December 23, 1915, was passed. Thus a military alliance has brought about an adoption of foreign legal principles; for it is unlikely that Great Britain will revert to her narrower doctrine after the war. But it is plain that we can find no legal fault with a doctrine of so many years' undoubted standing.

There is equally no doubt as to the jurisdiction of Great Britain to

<sup>4</sup> Published on June 17, 1916; accessible in the fourth supplement to 10 AM. J. OF INT. LAW, issued in October, 1916.

<sup>5</sup> Issued on August 22, 1914. See MANUAL OF EMERGENCY LEGISLATION, 377. The Proclamation on September 9, 1914 (MANUAL, p. 379) explained that "the expression 'enemy' . . . means any person . . . of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country." That this conforms with previous judicial opinion, see *Porter v. Freudenberg*, [1915] 1 K. B. 857, 868, and *Janson v. Dreifontein Consolidated Mines*, [1902] A. C. 484, 505. See also 2 OPPENHEIM, INTERNATIONAL LAW, § 88, citing GROTIUS, Bk. III, c. 4, §§ 6, 7, who in turn cites Livy and Thucydides. See also paragraph twelve of the British note of October, 1916.

<sup>6</sup> Accessible in 22 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, Documents, p. 28; A. SAILLARD, LE SÉQUESTRE, etc., p. 57, published by Berger-Levrault; ALEX. REULOS, MANUEL DES SÉQUESTRES, 1916, p. 11. Reulos explains on page 207: "This prohibition extends to every act of trade either with the nationals of these two countries, whatever their residence, by reason alone of their nationality, or with any person resident within the territory of these two Empires, whatever his nationality, by reason alone of his residence." See chapter six for a discussion of the decree. Originally it would seem that nationality was the sole test in France. In 1 DE PISTOYE ET DUVERDY, TRAITÉ DES PRISES MARITIMES, 321, is reported the case of *Le Hardy v. La Voltigeante*; on page 327, the court says: "Since the enemies of origin, although established in a neutral country and carrying on business under the protection of the neutral flag, do not lose their enemy character, it would be both unfair and illogical to make . . . neutrals of origin enemies solely because they reside and carry on business in any enemy country." Compare the following passage from the argument of counsel: "Look at the practice of the English, and follow their example. They do not seize only the ships and property belonging to . . . French subjects, but also the ships and the property of every person resident anywhere in French territory." In 4 CALVO, LE DROIT INTERNATIONAL, § 1932, the transition appears: ". . . commercial domicile does not create of itself a new nationality, but it creates a situation *sui generis*, . . . whence international law raises certain legal presumptions and practical effects which have sometimes the same result as a formal change of nationality"; see also § 1689

apply the act. The prohibition extends only to those persons "resident, carrying on business, or being in the United Kingdom,"<sup>7</sup> and a sovereign within his territory is necessarily supreme.<sup>8</sup> The French Decree, on the other hand, seems to go much farther than the British, and to apply to every French subject, at home or abroad.<sup>9</sup> But even this is quite in conformity with international law.<sup>10</sup> Recent examples make this clear. How can you distinguish between the right of a nation to call back its reserves from a foreign country at the outbreak of war, the right claimed by Austria to forbid her subjects abroad from working in munition plants that supply her enemies, and the right to forbid one's subjects abroad from trading with certain designated persons? Although Great Britain has denied herself in the Occident in this respect, the prohibition of the Trading with the Enemy Act of 1914 has been extended to all British subjects in the Orient within the jurisdiction of His Majesty's Supreme Court for China.<sup>11</sup> But this is only a use of Great Britain's extritorial jurisdiction in China,<sup>12</sup> and so not analogous to the French Decree.

This leaves the Black List unexceptionable as a measure forbidding trade with enemy nationals wherever they may be; and thus far Great Britain has no more than kept pace with her ally, France. But what of the phrase, "by reason of their enemy association," hitherto unconsidered? These words can mean only that Englishmen may be prohibited from trading, not only with Germans, but with all persons who trade with Germans. Here is a long step beyond the French, and here lies the nub of the American protest. England imposes upon American merchants, among other neutrals, and also, it is fair to state, Allied merchants,<sup>13</sup> the alternative of trading with her enemies or with herself, but not with both. No matter what England claims to be doing in this matter, it is plain that American firms are to choose between trading with England or with Germany. This involves choice of customers by American firms located in America; therefore, the well-established international rule that a sovereign is supreme within his realm does not apply.

<sup>7</sup> These words are repeated from the Trading with the Enemy Proclamation, August 5, 1914. See *MANUAL OF EMERGENCY LEGISLATION*, 375.

<sup>8</sup> BEALE, *CONFLICT OF LAWS*, § 107; Marshall, C. J., in *Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116, 136, "The jurisdiction of the nation within its own territories is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."

<sup>9</sup> This is not explicit, but it seems clear from the context and from the law of April 4, 1915. See REULOS, *MANUEL DES SÉQUESTRES*, 272. Reulos, on page 272, it may be added, entertains grave doubts whether this construction does not contravene Article five of the Code d'Instruction Criminelle, providing that a Frenchman can be convicted of a delict (which is this case) committed abroad only if it is also punishable by foreign law. But an act was proposed last January to cure this defect. And, in any event, Article five is not binding in the sense that our Constitution is; it could control only the construction of the decree.

<sup>10</sup> See 1 OPPENHEIM, *INTERNATIONAL LAW*, § 145, "The law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy." And BEALE, *CONFLICT OF LAWS*, § 106.

<sup>11</sup> *MANUAL OF EMERGENCY LEGISLATION*, Third Supplement, 297.

<sup>12</sup> See 53 & 54 VICT. c. 37 (1890). WHEATON, *INTERNATIONAL LAW*, 5 ed., 185, and 1 OPPENHEIM, *supra*, § 318.

<sup>13</sup> See paragraph seven of the British October note.



England's act partakes of the nature of a secondary boycott, and it becomes our problem to determine whether a belligerent power may justifiably attempt to conscript neutrals in the economic strangulation of her enemy.<sup>14</sup> In the absence of international rules it would seem permissible to look within the states to examine their regulations of the competitive struggle among individuals. Here it may be objected that municipal laws governing the orderly regulation of economic competition cannot be projected into the international sphere and applied as between warring states. But principles of international conduct have always been and must be sought in this way. As Kent has remarked: "We accordingly find that the rules of the civil law were applied to the government of national rights, and they have contributed very materially to the erection of the modern international law of Europe. From the thirteenth to the sixteenth centuries all controversies between nations were adjudged by the rules of the civil law."<sup>15</sup> That the use of the secondary boycott is illegal seems to be the municipal law of both England and America,<sup>16</sup> but there has been a striking difference of opinion on the subject,<sup>17</sup> and the method of approach to a determination of the question is more important for the matter now being discussed than the actual decisions.

It has been clearly recognized that in a conflict of interests it is necessary to strike a balance in order to attain a positive social gain. The purposes of the person or class employing the boycott are considered with reference to the welfare of the state, while the injury to be inflicted is also considered with reference to the social good. The sovereign state through its courts adjusts, according to its own ends, the conflicting internal elements. But as between nations there is no sovereign to adjust their conflicting interests to its own ends. Each nation is to judge for itself of the actions of the other with reference to it.

Just at this point it becomes obvious that the British Black List cannot be termed either legal or illegal. There is no world sovereign that can set itself up to consider the ends of the great war and to decide whether the condition of fighting shall be improved for one side or the other according to the aims of the World-State. There is no common sovereign to say that its welfare demands that the English cause be allowed to wield one additional weapon in its struggle for existence, maintenance of world domination, or whatever it is that England contends for. As pointed out above, neither do the municipal laws prohibiting secondary boycotts forge the international decision; they merely give us the method of looking at the problem.

<sup>14</sup> It is assumed that the blacklisting has been done solely for belligerent purposes, since the contrary is unproved as well as without the scope of the act.

<sup>15</sup> 1 KENT, COMMENTARIES, 12 ed., 12.

<sup>16</sup> As far as judicial decisions go, it seems that in Great Britain, aside from the Trades Disputes Act of 1906 (6 Edw. 7, c. 47), the case of *Quinn v. Leathem*, [1901] A. C. 495, makes it fairly clear that a secondary boycott is illegal. In the United States only three of our States, New York, California, and Oklahoma, have squarely held it legal, whereas about twenty-five have held it illegal. See LAIDLER, *BOYCOTTS AND THE LABOR STRUGGLE*, 236-37.

<sup>17</sup> See Mr. Justice Holmes' dissent in *Vegeahn v. Guntner*, 167 Mass. 92, 104, 44 N. E. 1077, 1079, and *Plant v. Woods*, 176 Mass. 492, 504, 57 N. E. 1011, 1015. Also 29 HARV. L. REV. 86.

In the absence of any world power adjusting the struggle between states in order to reach certain ends, or what are thought to be ends, it would seem that the United States can protest with good cause if the British Black List appears to have no reference to British aims in the struggle with Germany, or if it seems, in application, to involve action or produce effects not necessary to the satisfaction of those aims, for in either case England is acting arbitrarily. Two aspects of the English policy appear. First, if Viscount Grey is right, his government is seeking merely to cut off a stream of goods flowing from England, through America, to Germany.<sup>18</sup> Secondly, England's object may be the impressment of the United States into her policy of economic strangulation of Germany. In either aspect the Black List has a very apparent reference to England's purposes. Therefore it would seem that all this country can do about the Black List is to protest on some vague ground that its trade should not be killed.

The discussion, therefore, reduces to this: the English Black List will be acquiesced in or not according to whether or not this country regards England's aim as her aim.

**ECCLESIASTICAL LAW: HOW FAR ADOPTED IN THE UNITED STATES.** — An interesting question of statutory construction is involved in a recent decision that a court which by statute has power "to decree divorces from the bonds of matrimony"<sup>1</sup> has no jurisdiction by consequence to decree a legal separation. The legal separation, or divorce *a mensa et thoro*, was the decree given by the ecclesiastical courts of England. The court concedes that the ecclesiastical law is part of the common law,<sup>2</sup> but holds that it was not adopted in this country as part of the common law.<sup>3</sup> *Hodges v. Hodges*, 159 Pac. (N. M.) 1007.

The case does not present the same problem as is presented by the adoption of the principles of English law by our common law or equity courts.<sup>4</sup> In these cases tribunals were set up which were essentially the counterparts of their prototypes in England,<sup>5</sup> and hence if not by explicit provision, at least by implication,<sup>6</sup> they were given the entire jurisdiction of the English common law courts or courts of equity.<sup>7</sup> Because, however, of the difference in thought and in institutions due largely to the absence of an established church in most of the colonies, no ecclesiastical

<sup>18</sup> British Note of October last, paragraph six. "The legislation merely prohibits persons in the United Kingdom from trading with specified individuals, who by reason of their nationality or their associations are found to support the cause of the enemy, and trading with whom will therefore strengthen that cause."

<sup>1</sup> N. M. STAT. 1915, § 2773.

<sup>2</sup> See *Crump v. Morgan*, 3 Ired. Eq. (N. C.) 91, 98; *Le Barron v. Le Barron*, 35 Vt. 365, 367; 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 116 ff.; 1 COOLEY'S BLACKSTONE, COMMENTARIES, 4 ed., \* 84; DEAN POUND, INTRODUCTION TO THE STUDY OF LAW, 30-31.

<sup>3</sup> The New Mexico courts are directed by statute to apply "the common law as recognized in the United States of America." N. M. STAT. 1915, § 1354.

<sup>4</sup> For the legal theory as commonly stated, see 1 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., § 157. Cf. REINSCH, THE ENGLISH COMMON LAW IN THE EARLY COLONIES, BULLETIN OF THE UNIVERSITY OF WISCONSIN, Historical Series II, No. 4.

<sup>5</sup> See *Commonwealth v. Knowlton*, 2 Mass. 530, 534-35.

<sup>6</sup> See *Cleveland, etc. R. Co. v. Keary*, 3 Ohio St. 201, 205.

<sup>7</sup> See 1 STORY, EQUITY JURISPRUDENCE, 13 ed., §§ 56-58.



courts were set up here. Therefore, since law cannot be, without a tribunal to administer it,<sup>8</sup> the ecclesiastical law has never as a whole been in force in this country. Instead, certain portions of the subject matter originally adjudicated by the ecclesiastical courts, such as probate and divorce, have been put within the jurisdiction of our common law and equity courts.<sup>9</sup> Since the jurisdiction thus given is only fragmentary, special rather than general, it is limited strictly by the words of the statute. So where there is no statute permitting it the court may not give divorce for impotency of the husband,<sup>10</sup> or cruelty by the wife.<sup>11</sup> And so where the statute contemplates custody of the children by one of the parents, the court cannot award it to a third person.<sup>12</sup> So in the principal case, a grant of jurisdiction to decree absolute divorce does not confer power to decree a limited divorce.

It should not follow from this that none of the principles of the ecclesiastical law of divorce are to be applied by an American divorce court, nor is it generally so held.<sup>13</sup> The statutes are usually construed to authorize the adoption of such of the general principles of the ecclesiastical courts as are applicable to the jurisdiction conferred, and not inconsistent with American institutions and unsuited to American beliefs. So where a statute allowed divorce for impotency, but provided no method of obtaining proof, it was held that the court might resort to the practice of the ecclesiastical courts compelling a medical examination.<sup>14</sup> So also where the statute makes no provision with regard to connivance, courts have assumed that it was intended to adopt the general principles which governed the ecclesiastical courts as to connivance,<sup>15</sup> and similarly with regard to condonation.<sup>16</sup> And so the meaning of a term in the statute like "extreme cruelty" may be construed in the light of the ecclesiastical law.<sup>17</sup> In a striking case in probate law, another graft from the ecclesiastical tree, it was held that the court was free to choose the ecclesiastical rule regarding the effect of revocation on a prior will, in preference to a different rule laid down by Lord Mansfield.<sup>18</sup> No case could better illustrate the continued vitality of the principles of the ecclesiastical law where they are applicable to the circumscribed jurisdictions set up in this country, and where they are not in conflict with manners or statute.

<sup>8</sup> See *Dickinson v. Dickinson*, 3 Murph. (N. C.) 327, 328. In this case an attempt was made to secure a decree of divorce for an act of adultery committed before a divorce court was set up, under a retrospective statute. The court assumed that the law of divorce did not exist in North Carolina before the statute. See *Crump v. Morgan*, *supra*, 98. See also *Le Barron v. Le Barron*, *supra*, 367; 1 BISHOP, *supra*, §§ 116, 128.

<sup>9</sup> See *Collier v. Collier*, 1 Dev. Eq. (N. C.) 352, 353; *Parsons v. Parsons*, 9 N. H. 309, 318.

<sup>10</sup> *Burtis v. Burtis*, 1 Hopk. (N. Y.) 557, 564.

<sup>11</sup> *Perry v. Perry*, 2 Paige (N. Y.) 501.

<sup>12</sup> *Hopkins v. Hopkins*, 39 Wis. 167, 171.

<sup>13</sup> New York is commonly cited for the doctrine that no part of the ecclesiastical law has been adopted here. *Burtis v. Burtis*, *supra*; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, 463. But *cf.* *Wood v. Wood*, 2 Paige (N. Y.) 108, 111; *Griffin v. Griffin*, 47 N. Y. 134, 137; *Higgins v. Sharp*, 164 N. Y. 4, 58 N. E. 9. See 1 NELSON, *DIVORCE AND ANNULMENT OF MARRIAGE*, § 10.

<sup>14</sup> *Le Barron v. Le Barron*, *supra*.

<sup>15</sup> *Robbins v. Robbins*, 140 Mass. 528, 530.

<sup>16</sup> *Quincy v. Quincy*, 10 N. H. 272, 273.

<sup>17</sup> *Morris v. Morris*, 14 Cal. 76, 79.

<sup>18</sup> *Williams v. Miles*, 68 Neb. 463, 471, 94 N. W. 705.

## RECENT CASES

**ARMY AND NAVY — WRONGFUL ENLISTMENT OF MINOR — RIGHT OF PARENTS TO DISCHARGE.** — A minor by fraudulently misrepresenting his age succeeded in enlisting in the National Guard of a state after it had been drawn into the government service. His parents requested his discharge, which was refused. They thereupon obtained a writ of *habeas corpus* to be served upon the military authorities, but before service of the writ the minor had been arrested to await trial for fraudulent enlistment. There was a rehearing on the writ. *Held*, that the prisoner be released. *Ex parte Avery*, 235 Fed. 248.

At common law a minor's contract of enlistment is not voidable either at his own or his parents' instance. *Commonwealth v. Gamble*, 11 Serg. & R. (Pa.) 93; *United States v. Blakeney*, 3 Gratt. (Va.) 405. Nor may a parent obtain the discharge of a minor where a statute fixes the military age at eighteen, but makes no mention of a necessity of the parent's consent. *Acker v. Bell*, 62 Fla. 108, 57 So. 356. The federal statute, however, requires the consent of the parent or guardian. See U. S. REV. STAT., §§ 1116, 1117. Under this statute the minor himself may not avoid his contract. *In re Morrissey*, 137 U. S. 157. But see *In re Baker*, 23 Fed. 30; *Commonwealth v. Cushing*, 11 Mass. 67. But while all authorities agree that the parent may avoid the contract, there has been a great diversity of opinion as to the parents' right to do so before the minor has paid the penalty of his crime. *Ex parte Lisk*, 145 Fed. 860; *Ex parte Bakley*, 148 Fed. 56, 152 Fed. 1022; *Dillingham v. Booker*, 163 Fed. 696; *Ex parte Lewkowitz*, 163 Fed. 646. The court in the principal case reached its decision by finding that the jurisdiction of the civil court had attached before that of the court martial. However, the jurisdiction of the court martial is not distinct from that of the military authorities. But the question is not one of different courts of equal jurisdiction attempting to dispose of the same matter; the sole concern on a writ of *habeas corpus*, is whether the detention is lawful. See *United States v. Williford*, 220 Fed. 291. As the enlistment was good, though voidable, it follows that immediately upon the crime the military authorities had a legal right to hold the minor for court martial. *Ex parte Lewkowitz, supra*; *United States v. Williford, supra*. The writ must therefore fail upon such detention.

**BANKRUPTCY — ADMINISTRATION — RIGHT OF STOCKHOLDERS OF BANKRUPT BUILDING AND LOAN ASSOCIATION TO VOTE FOR TRUSTEE.** — A building and loan association became bankrupt. It owned \$750,000 worth of assets, and was subject to stockholders' claims to that amount, but it owed only \$12,000 to outside creditors. The stockholders were allowed to vote for the trustee in bankruptcy. *Held*, that this is proper. *Merchants National Bank v. Continental Building & Loan Association*, 232 Fed. 828 (Circ. Ct. App., 9th Circ.).

Only creditors having a provable claim are entitled to vote for a trustee in bankruptcy. U. S. COMP. STAT., §§ 9585 (9), 9628. A stockholder of an ordinary corporation is clearly not, as such, a creditor. A building and loan association is formed for the purpose of accumulating a fund from the stock subscriptions of its members in order to make loans to them. The stockholders, like those of any other corporation, are liable to contribute to losses to the amount of their shares. *McGrath v. Hamilton Savings & Loan Association*, 44 Pa. St. 383. But they have the privilege of withdrawing, and then become creditors of the association, though their claims are deferred to those of outside creditors. *Christian's Appeal*, 102 Pa. St. 184. The association is expected ultimately to pay back all its stock subscriptions. Hence, as is forcibly shown by the principal case, its liability to outsiders is never more than a small fraction of that



to its stockholders. It follows that in the great majority of cases it cannot be shown to be insolvent by considering simply the claims of outside creditors. Accordingly, the claims of members may be shown to prove the propriety of remedies as for insolvency. See *Globe Building & Loan Co. v. Wood*, 22 Ky. L. Rep. 1500, 1502, 60 S. W. 858, 860. ENDLICH, BUILDING ASSOCIATIONS, 2 ed., § 511. In like manner, if these associations are to be put through bankruptcy, the claims of the members must be permitted to be shown. But only debts provable in bankruptcy are included in the debts which make a person insolvent and allow a petition in bankruptcy against him. U. S. COMP. STAT., §§ 9585 (11) (12), 9587. So if these associations are to go through bankruptcy at all, their shareholders must be holders of provable claims and so allowed to vote for the trustee.

**CARRIERS — PASSENGERS — WHO ARE PASSENGERS — CHILD RIDING FREE AT INVITATION OF MOTORMAN.** — The plaintiff, a boy ten years of age, in response to the beckoning of a motorman, boarded the defendant's street car without payment of fare. Owing to the negligence of the motorman in suddenly stopping the car, the plaintiff was thrown off and injured. He now sues the carrier on the theory of breach of duty toward a passenger. Held, that the plaintiff may recover. *Hayes v. Sampsell*, 113 N. E. 611 (Ill.).

It has long been held that the relation of carrier and passenger can arise otherwise than in contract. *Marshall v. The York, etc. Ry.*, 11 C. B. 655; *Austin v. Great Western Ry.*, L. R. 2 Q. B. 442. However, the relation is perfected only by an acceptance of the person as a passenger by the carrier. Where the duty of accepting is delegated to an agent, it obviously includes acceptance only on payment of fare. Therefore, it is without the scope of the agent's authority to raise the relation when such payment is not intended. See J. H. Beale, "Carriers and Passengers," 19 HARV. L. REV. 250, 265. Thus adults are generally classed as trespassers when riding with the conductor's permission without payment of fare. *Purple v. Union Pacific Ry.*, 114 Fed. 123; *Robertson v. New York & Erie R. Co.*, 22 Barb. (N. Y.) 91. *Contra*, *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861. It must be equally apparent that it is without the scope of the agent's authority to raise the relation with respect to children under similar conditions, since the scope of the authority cannot vary in inverse ratio with the age of the person applying. See *Chicago, etc. Ry. v. Casey*, 9 Bradw. (Ill.) 632, 643. However, a number of courts have made an exception to the rule and allowed recovery for a child injured as in the principal case. Cf. *Wilton v. Middlesex Ry. Co.*, 107 Mass. 108, with *Robertson v. Boston, etc. Ry. Co.*, 190 Mass. 108, 76 N. E. 513. Cf. *Muelhausen v. St. Louis Ry. Co.*, 91 Mo. 332, 2 S. W. 315, and *Whitehead v. St. Louis, etc. Ry. Co.*, 99 Mo. 263, 11 S. W. 751, with *Snider v. St. Joseph Ry. Co.*, 60 Mo. 413. While it seems difficult to say that the true carrier-passenger relation arises in these cases, the courts apparently have in mind an affirmative duty either to exclude children or else admit them as passengers. See *New Jersey Traction Co. v. Danbeck*, 57 N. J. L. 463, 31 Atl. 1038; *Pittsburg, etc. Ry. v. Caldwell*, 74 Pa. St. 421.

**CONTRACTS — CONTRACT OF INDEMNITY — WHETHER ASSIGNABLE.** — A married woman owned stock in the plaintiff company, and was under heavy liability for calls thereon. In consideration of her executing a transfer of this stock to an infant, the defendant agreed to indemnify her against any liability for calls. The company went into liquidation, and the present holder of the stock being an infant, the woman was placed on the list of contributories. Judgment was recovered against her for calls, but as she had no separate estate, the judgment was fruitless. The liquidator then took an assignment from her of the contract of indemnity and sued defendant to recover the amount of the

calls. *Held*, that the plaintiff may recover. *British Union & National Ins. Co. v. Ranson*, 60 Sol. J. 679.

At law, recovery on a contract of indemnity, before payment on the liability, is dependent on the construction of the contract. If broad enough to be an indemnity for liability, and not merely an indemnity for payment upon liability, recovery will naturally follow. *Gage v. Lewis*, 68 Ill. 604; *Churchill v. Hunt*, 3 Denio (N. Y.) 321; *In re Negus*, 7 Wendell (N. Y.) 499; *Showers v. Wadsworth*, 81 Cal. 270, 22 Pac. 663. See *Smith v. Ry. Co.*, 18 Wis. 17, 24. But equity, proceeding on equitable principles, will disregard the language of the contract even if it expressly limits the indemnity to payment on the liability. *Lacey v. Hill*, L. R. 18 Eq. 182; *In re Law Guarantee, etc. Society*, [1914] 2 Ch. 617; *Central Trust Co. of N. Y. v. Louisville Trust Co.*, 87 Fed. 23. See *Johnston v. McKiver*, 19 Q. B. D. 458, 460. As to the point raised in the case upon the assignability of a contract of indemnity, there should be no difficulty. There is of course nothing personal in the right to receive money. The few cases in point so hold without argument. *In re Perkins*, [1898] 2 Ch. 182; *Jenckes v. Rice*, 119 Iowa 451, 93 N. W. 384; *Marshall v. Cobleigh*, 18 N. H. 485. The fact that the assignee is the party against whose claim the indemnity was given cannot decrease his rights. Indeed that fact might have been taken to give him a right independent of assignment to proceed against the claim to the indemnity, which is an asset of his debtor, ahead of other creditors. *Cf. In re Richardson*, [1911] 2 K. B. 705.

CONTRACTS — RESTRICTION ON ASSIGNMENT — EFFECT OF WAIVER. — A contract between the city and a contractor provided that neither the contract nor the right to moneys due thereunder should be assignable. The contractor assigned the claims for money to the bank for security. The city assented thereto and paid the money into court. A subcontractor claims that the assignment is invalid and, hence, that he can attach the claim as an asset of the assignor. *Held*, that the assignment operated to give the bank a complete right to the money due. *Portuguese-American Bank of San Francisco v. Welles*, U. S. Sup. Ct., Oct. Term, 1916, No. 45.

The court lays down the principle that restraining the alienation of a debt is no more to be tolerated than restraining the alienation of a chattel, and for this reason the assignment in this case operated to perfect the right of the bank to the moneys in question. It is well established that provisions against assignment are for the benefit of the contracting parties and if they waive their rights and do assign and themselves permit assignments, third parties cannot interfere. *Wilson v. Reuter*, 29 Ia. 176; *Burnett v. Jersey City*, 31 N. J. Eq. 341. *Cf. Staples v. Somerville*, 176 Mass. 237, 241, 57 N. E. 380, 381. On the other hand, if such provision is not waived, the assignee has no claims enforceable against the obligor. *Griggs v. Landis*, 19 N. J. Eq. 350; *Andrew v. Meyerdirck*, 87 Md. 511, 40 Atl. 173; *Lockerby v. Amon*, 64 Wash. 24, 116 Pac. 463. But see *Spare v. Home Mutual Ins. Co.*, 17 Fed. 568. If the analogy sought to be drawn by the court between a chattel and a debt were carried to its logical conclusion it would follow that the provision against assignment has no effect and that a waiver thereof is immaterial. It is submitted that such an analogy cannot be drawn, since the legal conception of a *chose* in action is utterly different from that of a chattel. *Board of Trustees v. Whalen*, 17 Mont. 1, 41 Pac. 849; *Griggs v. Landis*, *supra*, 353. For an exhaustive inquiry into the nature of a *chose* in action as regards assignability, see W. W. Cook, in 29 HARV. L. REV. 816, and Samuel Williston, in 30 HARV. L. REV. 97.

CRIMINAL LAW — FORMER JEOPARDY — IDENTITY OF OFFENSES — INFERIOR COURT'S LACK OF JURISDICTION OF GREATER OFFENSE. — The defendant, convicted in a mayor's court on a charge of assault and battery, was sentenced to



the workhouse and served his term. Later an indictment was returned against him on the same facts charging assault with intent to rape, an offense over which the mayor's court had no jurisdiction. The defendant pleads double jeopardy. *Held*, that the plea is bad. *Crowley v. State*, 113 N. E. 658 (Ohio).

The decision rests upon the ground that as the mayor's court had no jurisdiction of assault with intent to rape the defendant was never in former jeopardy for that offense. The same reasoning is advanced in similar decisions on this point in other jurisdictions. *Boswell v. State*, 20 Fla. 869; *Murphy v. Commonwealth*, 23 Gratt. (Va.) 960; *Huffman v. State*, 84 Miss. 479, 36 So. 395. But the double jeopardy exists in placing the defendant twice in peril for the lesser, not for the greater, offense. *State v. Cooper*, 13 N. J. L. 361. The inferior court's lack of jurisdiction of the greater offense is, therefore, beside the point. See 1 BISHOP, CRIMINAL LAW, 7 ed., § 1058. The weight of authority supports this view and is *contra* to the principal case. *Regina v. Miles*, 17 Cox C. C. 9; *Storrs v. State*, 129 Ala. 101, 29 So. 778; *State v. Smith*, 53 Ark. 24, 13 S. W. 391; *Commonwealth v. Squire*, 1 Met. (Mass.) 258. See 16 HARV. L. REV. 142. An exception, however, has been established in cases where, after a conviction for assault, the person attacked dies from the wounds inflicted. *Regina v. Morris*, 10 Cox C. C. 480; *Commonwealth v. Roby*, 12 Pick. (Mass.) 496; *Commonwealth v. Evans*, 101 Mass. 25; *Diaz v. United States*, 223 U. S. 442. In these cases the total inadequacy of the punishment to the crime ultimately proved to have been committed has led courts to depart from the strict logic of the situation.

**DOWER — EFFECT OF RELEASE OF DOWER — AVOIDANCE OF A FRAUDULENT CONVEYANCE IN WHICH DOWER IS RELEASED.** — A wife joined her husband in a conveyance of realty to trustees. After the husband's death the conveyance was set aside as being in fraud of creditors. It is provided that a widow shall be endowed of one third of all inheritable lands of which her husband was seized during coverture. 4 CONSOL. LAWS OF N. Y., Real Property Law, § 190. The wife seeks dower in the property. *Held*, that she is entitled to dower. *Jenkins v. Mollenhauer*, 56 N. Y. L. J. 362 (N. Y. Sup. Ct., App. Term).

A conveyance in fraud of creditors is made voidable only for the protection of creditors of the grantor; and hence the grantor, or, if he is dead, his representatives, cannot upset it. *Britt v. Aylett*, 11 Ark. 475. See *Wetherbee v. Cockrell*, 44 Kan. 380, 383, 24 Pac. 417, 418; *Lathrop v. Pollard*, 6 Colo. 424, 427. Likewise a joint conveyance by husband and wife in fraud of the husband's creditors will effectually bar any dower claim as long as the creditors do not attack it. *Elmendorf v. Williams*, 57 N. Y. 322. *Cf. Kitts v. Wilson*, 130 Ind. 492, 29 N. E. 401. But when a fraudulent conveyance is avoided by creditors, it is regarded as if it never existed. A release of dower is operative only when made in favor of one having title to the property in which dower exists. *Pixley v. Bennet*, 11 Mass. 298. See 2 SCRIBNER, DOWER, 307; *Malloney v. Horan*, 49 N. Y. 111. If, therefore, the husband's conveyance is set aside by the creditor, the grantee loses also the benefit of the dower release. *Lockett v. James*, 8 Bush (Ky.) 28. The creditors by thus incidentally setting aside the release do not acquire the dower interest, since the release had deprived them of no benefits to which they were entitled. Nor is the widow estopped to claim her dower against the creditors, since their claim is not by virtue of her conveyance but in spite of it. Consequently it is generally held that, if the conveyance is set aside during the husband's life, the wife is entitled to dower on his death. *Ridgway v. Masting*, 23 Ohio St. 294; *Malloney v. Horan*, *supra*. Also, since an avoided conveyance is regarded as if it never existed, the widow should equally get dower, where, as in the principal case, the joint fraudulent conveyance was made during the life of the husband and avoided after his death. *Fredrick v. Emig*, 186 Ill. 319, 57 N. E. 883; *Bohannon v. Combs*, 97 Mo. 446, 11 S. W. 232. See, *contra*, *Den v. Johnson*, 18 N. J. L. 87.

**DUTY OF CARE — MISFEASANCE AND NONFEASANCE — MORAL DUTY.** — The plaintiff, intending to become a passenger, jumped upon the step of a closed, vestibuled car of a moving train and clung to the handbars. Later the attention of the conductor was called to the plaintiff's condition, but he did not open the door and the plaintiff finally dropped off from exhaustion. He now sues the conductor and the railway company for his resultant injuries. *Held*, that he may take judgment against both. *Southern Ry. Co. v. Sewell*, 90 S. E. 94 (Ga.).

As the plaintiff had not put himself in the proper place for the carriage of passengers, it would seem that he was a trespasser and not a passenger. *Merrill v. Eastern R. Co.*, 139 Mass. 238, 1 N. E. 548; *Illinois Central R. Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. 294. The court then decides that the conduct of the defendants was misfeasance. As the train was moving when boarded by the plaintiff and its motion did not throw him off, it is difficult to find any action by the defendants, after the plaintiff was seen, which caused the accident. The only basis of liability would seem to be a nonfeasance. But there is no legal duty to act, except such as may arise from legal relations. See James Barr Ames, "Law and Morals," 22 HARV. L. REV. 97, 111-13. However, some courts, while ostensibly recognizing this rule, have, in effect, imposed affirmative duties where no relation existed. Thus, where one had made a gratuitous promise to effect the cancellation of an insurance policy, but did not take steps to do so, he was held liable for the resultant loss, the court calling his conduct misfeasance. *Condon v. Exton-Hall Brokerage & Vessel Agency*, 80 Misc. 369, 142 N. Y. Supp. 548. Again, under the guise of estoppel, an affirmative duty has been placed upon the apparent maker of a forged note to warn parties, relying on his apparent credit, of the forgery. *Urquhart v. Bank of Scotland*, 9 Scot. L. R. 508; *Ewing v. Dominion Bank*, 35 Can. Sup. Ct. 133. See 26 HARV. L. REV. 349. It has been suggested that a legal duty should be imposed to take positive steps to remove a peril innocently created or to mitigate an injury innocently caused. See F. H. Bohlen, "The Moral Duty to aid Others as a Basis of Tort Liability," 56 U. OF PA. L. REV. 217. In the principal case the conductor had, without fault, contributed to the dangerous situation by increasing the speed of the train. Accordingly, under this theory he would be under a duty to aid the plaintiff. And as this duty arose out of the employment, by the speeding up of the train, the railroad may well be liable for its breach. But if, after all, the duty is simply one of assistance whenever ethical standards demand it, the conductor seems to owe it as a human being merely, and not as a servant of the railroad. It would seem that the imposition of affirmative duties is more properly the function of legislation than of judicial decision. If, however, the courts contemplate the incorporation of moral duty into the law, it is advisable that they do so openly, and that its extent and limitations be clearly defined.

**ECCLESIASTICAL LAW — HOW FAR ADOPTED IN THE UNITED STATES — LEGAL SEPARATION.** — In a suit for absolute divorce, the lower court decreed a legal separation. A statute empowered the court to grant divorce from the bonds of matrimony, but made no provision for a legal separation. On appeal, *held*, that the ecclesiastical law, allowing divorce from bed and board, was not adopted as part of the common law. *Hodges v. Hodges*, 159 Pac. (N. M.) 1007.

For discussion of this case, see NOTES, p. 283.

**EQUITY — RECEIVER — JURISDICTION TO APPOINT A RECEIVER WHEN SUCH APPOINTMENT IS THE SOLE OBJECT OF THE SUIT.** — An individual with assets of about \$70,000,000, chiefly in land, and liabilities of \$22,000,000, of which \$15,000,000 was secured, and \$7,000,000 unsecured, became financially embarrassed for ready money to meet his obligations. Two of the unsecured creditors brought suit for a receiver, alleging the above facts and that, if the



secured creditors enforced their claim against the property, the unsecured creditors must go unpaid, while on the other hand, if the secured creditors held off for a time, in all probability all would be paid. *Held*, that a receiver be appointed. *Thompson's Receivership*, 44 Pa. County Ct. 518.

For a discussion of the principles involved in this decision, see Notes p. 273.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST — ALLOWANCE FOR COUNSEL FEES INCURRED IN DEFENCE OF BEQUEST. — A petition was filed for allowance from the estate for fees of counsel employed by executor to defend certain charitable bequests subsequently declared void. *Held*, that the petition be denied. *Arnold's Estate*, 64 Pitts. L. J. 596.

The argument is that an executor may not charge the estate unless he is acting in the interest of those eventually found to be entitled to the property. Originally an executor derived his authority entirely from the will. He acted as the representative of the deceased to carry out his wishes. Modern procedure merely requires the sanction of the court to this appointment and does not change the purpose. It would seem then that it was not only the privilege but the duty of the executor to defend the validity of the bequests and of the whole will. *Compton v. Barnes*, 4 Gill (Md.) 55; *Bradford v. Boudinot*, 3 Wash. (U. S. C. C.) 122; *Succession of Heffner*, 49 La. Ann. 407, 21 So. 905; *In re Tille, Guaranty & Trust Co.*, 114 App. Div. 778, 100 N. Y. Supp. 243. Wherefore he may defend a bequest even against the wishes of the legatees interested therein. *Reed v. Reed*, 74 S. W. 207 (Ky.). But he must be *bonâ fide* in the belief that there is a reasonable chance of upholding the bequest. *Henderson v. Simmons*, 33 Ala. 291; *Bratney v. Curry*, 33 Ind. 399; *Bowden v. Higgs*, 77 Tenn. 343. However, there is authority in support of the principal case, that the executor is acting in behalf of the legatees, and not for the testator. Under such theory it must follow that his recovery for counsel fees against the estate is limited to the interest in the estate of the legatee for whom he has acted. *Koppenhaffer v. Isaacs*, 7 Watts (Pa.) 170. And he can have no charge upon the estate if unsuccessful. *Kelly v. Davis*, 37 Miss. 76. But a special provision in the will desiring the expenses of defending a bequest to be paid out of the estate must surely protect the executor. The *dictum* of the court that such a provision would be void if the bequest was void is difficult to sustain. For there can be no public policy against testing one's legal rights in court.

INTERSTATE COMMERCE — COMPETITION — REVIEW OF COMMISSION'S ORDERS. — The Panama Canal Act provided a heavy daily penalty for the operation after a certain date of steamship lines found by the Interstate Commerce Commission to be in competition with railroads which owned them. The Lehigh Valley Railroad petitioned the Commission, before the date from which the penalties under the Act were to run, to declare that there was no competition between the railroad and its steamers. After two hearings in which the Commission found as a fact that such competition existed, the railroad brought a bill in equity asking the District Court to enjoin the Commission's order, which had refused, on the ground of the competition found, to declare that the railroad might run its boats without penalty. *Held*, that the prayer be denied. *Lehigh Valley R. v. U. S.*, 234 Fed. 682.

The position of the Interstate Commerce Commission as a fact-finding body is put in question. Without a binding statutory declaration the conception has become crystallized that the orders of the Commission as an administrative body made after hearing evidence are reviewable only in so far as they exceed the Commission's statutory authority, violate a constitutional provision, reveal a mistake in law, or transcend the bounds of reason. *I. C. C. v. Ill. Cent. R.*, 215 U. S. 452; *I. C. C. v. Union Pacific*, 222 U. S. 541; *I. C. C. v. Louisville, etc. R.*, 227 U. S. 88; *Los Angeles Switching Case*, 234 U. S. 294. See

*Procter & Gamble v. U. S.*, 225 U. S. 282, 297. And the Panama Canal Act has expressly declared that the Commission's finding on the question of competition shall be final. 37 STAT. AT LARGE, 566. Congress has thus put beyond a court's review the decision of a body of experts on this involved technical subject. But the complainant's case must also fall on another ground. The district courts have been given the power vested in the recently abolished Commerce Court to "enjoin, set aside, annul or suspend" the Commission's orders. 38 STAT. AT LARGE, 219; 36 STAT. AT LARGE, 539. By judicial interpretation this power to review has been limited in this class of cases to orders made to a carrier that it act affirmatively. *Procter & Gamble v. U. S.*, *supra*. Any other interpretation, which would give the district courts by an exercise of original action the power to enforce their conceptions as to the meaning of the Act on subjects in their nature administrative, would greatly tend to nullify the benefits derived from the existence of the Commission as a permanent body for investigation and administration. The order in the principal case is clearly negative, since with or without it the railroad must cease to run boats or else pay the penalty provided by Congress.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — REGULATION OF RATES — ELIMINATION OF WATER COMPETITION BY NATURAL CAUSES. — Certain railroads on applications to the Interstate Commerce Commission were allowed to reduce coast to coast rates below those to intermediate points, so as to meet water competition through the Panama Canal. Slides for several months had stopped traffic through the canal. Because of the greater profit in foreign commerce it was apparent that this traffic would not be resumed for several months. Section 4 of the Interstate Commerce Act provides in part that when a railroad shall reduce its rates in competition with a water carrier, it shall not be permitted to increase them except on grounds other than the elimination of water competition. The shippers of intermediate points seek to have the former applications reopened for further consideration and readjustment. *Held*, that the application will be reopened. *In the Matter of Reopening Fourth Section Applications*, 40 Int. Com. Rep. 35.

For a discussion of the principles involved in the decision, see NOTES, p. 276.]

LIBEL — PUBLICATION — DOES AN INTERCEPTED LETTER CREATE LIABILITY FOR PUBLICATION. — The defendant sent a letter to a friend containing statements defamatory of the plaintiff. The friend never saw the letter, but his father opened and read it. The plaintiff sues for this publication. *Held*, that the defendant is not liable. *Powell v. Gelston*, [1916] 2 K. B. 615.

Upon publication of a libel, the liability of the publisher as regards the falsity of the words, their reference to the injured party, and their defamatory content, would seem to be absolute. *Hulton v. Jones*, [1910] A. C. 20; *Campbell v. Spottiswoode*, 3 B. & S. 769. See *Neville v. Fine Arts, etc. Co.*, [1895] 2 Q. B. 156, 168. *Contra*, *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462; *Jones v. Polk & Co.*, 190 Ala. 243, 67 So. 577. See 29 HARV. L. REV. 533. But as regards the publication itself of the libel, an element of fault appears to be necessary to create liability. See *The King v. Paine*, 5 Mod. 163, 167. The defendant is liable if the writing came into circulation through his negligence or failure to take proper precautions to prevent it. *Vitzetelly v. Mundie's Co.*, [1900] 2 Q. B. 170; *Thorley v. Lord Kerry*, 4 Taunt. 355. *A fortiori*, an intended publication creates liability. But in the principal case the intended publication never took place, and negligence seems not to have been present, since the opening of the letter by the father could not have been foreseen. In the criminal law the intent to produce one result will create responsibility for another proximately caused, though unintended. *Gore's Case*, 9 Co. 81 a. But that is not the theory of the law in civil actions. Perhaps, however, the neces-



sary culpability may be drawn from a closer analysis of the intent here presented. In fact the intent is twofold — being primarily to publish the letter to the friend, and secondarily to injure the plaintiff by publishing the libel. If the letter had been sent to one newspaper, and it were intercepted and published by another, surely the main intent being to publish, and the method of publication secondary, culpability would ensue. Whether, in the principal case, the secondary intent to injure by the publication is sufficiently strong to create liability, is a question of degree. *Cf. Fox v. Broderick*, 14 Ir. C. L. Rep. 453.

**LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — SENDING CARD OF RIVAL UNDERTAKER TO FAMILIES IN WHICH THERE IS SERIOUS ILLNESS.** — Hughes and the defendant were rivals in the undertaking business, having no other local competitors. The defendant printed and sent to families in which there was at the time serious illness the following card: "Bear in mind our Undertaking Department. Satisfaction guaranteed. [Signed] H. L. Hughes." Hughes sues for libel. *Held*, that defendant's demurrer be overruled. *Hughes v. Samuels Bros.*, 159 N. W. 589 (Ia.).

The written statement in this unique case, plus its necessary implications, amounts to this: "I, [the plaintiff], solicit your business by this card." Such a statement is certainly untrue, and is made with malice; but it apparently does not come within the generally accepted limits of libelous words, since, taken by itself, it can injure neither the plaintiff's reputation nor his business. See ODGERS, LIBEL AND SLANDER, 5 ed., 2. It becomes libelous, however, because of an extrinsic circumstance, the time at which it is published. But any statement must need extrinsic circumstances to become a libel. An accusation of theft, for instance, is libelous only because of that extrinsic circumstance, the institution of private property. Accordingly it is submitted that what extrinsic circumstances are incorporated into a written statement is merely a question of degree, and that the statement in the principal case is rightly held libelous. *Morrison v. Ritchie & Co.*, [1902] 4 Sc. Sess. Cas. 645. *Cf. Rocky Mountain News Printing Co. v. Fridborn*, 46 Colo. 440, 104 Pac. 956; *Fitzpatrick v. Age-Herald Pub. Co.*, 184 Ala. 510, 63 So. 980; *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 220, 50 S. E. 68, 81. In the principal case the court rests the decision upon the broad principle that to injure another intentionally without justification is a tort, and, where the instrument of injury is the publication of written words, a libel. Thus the law of libel is at once rationalized and made an integrated part of our modern law of torts. See 29 HARV. L. REV. 559. The principal case is perhaps the first to announce such a doctrine of libel, formerly only an action on the case having been allowed for such torts as these. ODGERS, LIBEL AND SLANDER, 5 ed., 77 *et seq.* But whether or not the case is properly called one of libel, recovery is justified. For there is certainly intended injury, justified if at all by competition; and competition by means of telling lies is hardly to be protected.

**MARRIAGE — NULLIFICATION — RIGHT TO DISCONTINUE ACTION FOR ANNULMENT.** — A husband brought a bill for the annulment of his marriage. Subsequently he moves for leave to discontinue the action. *Held*, that the motion be denied. *Ginther v. Ginther*, 56 N. Y. L. J. 132 (Sup. Ct., App. Div.).

A suitor has a right before the final decision to discontinue any action or proceeding instituted by him, if no rights have accrued to others. *In re Buller*, 101 N. Y. 307, 4 N. E. 518. But where there is a public interest in the correct adjudication of the controversy the court may refuse to allow leave to abandon the action. So one who contests an election is refused permission to discontinue his contest. *Miles v. Macon*, 188 S. W. 313 (Mo.). See 24 HARV. L. REV. 673. In divorce suits the rights of the parties to the record are not alone to be con-

sidered; the public also has an interest in seeing that no divorce shall be granted without proper cause. *Murphy v. Murphy*, 8 Phila. (Pa.) 357; 2 BISHOP, MARRIAGE & DIVORCE, § 230. So a divorce will not be granted on failure of the defendant to appear, or on admissions in his pleadings, unless the plaintiff's charges are sustained by proof. *Hill v. Hill*, 24 Ore. 416, 33 Pac. 809; *Iverson v. Iverson*, 29 Misc. 240, 61 N. Y. Supp. 118. But, since public policy requires the quiet and peaceable termination of marital strife, ordinarily the plaintiff is entitled to discontinue such a suit. *Moore v. Moore*, 22 N. Y. Supp. 451; *Stover v. Stover*, 7 Idaho 185, 61 Pac. 462; *Ashmead v. Ashmead*, 23 Kan. 262. Where, however, in divorce suits the validity of the marriage, and hence the legitimacy of the issue and the status of subsequent marriages, is involved, there is a strong public interest in the correct adjudication of the matter; and courts do not allow as a matter of course dismissal of the bill. *Winans v. Winans*, 124 N. Y. 140, 26 N. E. 293; *Winston v. Winston*, 21 App. Div. 371, 47 N. Y. Supp. 399. The situation ordinarily presented by suits for annulment is the same; and the court should, as the principal case holds, be able within its discretion to refuse leave to discontinue.

**MECHANICS' LIENS — PRIORITY OVER MORTGAGES FOR PURCHASE MONEY TO PERSONS OTHER THAN THE GRANTOR.** — A development company agreed by parol with a stockholder to convey a lot to him on consideration of the erection of a house thereon. The stockholder made a written contract with one Pettit to sell him the land, and Pettit agreed to build the house. When it was partially erected, the stockholder procured a conveyance from the company to Pettit, and the latter executed mortgages to the stockholder as security for the price agreed. Material furnished and labor performed in the construction of the house, chiefly prior to this time, not having been paid for, mechanics' liens were claimed. *Held*, that the liens take priority over the mortgages. *Everest v. Gault Lumber Co.*, 159 Pac. 910 (Okla.).

A mechanics' lien can only accrue against the owner of some interest in the property, legal or equitable. Since the agreement between the company and the stockholder was by parol, no equitable title passed to the latter, prior to the completion of the work agreed to. *Botsford v. New Haven, etc. R. Co.*, 41 Conn. 454. None could therefore pass to the sub-vendee. Now it is generally held that if a possessor having made improvements, later acquires title, the liens attach to the subsequently acquired interest. *Courtemanche v. Blackstone, etc. Ry. Co.*, 170 Mass. 50, 48 N. E. 937; *Weaver v. Sheeler*, 124 Pa. St. 473, 17 Atl. 17. But although the liens may thus relate back, they cannot actually accrue previous to the time when title is received. In the principal case, the passing of title and the giving of the mortgages were simultaneous acts. Under such circumstances a purchase-money mortgage generally takes priority over liens arising out of improvements made by the possessor. *Rochford v. Rochford*, 188 Mass. 108, 74 N. E. 299; *Moody v. Tschabold*, 52 Minn. 51, 53 N. W. 1023. But where the mortgagee is a person other than the grantor it would seem on principle that the liens should prevail. For the legal title must pass through the grantee-mortgagor, at least momentarily, in order to reach the mortgagee. In this brief passage the liens could attach. It has been held otherwise, however, so far as the mortgage is for an advance of purchase-money, on the theory that the mortgagor in substance never held more than the equity of redemption. *New Jersey, etc. Co. v. Bachelor*, 54 N. J. Eq. 600, 35 Atl. 745; *Campbell & Pharo's Appeal*, 36 Pa. St. 247. But the mortgagee cannot be preferred unless the interest of the grantor was free of the liens prior to the conveyance to the mortgagor. *McCausland v. West Duluth Land Co.*, 51 Minn. 246, 53 N. W. 464. Here the express stipulation of the grantor company that the work be done before it would convey, subjected its interest to the lien of the work when done. *Hill v. Gill*, 40 Minn. 441, 42 N. W. 294; *Paulsen v. Manske*, 126 Ill. 72, 18



N. E. 275. The shareholder therefore has no preference upon his mortgages. His interest, if any, as an unpaid vendor, independent of the mortgages, is subject to the liens for the same reason. *Bohn Manufacturing Co. v. Kountze*, 30 Neb. 719, 46 N. W. 1123; *Lee v. Gibson*, 104 Tenn. 698, 58 S. W. 330.

MUNICIPAL CORPORATIONS — TORT LIABILITY — GOVERNMENTAL FUNCTIONS — PUBLIC ZOO. — While leaning against a coyote cage located in a park maintained by the defendant city, the plaintiff, a child of four years, was bitten and scratched by the coyote. Plaintiff sues. *Held*, that she may not recover. *Hibbard v. City of Wichita*, 159 Pac. 399 (Kan.).

For discussion of this case, see NOTES, p. 270.

PLEADING — AMENDMENT OF DECLARATION AFTER STATUTE HAS RUN — WHETHER AN AMENDMENT FROM COMMON LAW ACTION TO STATUTORY ACTION ON THE SAME FACTS IS PERMISSIBLE. — While performing his duties, an employee was injured by a crank shaft. A statute required shafting in factories to be guarded and took away certain defenses. But the employee sued his employer for common law negligence and did not plead sufficient facts to take advantage of the statute. At the trial he sought leave to amend his statement of claim, so as to sue on the statute. In the meantime the statute of limitations had run on the case. The trial court refused leave to amend. *Held*, that this was not error. *Card v. Stowers Pork Packing & Provision Co.*, 98 Atl. 728 (Pa.).

While it is true that the modern tendency is to allow great freedom in the amendment of pleadings, yet courts still refuse to allow amendments introducing new causes of actions. *Church v. Boylston & Woodbury Café Co.*, 218 Mass. 231, 105 N. E. 883. Especially is this so when the statute of limitations has run. *Union Pacific R. Co. v. Wyler*, 158 U. S. 285. *Contra*, *Rowell v. Moeller*, 91 Hun 421, 36 N. Y. Supp. 223. *Cf. Philadelphia, etc. R. Co. v. Gatta*, 4 Boyce (Del.) 38, 85 Atl. 721. But some jurisdictions allow them, subject to attack by demurrer or plea. *Williams v. Lowe*, 49 Ind. App. 606, 97 N. E. 809; *Atchison, etc. R. Co. v. Schroeder*, 56 Kan. 731, 44 Pac. 1093. The question apparently presented therefore seems to be, What constitutes a new cause of action? There is much authority which accords with the principal case, in considering an action pleaded upon statutory negligence as a different cause from one pleaded on the same facts at common law. *City of Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938; *Despeaux v. Pennsylvania, etc. R. Co.*, 133 Fed. 1009. Technically such view is correct. But if strictly adhered to it would prevent all amendments after the statute had run. For a defective cause of action is no cause of action, and an amendment correcting the defect must therefore be stating a new cause of action. It would seem as if the purpose of the statute were complied with and equity done, if the test were simply, Do the facts as originally stated sufficiently identify the transaction sued for to give the defendant warning? *Cf. Miller v. Erie R. Co.*, 109 App. Div. 612, 96 N. Y. Supp. 244. So a number of cases approximating the principal case have allowed the amendment. *Vickery v. New London North R. Co.*, 87 Conn. 634, 89 Atl. 277, 279; *Miller v. Erie R. Co.*, *supra*; *Oulitic Stone Co. of Indiana v. Ridge*, 174 Ind. 558, 91 N. E. 944. This liberal tendency is further indicated in a holding that amendments from the law of one jurisdiction to that of another are to be allowed after the statutory period. *Missouri, etc. Ry. Co. v. Wulf*, 226 U. S. 570.

RULE AGAINST PERPETUITIES — LIMITATIONS OF THE RULE AGAINST A "POSSIBILITY ON A POSSIBILITY." — A testator devised lands in trust for his son Thomas, a bachelor, for life; with a remainder for life to any woman whom Thomas might marry; remainder in fee to the children of Thomas at twenty-one, or in default of such children, to the other children of the testator.

The trustees were directed to sell the land at the death of the survivor of Thomas and his wife. Thomas and his wife died without issue. An originating summons is taken out to determine whether the remainder to the testator's children is valid, and whether the direction to sell worked a conversion of the property. *Held*, that the remainder is valid and the direction to sell void. *In re Garnham*, 115 L. T. R. 148 (Ch. D.).

The modern Rule against Perpetuities requires that an estate must be such as to certainly vest within twenty-one years plus the period of gestation after the death of a person living at the time a gift is made. The vesting of the estate within the period, not the coming into possession is what is required. *Murray v. Addenbrook*, 4 Russ. 407, 418. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 205. Also the period of gestation is allowed by the Rule in addition to the twenty-one years. See LEWIS, LAW OF PERPETUITY, 147. Hence in the principal case neither the remainder to the children of Thomas nor the gift over to the children of the testator are barred by the Rule. But a long line of cases lay down an older and independent rule against "double possibilities." *Rector of Chedington's Case*, 1 Co. Rep. 373, 382; *Whitby v. Mitchell*, 44 Ch. D. 85, 90. See J. L. Thorndike "Contingent Remainders," *supra*, p. 238. It has, indeed, been doubted whether on principle this applies where the modern Rule against Perpetuities is satisfied. See LEWIS, LAW OF PERPETUITY, 420. At any rate, this older rule seems to be clearly confined to the case of a gift to a child of an unborn person. *In re Nash*, [1910] 1 Ch. 1, 9. See *Monypenny v. Dering*, 2 D. M. & G. 145, 170; WILLIAMS, REAL PROPERTY, 21 ed., 413. The mere fact that one parent may be unborn does not bring the case within this older rule, if the parent with reference to whom the child is identified is in being. *In re Bullock's Will Trusts*, [1915] 1 Ch. 493, 501. In the principal case the remainder is to the children of Thomas, a living person. This remainder, therefore, satisfies the older rule; and consequently there can be no objection to the gift over to the testator's children. But it is otherwise with the direction to sell. Where a power may be exercised at a time beyond the limits of the Rule against Perpetuities, it is void. *Hartson v. Elden*, 50 N. J. Eq. 522, 526; *Johnston's Appeal*, 185 Pa. St. 179, 189. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 473; LEWIS, LAW OF PERPETUITY, 555. In the principal case the power may be exercised after the death of the wife of Thomas; and she may not be *in esse* at the time of the gift. The direction to sell, therefore, violates the Rule against Perpetuities, and is void.

**SALES — IMPLIED WARRANTY — LIMITATION OF ACTION.** — The plaintiff purchased from the defendant certain copper wire, ordered by description. In Georgia the statutory period of limitation on implied or oral contracts is four years; that on written contracts, six years. More than four but less than six years after the delivery of the wire the plaintiff brings an action for breach of an implied warranty of quality. *Held*, that the suit is not barred. *John A. Roebbing's Sons Co. v. Southern Power Co.*, 89 S. E. 1075 (Ga.).

The court says that the implied warranty is "written into the contract by the law itself, and . . . is as much a part of the written contract as if expressed therein." Such a statement can only mean that all existing law must be deemed to have been within the contemplation of the parties and so, impliedly, form a part of their written agreement. The decisions of many eminent tribunals voice this conception. See *Hutchinson v. Ward*, 99 N. Y. Supp. 708, 709; *Leindecker v. Aelna Indemnity Co.*, 52 Wash. 609, 611, 101 Pac. 219; *Edwards v. Kearzey*, 96 U. S. 595, 601. Clearly this is a fiction. Nor do the cases support so broad a proposition. The duty to use due care in forwarding goods intrusted to a common carrier, on a contract of shipment beyond the carrier's line, is held to be a separate unwritten promise and not an integral part of the written agreement. *Penn. Co. v. Chicago, etc. Ry.*, 144 Ill. 197, 33 N. E. 415. So,



likewise, is the implied promise to restore upon which the purchaser of land is allowed, upon non-conveyance by the vendor, to recover the price paid, in quasi-contract. *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899. *Duncan v. Gibson*, 17 Utah 209, 53 Pac. 1044. The decisions would seem to draw the line between such implied contracts as those just cited, on the one hand, and all implied warranties, as in the principal case, on the other. *Bancroft v. San Francisco Tool Co.*, 47 Pac. 684 (Cal.); *Meade v. Warring*, 35 S. W. 308 (Tex. Civ. App.). Such a distinction is hardly satisfactory. The cases of implied warranties, despite the broad language of the opinions, usually involve warranties of goods ordered by description only. The principal case is of this type. Here it may well be argued that a fair interpretation of the language shows that the parties in fact contemplated goods of a fair quality of the description specified, and not any goods of that description. See WILLISTON, SALES, § 230. But when the sale is of a specific chattel, the implied warranty cannot be derived from the terms of the bargain. It is imposed upon the vendor regardless of the intent of the parties by operation of law, and should be subject to any statutory limitations upon unwritten or implied contracts.

SALES — STOPPAGE *IN TRANSITU* — SELLER'S LIABILITY FOR FREIGHT. — A vendor sold goods on credit. The purchaser contracted with a shipowner to pay for their transportation. On learning of the purchaser's insolvency, the vendor stopped the goods *in transitu*, but did not take possession of them. The carrier sues the vendor for the freight. *Held*, that he may recover. *Booth Steamship Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570 (Ct. of App.).

In most cases of stoppage *in transitu* the carrier is amply protected by his lien on the goods. The novel point presented by the principal case can, therefore, only arise when the goods at the point of stoppage are not worth enough to pay the freight. Stoppage *in transitu*, being a right of purely equitable nature, is not allowed where it would be unfair to the carrier. See WILLISTON, SALES, § 541. In view of this principle, if the right to stop is clearly given the seller, an exercise of the right should obligate him to indemnify the carrier for any loss caused thereby. But the loss occasioned in a case like the principal case would be only the amount which the carrier could recover from the insolvent buyer. Hence this quasi-contractual remedy would not give the carrier the full price of the freight. But the principal case finds full support on another theory. Formerly a stoppage *in transitu* was effective only if the seller secured actual possession of the goods. See *Snee v. Prescott*, 1 Atk. 245, 248. The present method, by mere notice, is really a short cut to the same result, for the stoppage gives the seller only a lien, which depends for its effectiveness on his possession. See *Newhall v. Vargas*, 15 Me. 314. It is not unreasonable, therefore, to imply from the seller's notice to stop a promise by him to take possession of the goods. But in order to obtain possession, the seller must discharge the carrier's lien for freight. *Potts v. New York & New England R. Co.*, 131 Mass. 455; *Pennsylvania Steel Co. v. Georgia R., etc. Co.*, 94 Ga. 636, 21 S. E. 577. It would therefore follow that a promise to discharge the lien is likewise implied in the order.

TRUSTS — CREATION AND VALIDITY — CONDITION CONTRARY TO PUBLIC POLICY. — A settlor placed certain funds in trust for the plaintiff until he should come of age. The interest on this sum was to be paid for the plaintiff's maintenance. But no interest was to be paid unless the father, in whose custody he then was, should give up all control over him. Plaintiff seeks to have interest paid him while still in his father's control. *Held*, that the condition is enforceable. *Re Borwick's Settlement*, 115 L. T. R. 183 (Ch. D.).

As in the case of contracts, conditions in gifts and testamentary dispositions making the effectiveness of the gift dependent on the doing of an act contrary to

public policy by the beneficiary have been held void. *Morley v. Renoldson*, 2 Hare 570; *In re Morgan*, 26 T. L. R. 398; *Matter of Anonymous*, 80 N. Y. Misc. 10, 141 N. Y. Supp. 700. The ground taken by the court in the principal case is that though the condition might be void if it were to be performed by the beneficiary, as it is to be performed by a third party, the father, and requires no illegal act by the beneficiary, it is binding. But whether a condition is void or not must depend on whether it has a sufficiently strong tendency to cause an act contrary to public policy. *Daboll v. Moon*, 88 Conn. 387, 91 Atl. 646; *Matter of Seaman*, 218 N. Y. 77. On principle it would seem immaterial whether the act is to be done by the beneficiary or a third person. *In re Sandbrook*, [1912] 2 Ch. 471. The more difficult question arises: is the act of giving up all control over a son against public policy? An earlier English case has so held. *In re Sandbrook*, *supra*. And contracts to give up such control have been held voidable and not binding on the parent. *Queen v. Barnardo*, 23 Q. B. D. 305; *Swift v. Swift*, 12 L. T. R. 435, 34 Beav. 266; *Matter of Scarritt*, 76 Mo. 565. But it would seem as if the public policy involved must rest on the facts of each case — in some instances the separation of father and son must be distinctly beneficial.

UNINCORPORATED SOCIETIES — TRADE UNIONS — SHERMAN ANTI-TRUST LAW. — An action for treble damages under the Sherman Anti-trust Law was brought by the receiver of nine coal mining companies against an unincorporated labor union in the name of the union. *Held*, that the action lies. *Dowd v. United Mine Workers of America*, 235 Fed. 1.

For a discussion of this case, see NOTES, p. 263.

WATER LAW — EASEMENTS ON RUNNING WATER — EFFECT OF A CONTRACT INDEFINITE AS TO TIME. — In return for an easement for its pipes in the railroad company's right of way a water company bound itself to supply water from a station hydrant free of charge for an indefinite period. The water company later refused to supply this water. The railroad sues to have its rights declared. *Held*, that the contract created a servitude upon the pipe line and water system. *Southern Pacific Co. v. Spring Valley Water Co.*, 159 Pac. 865 (Cal.)

It was the general theory of the common law that running water in its natural state was incapable of classification as property. 2 BLACK. COMM. 18. So, when diverted into an artificial container, and subjected to property classification, water would seem to fall under the head of personalty. *People ex rel. Heyneman v. Blake*, 19 Cal. 579; *Bear Lake Co. v. Ogden*, 8 Utah 494; *Hagerman, etc. Co. v. McMurray*, 113 Pac. 823 (N. M.); *Chockalingani Pillai*, 2 Mad. W. N. 219 (India). See 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 35. But the irrigation laws of certain of the western states grew up from a customary usage between irrigators and distributing companies, according to which it was conceived that the irrigator was the real appropriator from the natural stream at the head of the system, and that he had an estate, servitude, or easement in the water system itself. *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 17 Pac. 317. The adoption of this rule, known as the Colorado rule, necessarily rejected the common law position. So, in the case which adopted the Colorado rule in California, the *dictum* that water in a pipe is personalty was observed and denied. *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 726, 93 Pac. 858, 862. A later case declared that the Colorado rule was unconstitutional under the California constitution. *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 106 Pac. 404. See *San Joaquin, etc. Irrigation Co. v. Stanislaus Co.*, 34 Sup. Ct. Rep. 652. But the position on the nature of running water which had been adopted to support the Colorado rule was upheld even when the reason for it was gone. *Copeland v. Fairview etc. Co.*, 165



Cal. 148, 154, 131 Pac. 119, 121. Under the theory that the water in the defendant's pipe-line was personality the plaintiff must have failed in the present action. For a contract indefinite in time by which one party agrees to supply a commodity to another at a fixed price may be terminated by either party on reasonable notice and after a reasonable time. *McCullough-Dalzell etc. Co. v. Philadelphia Co.*, 223 Pa. 336, 72 Atl. 633.

**WILLS — CONSTRUCTION — FROM WHAT TIME A WILL SPEAKS.** — Testator devised to his wife "my house in Urquhart St." Subsequently he bought another house in Urquhart Street, which he owned at the time of his death, and sold the first. A statute provides that "every will shall be construed with reference to the real estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." VICTORIA WILLS ACT, 1915, § 22. *Held*, that the testator's wife take the second house. *Watson v. Smith*, [1916] Vict. L. R. 540.

The statute is practically identical with § 24 of the English Wills Act and statutes in most of the United States. 1 VICT. c. 26, § 24. See 1 JARMAN, WILLS, 5 Am. ed., 602, n. 4. Its effect is to abolish the common law rule that after-acquired real estate could not be devised. It also raises a strong presumption that the will speaks from the date of the testator's death, but does not change the ultimate question, what was the testator's intention, as expressed by the will, which must of course be his intention at the time he made the will. The exact problem of the principal case has never before arisen, and there has been some difference among text-writers as to what should be its solution. See THEOBALD, WILLS, 7 ed., 130; 1 JARMAN, WILLS, 5 Am. ed., 608. The cases bearing on the point fall into two general groups. If the subject of the devise is such that the testator may well have intended to include any future additions or substitutions, it will be construed as speaking from the date of the testator's death. *Goodlad v. Burnett*, 1 K. & J. 341 ("my New 3% Annuities"); *Richmond v. Vanhook*, 3 Ired. Eq. (N. C.) 581 ("my chest and all that is in it"). See also *In re Slater*, [1907] 1 Ch. 665, 670. On the other hand, if the subject of the devise is such that the testator must have intended to include only the particular things falling within his description at the time the will was made, then it will be construed as speaking from the time of its execution. *Georgetti v. Georgetti*, 18 N. Z. L. R. 849 ("my dwelling house"); *In re Evans*, [1909] 1 Ch. 784 ("my house known as Cross Villa"); *In re Gibson*, 2 Eq. 669 ("my 1000 shares of stock" in the X. Co.); *Amshutz v. Miller*, 81 Pa. 212 (a devise to A. for life and after his death to "his widow"). Cf. *Webb v. Byng*, 1 K. & J. 580; *Williams v. Owen*, 9 L. T. (N. S.) 200; *Pattison v. Pattison*, 1 My. & K. 12. But cf. *Castle v. Fox*, 11 Eq. 542. In the principal case, the words "my house on Urquhart St." indicate a single, specific thing, and cannot contemplate any future additions or substitutions. It is submitted, therefore, that it falls within that class of cases in which the will should be construed as speaking from the time it was executed.

**WILLS — LEGACIES AND DEVISES — DEDUCTION OF EXTINGUISHED NOTE FROM LEGACY UNDER SET-OFF CLAUSE.** — A testator made a bequest to his son, from which were to be deducted all notes of the son owned by or held in trust for the testator at the time of his decease. The will next stated that he had already paid to the son certain large sums "which are not included in the indebtedness aforesaid." In a suit by the son for the legacy, the executors introduced a note equal in amount to the legacy. The son offered to prove that prior to the testator's death the note had been extinguished by merger of the mortgage given to secure it with the equity of redemption, and that the payment in return for which such note was given was the only large payment

made by the testator to the son. *Held*, that the offer of proof be refused and the note deducted in full. *Pierce v. Loomis*, 224 Mass. 226, 112 N. E. 1027.

The primary purpose in construing a will is to carry out the testator's intention, and when the latter is clearly expressed in the instrument its terms must be adhered to. Thus, where a testator provides that a specific sum or obligation be deducted from a legacy, the amount stated cannot be disputed although erroneous. *In re Wood*, 32 Ch. D. 517; *Dunshee v. Dunshee*, 243 Pa. St. 599, 90 Atl. 362. Similarly, although the specific obligation due from the legatee has become unenforceable, the expressed intent must prevail. *In re Fussell's Estate*, 129 Ia. 498, 105 N. W. 503. Even where the set-off clause is general, the same result is reached, if the obligation is merely unenforceable, as when barred by the Statute of Limitations. *In re Gillingham's Estate*, 220 Pa. St. 353, 69 Atl. 809. *Cf. Stephenson v. Norris*, 128 Wis. 242, 260, 107 N. W. 343, 349. But *cf. Golds v. Greenfield*, 2 Sm. & G. 476. But an extinguished claim is usually not within the terms of a general set-off clause. *Howe v. Howe*, 184 Mass. 34, 67 N. E. 639. Thus in the principal case it is difficult to see how an extinguished note can fall within the terms of the will as one held in trust at the testator's decease. Moreover, the testator must have received substantial satisfaction in the merger of the mortgage and equity of redemption. In those cases where the deduction was made, the unenforceable obligation had never been satisfied, and the testators usually intended the distribution of their entire property in desired proportions. See *Sibley v. Maxwell*, 203 Mass. 94, 103, 89 N. E. 232, 234. But where satisfaction has been had, a deduction destroys this desired equality and results in a contrary inequality. *Aster v. Ralston*, 179 Ill. App. 194; *Musselman's Estate*, 5 Watts (Pa.) 9. Even where the set-off clause was specific, the deduction has been lessened by whatever amount had actually been received by the testator. *Sibley v. Maxwell*, *supra*. Furthermore, if the note in question represents the only large payment ever made by the testator, the inference from the will seems inevitable that he did not intend this note to be deducted.

## BOOK REVIEWS

**A HISTORY OF CONTINENTAL CRIMINAL LAW.** By Carl Ludwig von Bar and others. Volume V of the Continental Legal History Series, published under the auspices of the Association of American Law Schools. Boston: Little, Brown and Company. 1916. pp. 561.

This volume is part of the series through which the Association of American Law Schools seeks to put before the public, and particularly the legal profession, the best results of modern juristic thought upon the history and development of Continental European law. The plan followed in this volume has been to take the book of Von Bar, "*Geschichte des deutschen Strafrechts und der Strafrechtstheorien*," as the basis of the volume. As that work, however, related only to German law, and as it was desired to include as many as possible of the Continental countries in this volume, Von Bar's work has been supplemented by inserting selections from other writers on the history of criminal law in European countries other than Germany. Substantially all European countries of any importance are included, with the exceptions of Italy, Spain, Portugal, and Russia. For Italian law the editors refer to Volume VIII of the series, by Professor Calisse. In the case of Spain and Portugal the omission is explained on the ground that they have not been able to find any suitable account existing. For the omission of Russia no reason is given, and the name of Russia does not even appear in the index. It would certainly seem as though in any volume designed to cover the history of Continental criminal law an omission



of so large a state as Russia could hardly be justified; certainly not without some explanation making the reason for it clear. It would be ungrateful, however, to complain that everything has not been done, when the Association has done so much.

By this publication a great service has been rendered to legal thought in this country. The time is rapidly approaching when our existing American criminal law must inevitably undergo an extensive revision, not only to meet the social changes which have taken place since it acquired its original form, but also to meet the changed theories of the relation of the law and state to the criminal population. In such a revision a knowledge of what has been thought and done in countries other than our own, yet with civilizations and problems not unlike our own, cannot wisely be disregarded. This volume opens to future legislators and jurists the door of a vast treasure house of experience and theory.

Its arrangement is clear, the indexing good, and the translation, so far as can be judged without a careful comparison with the original writers, an excellent piece of work.

ARTHUR D. HILL.

A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS. By Henry Campbell Black. Two volumes. Kansas City: Vernon Law Book Co. 1916.

If law is a science, law books ought to be written like treatises in other sciences — economics, politics, education — and not like the *magnum opus* of the clergymen in "The Way of All Flesh": "After breakfast he retires to his study; he cuts little bits out of the Bible and gums them with exquisite neatness by the side of other little bits." We have a similar atomic theory of law books, except that the atom instead of being a Scriptural verse is the headnote. Headnotes arranged vertically make a digest. Headnotes arranged horizontally make a textbook. Textbooks arranged alphabetically make an encyclopedia. Every few years some investigator has to disintegrate one of these works into its constituent atoms, add some more headnotes from recent decisions, stir well, and give us the latest book on the subject. And so law libraries grow.

But the law does not thus grow. Or, at least, it grows only by the accretion of new decisions which increase the existing confusion. While a collection of holdings from one jurisdiction does at least serve to indicate the law of that jurisdiction, a mass of authorities from fifty states establishes *per se* no law whatever. The only value of such cases, outside of their own state, is to furnish reasons for the doctrine held by them, and if the reasons are left out of the textbook, we have only a list of citations to serve as a starting point for true investigation by somebody else.

What we need to promote true growth in the law is a textbook which will discuss and endeavor to solve the problems in human life and social adjustment presented by a particular branch of law. What we get is too often a tremendous conglomeration of sets of facts, more or less well arranged under headings, with a moderate amount of comment by way of introduction. Undoubtedly decided cases are a very valuable aid in the solution of legal problems, but they are only a means to that end; and there are other means, which are usually ignored.

In the scientific legal treatise for which we hope, the indispensable task of gathering decisions seems only a first step. The second step would be a classification of the reasons for and against proposed methods of handling a given situation,<sup>1</sup> and the text-writer would draw these reasons, not only from judicial

<sup>1</sup> For an illustration of this method as applied to a political problem, see the discussion of the referendum in W. B. MUNRO, *GOVERNMENT OF AMERICAN CITIES*, p. 334.

opinions and other legal writings, including the Civil Law, but from any lay thinkers who had considered the problem now before him,<sup>2</sup> and from any facts, however ascertained, which have a bearing. He would regard precedents as only a part, though a very important part of his data. His third step would be to weigh and balance these reasons pro and con, in order to obtain a proper rule, that is, a solution for his problem. In many cases he would get help from seeing how similar situations were met in other branches of the law. His final step would be the correlation of these rules, so far as possible, into a system of principles governing his subject. Then when he put the results of this labor into his book, the first step — the isolated sets of facts as well as the names and citations of cases — should be for the most part relegated to the footnotes, just like the authorities of a historian or sociologist, leaving the text free for the ideas obtained in the last three steps. Wigmore on Evidence is an example. If a briefer textbook is planned, the cases could be weeded out, and only the more important or troublesome decisions retained for purposes of authority or explanation.

Mr. Black's work is hardly the textbook of our dreams. It is useful as opening up a new field not separately treated before, and it is well arranged in presenting, first, the grounds for rescission, second, the application of the rules to various classes of contracts; and third, the time and methods of effecting rescission.<sup>3</sup> A large number of cases are collected, which are good raw material for the practicing lawyer or for future investigations of the subject, but many well-known decisions are missing,<sup>4</sup> and there is very little attempt to do anything with the cases except state their facts. For example, one of the most interesting cases on rescission is *Goodrich v. Lathrop*.<sup>5</sup> The purchaser looked at one lot while the vendor meant to sell another; the contract described the vendor's lot; the purchaser asks for rescission. The case involves many difficult questions. Is there a contract if there is a concurrence in the expressions of the parties' wills, or must there also be a concurrence of wills, the so-called external and internal theories, much controverted in the Civil Law? Does the plaintiff's carelessness bar relief? Does the fall in value of the land between the contract and the suit constitute a change of position which will bar relief? If rescission is granted, should the vendor receive compensation? What is the effect of the California statute,<sup>6</sup> and is it desirable legislation? Mr. Black cites *Goodrich v. Lathrop* three times,<sup>7</sup> but hardly touches any of these problems, and in no part of his book does he discuss the nature of a contract. Indeed, Mr. Black almost never gets away from the bare facts of the cases in his narrow field. No use is apparently made of the analogies of quasi-contract and specific performance. Other text-writers are infrequently cited. No reference is given to the careful test of rescission for mistake in the new German Code,<sup>8</sup> and all discussion of that topic in the Roman Law is ignored, although Blackburn, J., went straight to the Digest to learn what is a material mistake.<sup>9</sup> Even the common law cases appear chiefly in an interminable succession of sets of facts, and the reasoning of the courts is rarely quoted or summarized.

<sup>2</sup> See WIGMORE, EVIDENCE, and CASES ON TORTS.

<sup>3</sup> The term "administrative law," applied by Mr. Black to this third division, is unfortunate, since those words are now used of a department of public law, wholly unconnected with rescission.

<sup>4</sup> *E. g.*, *Hitchcock v. Giddings*, 4 Pri. 135 (sale of a defeasible interest which had already lapsed); *Scott v. Coulson*, [1903] 2 Ch. D. 249 (sale of insurance policy on a man already dead); *Lawrence v. Staigg*, 8 R. I. 256 (question whether mistake in area of land sold should be ground for rescission or change in the price); *Gun v. McCarthy*, L. R. Ir. 13 Ch. D. 304 (unilateral mistake due to error in calculation, known by the other party); *Sherwood v. Walker*, 66 Mich. 568 (sale of cow supposed to be barren but discovered to be a breeder).

<sup>5</sup> 94 Cal. 56.

<sup>6</sup> CAL. CIV. CODE, §§ 3407, 3408.

<sup>7</sup> §§ 140, 633, 697.

<sup>8</sup> § 110.

<sup>9</sup> *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 580, 587.



Where there is a conflict of authority, we could wish a more thorough analysis of the opposing considerations.<sup>10</sup>

It is not a book to which one can go for help in grappling with the difficulties of rescission. Thus in the chapter on rescission for breach of contract,<sup>11</sup> there is nothing on the right of the party at fault to recover for work done before the rescission.<sup>12</sup> The questions, why is a mistake a ground for rescission and what is a material mistake, receive only unsystematic attention.<sup>13</sup> Mr. Black is to be thanked for repudiating the mistake of law delusion,<sup>14</sup> but we must go to Woodward<sup>15</sup> for arguments which will free judges from that obsession.

A minor fault, but one which is becoming so common in law books that it ought to be noticed, is the use of the legal slang "breaches a contract"<sup>16</sup> instead of the expressive "breaks."

In conclusion, we would suggest that reformation is so closely allied to rescission that the two subjects could profitably be treated together in a discussion of the principles which govern attack on an apparently valid legal transaction.

ZECHARIAH CHAFEE, JR.

MAGNA CHARTA AND OTHER ADDRESSES. By William D. Guthrie. New York: Columbia University Press. 1916. pp. vi, 282.

An address before the Constitutional Convention of the State of New York, a banquet speech before the Mayflower descendants, addresses before bar associations and a political convention, remarks at the dedication of a Roman Catholic parochial school — these are some of the papers here collected. The topics are as varied as the occasions; but the papers have in common the quality of proceeding from the point of view of an experienced and conservative lawyer. Perhaps the paper most pertinent to the present time is the one denouncing direct primaries (pp. 219-46); and certainly the paper most obviously of permanent utility is the one on the Eleventh Amendment (pp. 87-129).

EUGENE WAMBAUGH.

THE LAW OF PROMOTERS. By Manfred W. Ehrich. Albany: Matthew Bender and Company. 1916. pp. lxi, 645.

This treatise, well arranged and carefully indexed, attempts to present a comprehensive summary of the law relative to the formation of corporations. The field has been covered with thoroughness. Both the American and English cases on the subject have been consulted, and a large part of the text consists of lengthy quotations from them, and of summaries of their holdings. Occasionally the author expresses his own opinions, though not always either very fluently or very fortunately. For example, it may perhaps be doubted that specific performance of a contract to form a corporation will never be decreed (§ 38).

The book should be of some value to attorneys practicing in this field, because of its collection and arrangement of authorities. Especially should this be true of the chapters on secret and lawful profits (containing an exhaustive statement of the Old Dominion litigation). It is, however, difficult to say that the author's avowed purpose — to benefit the academic student of the law — has been fulfilled.

RAEBURN GREEN.

<sup>10</sup> *E. g.*, § 128 on unilateral mistake.

<sup>11</sup> Chapter viii, Failure, Refusal, or Impossibility of Performance.

<sup>12</sup> Fully discussed by WOODWARD, QUASI-CONTRACTS, ch. x.

<sup>13</sup> § 134 ff. Compare the valuable analysis in POLLOCK, CONTRACTS, ch. ix.

<sup>14</sup> § 147.

<sup>15</sup> WOODWARD, QUASI-CONTRACTS, ch. iii.

<sup>16</sup> § 5.

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## GERMANIC AND MOORISH ELEMENTS OF THE SPANISH CIVIL LAW

SPANISH law, like Spanish civilization, owes its form to Philip II. His *Nueva Recopilacion* was on the legal side like the Escorial on the architectural, the Inquisition on the religious, and the Armada and work of Alva on the political side — the supreme expression of the will which ruled Spain with a rod of iron. The *Siete Partidas* is mentioned oftener, the work of Alfonso the Wise of Castile, before there was a united Spain. Nevertheless the tendency represented by the *Siete Partidas* — the law in Seven Parts — culminated in Philip's *Recopilacion*, the first real Spanish codification of jurisprudence, because only then was there a real Spain. The *Partidas*, moreover, was never more than supplementary,<sup>1</sup> while Philip's code was the law until Charles IV found it needful to revise it, unchanged in principle, by his *Novisima Recopilacion*. This in turn did duty until the days of the Constitution of 1812 and the modern Commercial, Civil, Criminal, Civil Procedure, Criminal Procedure, Political, and Mortgage codes, — which might be said to make up a *Novisimas Siete Partidas* or Law in Seven Parts.<sup>2</sup>

The origins of Spanish law, therefore, go back of Philip II, and back even of Alfonso El Sabio. As with Tamar, two principles struggled for precedence, and, although the Roman can be marked with a scarlet thread because it first showed itself, the Germanic or

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<sup>1</sup> E. Stocquart, 4 REV. DE DROIT INT. (2<sup>e</sup> Série), 554 (1902).

<sup>2</sup> A study of the early codes is in the lecture of Wm. Wirt Howe, republished in 60 ALBANY L. J. 101. His Yale studies in the Civil Law cover the civil law, mainly French, as found in Louisiana.



Gothic element breaks forth like Pharez, and indeed we shall also find Moslem and particularistic influences prominent in the thousand years' gestation from the Roman Empire to the expulsion of the Moors.<sup>3</sup>

Roman Law in Spain is a subject by itself. Spain and France were thoroughly Romanized and the *jus civile* was as well known and obeyed at Gades (Cadiz) and Tarragona as at Rome and Naples, and the Roman cities of the two peninsulas were much alike. But it was that law as it was known before Justinian. His Digest and Code were yet to be, for Spain was severed from the empire while the law, as developed by the prætor and changed only by the early emperors, was in force. Justinian never ruled more than a part of the Mediterranean coast of Spain, nor did his legislation. Nevertheless in Hispania the prætor had already given way to the *judex*, and the *conventus* or circuits of the numerous courts, varying from time to time, brought justice home to all.

In every important city was the forum, and on it was a basilica, the seat of the courts. In the late empire law was less influential, and the forum became the plaza, the basilica became the church; but even there prevailed a Roman ritual and a Canon Law taken from the civil, and still later the Latin language and the Civil Law attracted and charmed rude barbarians from the north, whether named Alans, Suevi, Vandals, or Goths. Roman principles and forms survived Roman political rule.

The reverence for documents and documentary evidence, for the notary who makes the protocol, the love of form which equalizes the two species of property known in other lands as realty and personality, and almost ignores heirs and fraud until a court has de-

<sup>3</sup> The approximate dates and number of articles of the principal codes are as follows: A. D. 466-485, Code of Euric; 506, Breviarium Aniani; 687-700, Fuero Juzgo, 578 laws; 1212, Fuero Viejo, 229 laws; 1255, Fuero Real, 545 laws; 1258, Especulo, 675 laws; 1263, Siete Partidas, 2479 laws; 1300, Leyes de Estilo, 252 laws; 1348, Ordenamiento de Alcalá, 125 laws; 1490, Ordenamiento Real, 1133 laws; 1502, Laws of Toro, 83 laws; 1567, Nueva Recopilacion, 3391 laws; 1680, Recopilacion de Indias, 6474 laws; 1745, Autos Acordados, 1134 laws; 1805, Novísima Recopilacion, 4020 laws; 1829, Código de Comercio, 1219 articles; 1855, Ley de Enjuiciamiento Civil, 1415 articles; 1870, Criminal Code (extended to Porto Rico in 1879), 626 articles; 1881, Civil Procedure (P. R. 1885), 2182 articles; 1882, Criminal Procedure (P. R. 1889), 998 articles; 1885, Commercial Code (P. R. 1886), 955 articles; 1889, Civil Code (P. R. 1889), 1976 articles; 1893, Mortgage Law (P. R. 1893), 413 articles. Those prior to 1847 are found in the excellent quarto edition beginning with that date published at Madrid, each with valuable introductions and notes.

clared them such, go back to a Roman source; but what has been called a spiritual or Germanic principle also appears in the Civil Code,<sup>4</sup> for a contract binds the parties if its essence — agreement — exists even though the form prescribed by law be lacking. In the province of torts the Roman principle that a man is responsible only for what he does himself<sup>5</sup> still prevails and *respondeat superior* is unknown beyond a few instances fixed by modern legislation.<sup>6</sup>

The first great modification of Roman Law came from the Germanic conquerors of the country and particularly the Visigoths or West Goths; for Hallam is right in saying that they were to Spanish history what the Anglo-Saxons were to English.

Visigoths overran the empire from east to west, and about 412 established their capital at Tolosa (Toulouse). The conquerors, fewer in number than the provincials, left the conquered under the old complex rules of civil relations, while they took two thirds of the land for themselves and retained the freer social organization and customs described in Tacitus' "Germania." King Euric about 475 compiled the German customs for his Visigothic comrades, and his successor, Alaric II, hardly a quarter of a century later drew up a Digest or *Breviarium* for his Roman subjects, largely made up of the Institutes of Gaius and the edicts of Theodosius. These were valid for the respective races from the Atlantic to the Garonne, for Spain as we know it had not yet a local name or national feeling.

The formulas of court procedure in ancient Rome had been the means by which the prætors worked their legal revolution, and the closing of the Common Law forms was to be the occasion for the development of the equity jurisdiction of the English chancellor. Indeed in all ages procedure was to be the means by which substantive law came to be. So that it is perhaps not surprising that the eighty-six formulas of procedure and instruments found in the *Codex Ovetensis* of Madrid<sup>7</sup> give us the links between the different systems for the Romans and the Goths and a uniform code for all people in the country. Among them those for testaments, sales,

<sup>4</sup> 8 MANRESA, COMENTARIOS, 2 ed., 690, on articles 1278-79.

<sup>5</sup> SOHM, INST. ROMAN LAW, 233, § 45.

<sup>6</sup> CIVIL CODE, Art. 1902-03 (PORTO RICO CIVIL CODE, Sec. 1803-04). Thus the owner of a private automobile in Porto Rico is not generally liable for acts of the chauffeur unless he is personally in control. Vélez v. Llavina, 18 P. R. 634 (1912); Avila v. Fantauzzi, 7 P. R. Fed. Rep. 4 (1913).

<sup>7</sup> Published at Paris, 1854.



gifts, and court procedure are based on Roman Law and are for Romans, and the *Lex Aquilia* and *Lex Papia Poppaea* are freely cited as authorities. On the other hand the dowry or purchase money given by the husband is Gothic and supersedes the civil law gift by the father to the bride. The Roman rule forbidding a freeman to sell himself is abolished, and the Gothic rule prevails against alienation of property in litigation.<sup>8</sup>

The coexistence of the two systems was inevitable at first, but the admirable Roman roads, particularly in the west and in the province along the Baetis, now the Guadalquivir, facilitated communication. Old customs and the new trading population, descended from the fifty thousand Jews whom Trajan had transplanted to the peninsula, gradually broke down the barriers between the races.

In course of time, therefore, the Goths and the Romans became assimilated somewhat as the Normans and Saxons were to be much later in England, and the Gothic kings came to legislate as for one people. Leovigild and Recaredo were perhaps the first to reform Euric's laws on Roman models, and Chindasvintus became the Visigothic Justinian.<sup>9</sup> He was the originator of much of the work which his son Recesvintus presented to the eighth council of Toledo for adoption as the *Liber Judicum* or *Fuero Juzgo*. While the *Fuero* as we have it is a more or less consistent book, there is no difficulty by a kind of higher criticism in detecting the elements and their growth at the several councils from the time of Leovigild, who first occupied Toledo and established civilization on a firm basis. Recaredo, his successor, assumed the imperial title Flavius and began the legislation of the Goths,<sup>10</sup> which culminated in the law of Chindasvintus forbidding the use of the Roman or any other law book than the *Fuero Juzgo*.<sup>11</sup>

Originally the Visigoths were Arians, and like other Arians tolerant, but, when Recaredo and his officials with him embraced Catholicism in 589 at the third council of Toledo, the new faith proved itself thoroughgoing. The country still remained all but independent of

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<sup>8</sup> I F. CARDENAS, ESTUDIOS JURIDICOS, XXXIX *et seq.*

<sup>9</sup> An edition of his *LIBER JUDICUM* in English was published by S. P. Scott at Boston in 1910.

<sup>10</sup> I F. CARDENAS, ESTUDIOS JURIDICOS, 70 *et seq.*

<sup>11</sup> Law VIII, tit. I, Liber II.

Rome, but in their zeal for conversion of the kingdom the priests invaded homes and assumed every function in the state. The king became practically their servant and in their councils all legislation was passed. Spain owed her unity to the church, and has repaid the debt by her devotion.

Ervigius and Egica added some laws, especially against the Jews, as did Wamba; but the Book of Judges, *Fuero Juzgo*, was substantially as Recesvintus and his father Chindasvintus left it.<sup>12</sup>

No doubt much, perhaps most, of this legislation was due to the bishops in these councils, for they were the learned class and exercised great influence. This is indicated in many ways. The laws are often based on the Mosaic dispensation, as in the frequent instances of *lex talionis*, and, while the clergy is often subjected to the law, the punishment is much lighter than for laymen, and the bishop is given a kind of supervision or visitation of courts and judges.

While these councils of Toledo were not representative in the modern sense, they were national and marked the rise of peninsular interests. As the Gothic lands across the Pyrenees fell away, the councils built up a Spanish patriotism.

The preambles to the laws express high aims and often show great wisdom. That law is the mistress of life,<sup>13</sup> that it is designed to repress evil, that it must be amended from time to time to meet new evils, are among its maxims and might well be taken from a modern law book. Indeed the preliminary title of the *Fuero*, decreed in the eighth council of Toledo, declares to the king that he will be king only so long as he does right. The equality of men before the law is expressly declared.<sup>14</sup> Christianity was inculcated and Jews punished severely.<sup>15</sup>

God is declared to be justice,<sup>16</sup> an expression which would seem to be worthy of St. Augustine. The happiness of the state therefore is the practice of the precepts of law.<sup>17</sup> The family is upheld, even to the extent of requiring the wife to be the younger,<sup>18</sup> and

<sup>12</sup> I F. CARDENAS, ESTUDIOS JURIDICOS, 134, XIV.

<sup>13</sup> Law II, tit. II, Liber I.

<sup>14</sup> Law II, tit. I, Liber II.

<sup>15</sup> Laws II and IV, tit. II, Liber XII.

<sup>16</sup> Law II, tit. II, Liber I.

<sup>17</sup> Law IX, tit. I, Liber I.

<sup>18</sup> Law V, tit. I, Liber III.



unlike the Roman Law the father could not sell his son.<sup>19</sup> Responsibility attaches only to the actual criminal,<sup>20</sup> and the attainder of the English Common Law was unknown. The punishments declared are severe, even barbarous, being generally scourging and extending to cutting off a hand, putting out an eye, and also to execution; but on the other hand the judge is instructed to be moderate in his punishments. A favorite remedy is making the offender the slave of the man he has wronged. Trade was encouraged with foreigners, who must be well treated by the judges.<sup>21</sup>

The Roman Law nevertheless greatly influenced the *Fuero Juzgo*. There, as in all other Spanish codes, the Law of Obligations, embracing contracts and torts, is largely adopted from the Civil Law. Sale, lease, and contracts in all their forms appear and go back of the times of the fighting, nomadic Goth.

Family relations, however, remained Germanic. Thus there could be no marriage without dowry by the husband,<sup>22</sup> and there could be no gift between husband and wife until after a year.<sup>23</sup> These principles were contained in the local *fueros*, and we find them in the life of the Cid and others, the difference being that later there was no limit to the amount of the dowry. But it was not until the *Partidas* that, adopting the Roman customs, the husband acquired power over the dowry.<sup>24</sup>

The chronicle of the Cid shows curious facility of remarriage. When unworthy sons-in-law abused and deserted his daughters, the Campeador's friends overcame the men in the lists before the king and *Cortes*, and the two deserted wives were without court divorce given in marriage to royal princes of other houses.<sup>25</sup>

A striking feature of Spanish law is the conjugal partnership, the joint ownership or community by husband and wife of property acquired during marriage. This is not Roman, and comes into view first in a law of Recesvintus to be found in the *Fuero Juzgo*,<sup>26</sup>

<sup>19</sup> Law VII, tit. III, Liber VI; Law XII, tit. IV, Liber V.

<sup>20</sup> Law VII, tit. I, Liber VI.

<sup>21</sup> Law VII, tit. I, Liber I.

<sup>22</sup> Law I, tit. I, Liber III.

<sup>23</sup> Law VI, tit. I, Liber III.

<sup>24</sup> Part. IV, tit. II, Law XVIII, etc.

<sup>25</sup> FUERO JUZGO requires divorce, Law I, tit. VI, Liber III.

<sup>26</sup> Law XVI, tit. II, Liber IV. Its history is traced by 9 MANRESA, COMENTARIOS, 2 ed., 542 *et seq.*, commenting on CIVIL CODE, Art. 1392, etc.

which preserved the individual ownerships in property acquired before marriage. The custom was recognized by many local *fueros* when they came into existence.<sup>27</sup> The *Partidas* does not mention it, but hardly intended to abolish it,<sup>28</sup> and it has been the practice at least ever since the laws of Toro and of Ferdinand and Isabella.

In all early law personal relations or status occupy the first place, and they have retained it in Spain. Slavery in ancient times was personal, but was being ameliorated in the *Fuero Juzgo*, for masters were held accountable for cruelty.<sup>29</sup> Later in the Middle Ages slavery became serfdom, the people annexed to the soil,<sup>30</sup> but the feudal system came slowly in Spain and fiefs were rare in Castile until the fourteenth and fifteenth centuries,<sup>31</sup> when they were in the rest of Europe beginning to give way to modern tenures. Chivalry *en gross*, so to speak, however, extends almost from Bernado del Carpio at Roncesvalles until — Don Quixote de la Mancha! Commendation or submission of freemen to a lord became not uncommon, but such *benefactoria* are not known in the *Fuero Juzgo*. There we find slaves and freedmen with duties to their patrons similar to those of the Roman *libertini*, and land seems to be held in absolute ownership, with measures both Roman and Gothic.

When we pass from status to contract the *Fuero Juzgo* finds the Roman Law ready to hand and adopts not only its principles but often its terms and language. This has also been the case with the later codifications, and the *Partidas*, for instance, is arranged on the model of the Digest of Justinian. By the time of Philip V, grandson of Louis XIV, Spanish law was regarded as incidental to the Roman Law.<sup>32</sup> While the beauty and value of the old Roman Law has always caused it to be influential, it was never received in the sense that it was in France and Germany, and strictly speaking it is not the Common Law of Spain.<sup>33</sup> The Barcelona *Cortes* in 1251 petitioned King Jayme I to forbid the use of Roman Law in the courts.<sup>34</sup> The term Common Law is not unknown, but it is

<sup>27</sup> 2 F. CARDENAS, ESTUDIOS JURIDICOS, 77, 92.

<sup>28</sup> *Ibid.*, 100, 104.

<sup>29</sup> Law XII, tit. V, Liber VI.

<sup>30</sup> E. Stocquart, 10 REV. DE L'UNIV. BRUX., 473.

<sup>31</sup> *Ibid.*, 468.

<sup>32</sup> E. Stocquart, 4 REV. DE DROIT INT. (2<sup>e</sup> Série), 556 (1902).

<sup>33</sup> ASSO, INSTITUTES OF CIVIL LAW OF SPAIN, XX, etc.

<sup>34</sup> E. Stocquart, 4 REV. DE DROIT INT. (2<sup>e</sup> Série), 555 (1902).



used more in a theoretical than a practical sense, as being those principles common to the whole country or to the world, much as the *jus naturae* of the Stoics.<sup>35</sup> Some of this was in the Roman Law, but some of it was in the local customs not written but of long use, as they are described in the *Partidas*.<sup>36</sup> These kept alive much of the Germanic law of old, just as the *Costumes*, particularly of Paris, were doing across the Pyrenees.

#### MOHAMMEDAN INFLUENCES

The main sources of Spanish law therefore up to this time were the Roman Law and Germanic custom, combined at least for the land in the *Fuero Juzgo* or *Liber Judicum*.

But a third source of legal institutions, almost unnoticed heretofore,<sup>37</sup> must be found in the Arabs, whose invasion in 711 and rapid conquest constitute a romantic and far-reaching element of Spanish history. At first they threatened to cross the continent and joining hands with brethren from Damascus ingulf Europe in Mohammedanism. This was only prevented by Charles Martel's victory, the crowning mercy of Tours, in 732. The Arabs were thrown back southward to develop a Moslem empire in the Spanish peninsula over against the Christian survivors, looking on powerlessly from the mountains and coasts of the north. There came to be a Moslem Spain, centering at Cordova, as previously there had been a Gothic Spain centering at Toledo.

By 756 the Arabs or Moors had made of Spain the khalifate of Cordova, to be not only independent of Damascus and Babylon, but the focus of one of the great civilizations of the world. From a country mainly of hunters and shepherds, as shown by the *Fuero Juzgo*, the peninsula, particularly in what was to be called Andalus, became the seat of agriculture, manufactures, and learning. Abderrahman I and III and Almansor ruled the whole peninsula except the districts between the mountains and the Bay of Biscay in which the ancient inhabitants remained and which came to be the kingdoms of Galicia, Leon, Castile, Navarre, and Aragon about the

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<sup>35</sup> ESCRICHE, DICCIONARIO RAZONADO, s. v. *Derecho Comun*.

<sup>36</sup> Part. I, tit. II, Law IV.

<sup>37</sup> Legal histories, such as that of Modesto Falcon, omit the Moorish domination as a source of law. Escriche denies its influence, although many of his pages contradict his statement.

Ebro. While the Arabs, like the Goths before them, left the old law to the conquered, they introduced and developed Mohammedan institutions to an extent which left lasting traces.

Mohammedan law is founded upon the Koran, the decisions of the prophet, the traditions of his immediate successors, and ultimately on the agreement of the faithful and analogy in new cases. The state and church were never separated, the executive and the courts were in the same hands even more definitely than with the Gothic councils of Toledo. Different elements appealed to different teachers and there came to be four different schools, of which the more rationalist, founded by Malek, prevailed in North Africa. It was made dominant in Spain by the great teacher Abu Mohammed Yahya and was maintained by Abenhabib, called the wisest of Andalusia, and by Isa of Toledo, named the first of jurisconsults.<sup>38</sup> Law absorbed the study of many families of jurists, as in Seville, Cordova, Valencia, Murcia, Malaga, and Granada; nor was the Malekite doctrine without dissent. The family of Benimajlad founded a school which they maintained for four centuries. Their most distinguished man was Abu Abderrahman Baqui, 817-889, who had 248 teachers and traveled in many lands before settling in Cordova to give a more religious tone to law. He wrote a commentary on the Koran, but should be more famous for his book "El Mosnad," a collection of traditions in the form of a dictionary which cited decisions and 1300 authors.<sup>39</sup> All hail to the author of the first law dictionary, especially as his rivals sought his death until the Emir Mohammed bought a copy of his book and ordered him to keep on teaching!

The classical author of the Malekite school was Sidi Khalil, who flourished in the fourteenth century and whose system still obtains in Algeria and has been frequently published and commented on in modern times. As given by Zeys,<sup>40</sup> it covers, first, Marriage and its dissolution; then Procedure, including something analogous to Injunctions (Interdiction); and third, Contracts, including Partnership. It is perhaps less indebted to the Roman Law than the system of Hanafi, which is predominant in the rest of the present Mohammedan world.

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<sup>38</sup> UREÑA, HOMENAJE A CODERA, 256.

<sup>39</sup> *Ibid.*, 257-58.

<sup>40</sup> TRAITÉ ÉLÉMENTAIRE. Published at Algiers in 1885-86.



Under the Moors the highest judicial officer in large towns was the *cadi*, under whom were inferior officials. He sometimes had all kinds of power—civil, military, and religious—and in Toledo, Seville, and Valencia was almost a king.<sup>41</sup> It is a tribute to his justice that the word not only survived in Andalusia but was taken over by the Castilians themselves, although with less dignity. The *Fuero Juzgo* shows so many officials authorized to try cases and so little distinction in the Gothic mind between the makers and expounders of the law that the new word supplied a missing thought. Cervantes mentions *cadi* as the Moorish judge in his day.<sup>42</sup> The word was preserved in the local *fueros*, where *alcadi* was the judge of the *fuero* as distinguished from the judge of the book or *Forum Judicum*. The Spaniards, however, soon lost its judicial meaning and came to use it as *alcalde* for the mayor or chief officer of a community, as we see it to-day.

Under the Moors the officer next to the sultan was the vizier or *alguacer*. As the country became decentralized and smaller chiefs prevailed, the title was in some places, as Toledo, Seville, and Murcia, applied to the executives of the *cadi's* court,<sup>43</sup> and in this sense it passed to the Spaniards. He was sometimes jailer. The word *alguacil* is now an integral part of Spanish jurisprudence and the officer corresponds to the American sheriff and even constable.

Other terms and officers passed from the Moslems to the Spanish, such as *almojarife*, *zalmedina*, *mustaqaf*, *alferez*, *adalid*, *alcabala*,<sup>44</sup> and even *alquilar*, "to rent," and words connected with irrigation. *Exaricos*, "agricultural partners," is from *xarica*, which term was essential to create the relation. It long survived in Aragon,<sup>45</sup> and civilians tried to make it equivalent to *emphyteusis*. Arab words abound in Spanish, and Cervantes claimed that everything beginning with *al* ("the") is Arabic. Few survive in modern Latin-American law except as to irrigation.

The Moorish *cadi* sought first to reconcile the parties before trying the case formally, and this patriarchal function, coming from the deserts of Arabia, was adopted by the Castilians in their prac-

<sup>41</sup> J. RIBERA TARRAGÓ, *ORÍGENES DEL JUSTICIA DE ARAGÓN*, 78.

<sup>42</sup> *DON QUIKOTE*, ch. 40.

<sup>43</sup> J. RIBERA TARRAGÓ, *ORÍGENES DEL JUSTICIA DE ARAGÓN*, 69.

<sup>44</sup> *Ibid.*, 40, 49, 60, etc.

<sup>45</sup> *Ibid.*, 39.

tice.<sup>46</sup> The first step in procedure in many cases to this day even under the new codes is the proceeding known as Conciliation, an informal adjustment, where possible, of the dispute before it reaches the formal stages of proof.<sup>47</sup> This custom prevails also in Denmark, but has there a different origin.

There is good reason to think that the greatest judicial official of Aragon, the *Justicia*, was taken from the Moslems.<sup>48</sup> They had a similar magistrate, and the Aragonese did not have the office previously. It was this official who offered to the autocratic Philip II the greatest opposition he ever met.

Moorish influence may also be found in substantive law. To this day are applied in Valencia, Murcia, and Granada the irrigation practices of the Moors. Around the Mediterranean, from Egypt to the Pyrenees, there is fertile coast land lacking water, and through this whole region there has come to be an artificial system of irrigation.<sup>49</sup> Egypt, the gift of the Nile, as Herodotus declares, solved the problem first, and the Arabs took to Spain the lessons they had learned there. Around Valencia they led canals to the *huertas* or gardens from the rivers Turia and Jucar; about Murcia others from the river Segura; and about Granada not only canals to the *vegas* or valleys near the Darro and Genil, but from the snows of the mountains to the palace of the *Generaliffe*, all at different periods beginning about 800 A. D. When Jaime I conquered Valencia for Aragon in 1238 he divided the lands and appurtenant waters among his followers according to the Moorish laws and customs, and so he did in 1275 at Murcia. The division of water at Granada is more subject to state control than elsewhere, but at Valencia the users of one canal form a *junta central*, who biennially elect a *junta de gobierno*, syndic, and *atandores*. These supervise irrigation on the Moorish plan not of measurement absolute but of measurement relative, an *hilo* or thread being a twelfth or other subdivision of the available water. The Moorish word for "ditch," *acequia*, still prevails, and indeed this is only one of the many terms which were once quite common and are still found in some places. The officials

<sup>46</sup> J. RIBERA TARRAGÓ, ORÍGENES DEL JUSTICIA DE ARAGÓN, 81.

<sup>47</sup> E. Stocquart, 4 REV. DE DROIT INT. (2<sup>e</sup> Série), 541 (1902); REV. DE L'UNIV. DE BRUX., 1904, 479.

<sup>48</sup> J. RIBERA TARRAGÓ, ORÍGENES DEL JUSTICIA DE ARAGÓN. The earlier holders of the office are found in REVISTA DE ARCHIVOS, 1904, 119.

<sup>49</sup> JEAN BRUNHES, ÉTUDE DE GEOGRAPHIE HUMAINE, L'IRRIGATION, Paris, 1902.



controlling the turns of irrigation were called *zabacequias*, and about Zaragoza the word for "turn" itself was *adula* or *ador*, which is Arabic, as is also *alfarda*, the "water right."<sup>50</sup> While the words are different, the practice in Egypt was similar. The rules were in neither country reduced to written laws and much was left to the discretion of the public officials. In case of dispute resort is had at Valencia to the *Tribunal de Aguas*, which sits every Thursday on a sofa at the cathedral door, and from its decision upon an informal hearing there is no appeal. The culture of rice, oranges, pears, peaches — all introduced by the Moors — is still governed by their rules.<sup>51</sup> In Porto Rico the landowners on irrigable water form a commission or syndicate, for administrative purposes.<sup>52</sup>

The *Usatges* of the Moors in the eleventh century marked a higher civilization in Spain than in any other part of Europe,<sup>53</sup> and on the surrender of Granada Ferdinand and Isabella contracted that the inhabitants should retain their laws and judges — a promise ill kept. One Moorish custom long prevailed, however, that of a kind of civil marriage in the presence of witnesses. It was called *barragañas* or *sponsalia* and the children were as legitimate as those of a church marriage. The custom was opposed by the clergy and later by the *Cortes*, although it became unlawful only with expulsion of the Moors.<sup>54</sup>

### FUEROS

Castile, the Spanish land of forts or castles *par excellence* — the borderland — had already absorbed Leon when it took the lead in the long reconquest from the Moors, and so the land conquered became mainly provinces of the kingdom of Castile. Not wholly, however, for Cataluña became part of Aragon and extended that old country to the sea. But the other northern districts which had not yielded to the Moor — Galicia, Viscaya, Navarre — also became independent kingdoms with laws or *fueros* suited to their particular circumstances. Indeed it is true that many cities as they were conquered, beginning with Leon in 1020, were given each

<sup>50</sup> J. RIBERA TARRAGÓ, *ORÍGINES DEL JUSTICIA DE ARAGÓN*, 38.

<sup>51</sup> A correspondent of the New York Evening Post found this court in use and respected by all a few years ago.

<sup>52</sup> *Semidey v. Central Aguirre Co.*, 7 P. R. Fed. Rep. 185, 572 (1914).

<sup>53</sup> E. Stocquart, 10 REV. DE L'UNIV. BRUX., 1905, 480.

<sup>54</sup> *Ibid.*, 478.

its *fuero*, one of the privileges of which was enforcing its law by its own selected judges.<sup>55</sup> These customs gradually crystallized into the *fueros* of Galicia, Viscaya, Navarre, Mallorca, and other districts and contributed not a little to the local independence of the inhabitants of these provinces.

The *Fuero Juzgo* itself was given by Ferdinand III to Cordova as its local *fuero* when in the thirteenth century he recovered it from the Moors — and as he translated it into Castilian for that purpose he incidentally established the beginning of Spanish literature also.

Political institutions became assimilated after Ferdinand of Aragon married Isabella of Castile and their descendants ruled the whole of Spain, but the *fueros* of the old kingdoms and present provinces remain untouched until this day. The *Partidas* and *Recopilacion* did not supersede them. In the eighties of the last century they received much study and a whole library of *Legislacion Foral* was printed and commented on. Such local law of wills, legitimacy, Catalanian *fideicomiso*, the Tribellian quarter, heirship, Aragonese right of survivor of a marriage (whether usufruct or property), and rights of contract<sup>56</sup> not only remained but are expressly recognized by the Civil Code.

These *fueros* go further than the local customs of England, such as gavelkind in Kent, for they are real codes of many civil relations and often differ materially from the Civil Code. A striking instance is in Navarre, whose *fuero* permits a father to dispose of his property by will as he pleases,<sup>57</sup> while the Civil Code of Spain practically denies the right to disinherit children. The preservation of the family as an institution is one of the striking marks of the Civil Law as distinguished from the individualism of the Common Law development. In Aragon King Peter in 1283 granted to the *Cortes* the Great Privilege, which was a kind of Magna Charta, and they also had a remedy, called the Manifestation, which was much like the *habeas corpus* of the English people. While the *Utsages* of that country were not to become as famous as the *Fuero Juzgo* preserved

<sup>55</sup> E. Stocquart, 4 REV. DE DROIT INT. (2<sup>e</sup> Série), 552 (1902). A list of Aragonese towns which acquired this privilege is given in J. RIBERA TARRAGÓ, ORIGINES DEL JUSTICIA DE ARAGÓN, 82. The change to political chiefs is more marked in Castile. *Ibid.*, 83.

<sup>56</sup> 1 M. A. MARTINEZ, CODIGO CIVIL, 46.

<sup>57</sup> *Ibid.*, 50.



in the larger kingdom of Castile, they marked a people of originality and vitality.

It would, however, take us too far afield to discuss in detail the *fueros* of these old kingdoms, each of which makes up a substantial volume.<sup>58</sup> They are exceptions which are perhaps not important in the Latin-American countries, for these were settled by Castile. It may well be, however, that the many decrees and *cedulas* issued for the colonies and the later local legislation take the place thus left vacant by the *fueros*. The *Leyes* or *Recopilacion de las Indias* compiled by Charles II in 1680 is still of great value for American countries.<sup>59</sup> The *fueros* are important locally rather than as sources of the Spanish Civil Law as such, for they were found a great obstacle to modern codification and had to be preserved in part.<sup>60</sup> Nevertheless it is well to note that these local grants not only delayed the rise of the feudal system, but developed the law of personal rights even earlier than in England.<sup>61</sup>

Historically the Civil Code adopted in 1889 was in the main but the local law or *fuero* of the greatest province, that is to say, of Castile; for in legal as in political history we have here the process which has made Middlesex into England and the county of Paris into France. Such instances are more than a survival of the fittest — they are the conquest by the fittest.

#### CONSULADO

There was another local law of Spain which has had general influence. It arose in Barcelona, the ancient capital of Cataluña, from the beginning until now famous for the independence of its citizens. It was an old saying that they enjoyed so many privileges that nothing was left for the king.

Barcelona was in the Middle Ages one of the great ports of the Mediterranean, as indeed it has remained, and about 1266 there was digested<sup>62</sup> for the Prohoms of the city the maritime customs which

<sup>58</sup> LEGISLACION FORAL, Navarre, 1888; Galicia, 1883; Viscaya, 1888; Cataluña, 1887; Mallorca, 1888; Aragon, 1888. Each has a valuable introduction by a distinguished jurist.

<sup>59</sup> They are, for example, quoted largely in the INSTITUCIONES OF JOSÉ MARIA ALVAREZ of Guatemala.

<sup>60</sup> CIVIL CODE, Arts. 10, 16.

<sup>61</sup> E. Stocquart, 10 REV. DE L'UNIV. BRUX., 470.

<sup>62</sup> CODIGO DE LAS COSTUMBRES MARITIMAS DE BARCELONA, xxi, Madrid, 1791.

had prevailed on that sea. There had been in Roman times such laws coming from the Rhodians, of which the principal survival is one on Jettison, but doubtless the Rhodian Code has material coming down even from the Phœnicians. From the middle of the thirteenth century the *Consulado del Mar* takes its place alongside the *Siete Partidas*, performing even more thoroughly for the sea what that attempted to do for land.

The chief function of the *Consulado* was to declare the law of commerce by sea and to establish maritime courts under officers called consuls. From time to time other cities of Spain, from Seville to Bilbao, and the ports of other countries following suit obtained the right to such courts.<sup>63</sup> From them originated consuls as now known, and every code of commerce by sea since then has its origin therein.

The law of Spain in its finished form controls the civil relations not only of the peninsula, but of Central and South American countries, of Porto Rico and the Philippines even under the American flag, and of Cuba *libre* also. The Spanish Civil Law is the most influential body of law on the globe to-day, and even to Americans is second only to the Common Law. Its origin is a subject of interest to more people than the origin of any other body of law after the Mosaic. It is no copy of the Code Napoléon, although that was carefully consulted. A French writer of note says that the Spanish code is the more logical. It is, no less than the English Common Law, an outgrowth of the needs of the nation that created it. Unlike the English Common Law, the Civil Law originally aimed to cover all legal relations and left nothing to judicial initiative. This accounts for its exactness and also for its formality. And yet, unlike the Roman Law, room is left in the Spanish code for growth and for expansion somewhat as at Common Law. If a case arises not expressly covered, it must be decided by natural equity,<sup>64</sup> and the

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The Consulado proper contains 292 chapters, distributed under fourteen titles, and the Ordenanzas for judicial procedure, first given Valencia in 1283, were 44 or 35 in number, according to their varying forms.

<sup>63</sup> CODIGO DE LAS COSTUMBRES MARITIMAS DE BARCELONA, 317, 319. The second volume gives the laws of the Rhodians and many other maritime laws.

<sup>64</sup> CIVIL CODE, Art. 6: . . . "When there is no law exactly applicable to the point in controversy, the customs of the place shall be observed, and, in the absence thereof, the general principles of law."



rule as to negligence is in such general terms as to allow the growth of the whole law of torts. Thus in Porto Rico the American precedents have been imported.<sup>65</sup>

In the Spanish Civil Law, therefore, we find on a Roman foundation Gothic, Moslem, local and maritime elements which, nevertheless, make up a harmonious whole, the outgrowth of Spanish history.<sup>66</sup> This Civil Law is gradually receiving through local legislation the modifications needed to fit it to the wants of half the world; for her widespread colonies continue her civilization after Spain herself has ceased to rule. In this Spanish history is like to that of Rome. And doubtless the Spanish law is the better fitted for its mission that it contains many compromises and admits of more.

The modern nations best representing Rome are Italy, France, and Spain, and their line is gone out throughout all the new world. The triad may be said to represent their original in different ways — Italy in Art, France in Letters, and Spain in Law. Each is influential: but, as law is the underlying force holding society together, we may say of social bonds, as Paul said of a principle in religion, that the greatest of these is Law.

*Peter J. Hamilton.*

DISTRICT COURT OF THE UNITED STATES  
FOR PORTO RICO.

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<sup>65</sup> CIVIL CODE, Art. 1902: "A person who by act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

<sup>66</sup> The number of codifications necessitated a law of prelation, which dwarfs Valentinian's on citation of the jurisconsults. SOHM, INST. ROMAN LAW, 122; Law II, tit. I, Liber III, of the NOVISIMA RECOPIACION. Other legislation is noted in 1 ESCRICHE, DICCIONARIO, s. v. *Fuero Municipal*.

TORT AND ABSOLUTE LIABILITY — SUGGESTED  
CHANGES IN CLASSIFICATION

## II

ASSUMING that the term "tort" is generally to be used as including only cases of fault, and further assuming that "fault" involves wrong intention or culpable inadvertence, what specific kinds of injuries heretofore grouped under the general head of torts should continue to be classed under that head? Where, for instance, should we class Assault, or Deceit, or Defamation? Under tort, as involving fault as an essential requisite, or in the third class, where the law imposes absolute liability in the absence of fault?

In what specific kinds of injury is fault, generally, a requisite to liability?

A full discussion of this question would require us to go behind conventional names (such as Assault or Deceit) and consider the precise nature of the right to be protected or the duty to be enforced. But we can here deal with the question only in outline.

If we take up, one by one, the various specific torts, which are usually designated by conventional titles and are named according to the nature of the right affected or the harm done,<sup>1</sup> we shall find two things:

1. In most, though not in all, of these specific torts fault is, as a general rule, requisite to liability.

2. But, although fault is generally requisite, yet there are exceptional instances of absolute liability in the absence of fault. And such instances are not confined to any one or two of these various kinds of tort, but are liable to occasionally occur in any or all of them (except Malicious Prosecution). Under the classification suggested in this article, such instances would belong, not under torts, but under the third class of absolute liability.

<sup>1</sup> As to "Unnamed Wrongs," or injuries outside of "the known causes of action which have received names," see BISHOP, *NON-CONTRACT LAW*, §§ 485-94; Sir F. Pollock, 14 *ENCYCLOPÆDIA OF LAWS OF ENGLAND*, 2 ed., 135, paragraph 2; Judge Swayze, 25 *YALE L. J.* 1.



Before enumerating the so-called "specific torts" as to which fault in some form is, generally, a requisite to liability, it must be noted that there is a difference as to the kind, or grade, of fault required in various cases. Rights or interests which receive some protection from law are not all equally protected. Some are protected more highly than others. Thus, a right may be protected only against a violation proceeding from bad motive. In other words, bad motive may be one of the essential requisites to an action (*e. g.*, malicious prosecution). Or a right may be protected against intentional wrongdoing, but not against harm due to merely negligent conduct. Or another right may be protected against harm caused negligently. And, in some cases, where it is conceded that fault is essential, there may be a controversy as to exactly what kind or species of fault is requisite.

In the following so-called "specific torts" it is the general rule that fault, in some form or other, is requisite to (*primâ facie*) liability: Assault, Battery, Imprisonment, Malicious Prosecution, Injurious Falsehood,<sup>2</sup> and Deceit.<sup>3</sup>

In Defamation, heretofore usually classed under the general head of tort, fault, though as a matter of fact it is generally present, is not an essential requisite to making out a *primâ facie* case.<sup>4</sup> Hence, under our proposed reclassification, Defamation would come within the third class.<sup>5</sup>

In "Slander of Title," so-called,<sup>6</sup> fault is not requisite to sustain an action against a stranger; but it is essential in an action against a rival claimant.<sup>7</sup> It would seem that this general topic (Slander of Title), heretofore treated as a unit, must be separated into two

<sup>2</sup> See this species of tort distinguished from both Deceit and Defamation, in SALMOND, TORTS, 4 ed., 504.

<sup>3</sup> It has sometimes been thought that False Representation should be dealt with under, or as a branch of, the Law of Contract rather than the Law of Tort. See Professor Wigmore, 8 HARV. L. REV. 395.

Compare POLLOCK, TORTS, 10 ed., 293-94; 1 BOHLEN, CASES ON TORTS, Preface, iii.

<sup>4</sup> See fuller statement by the present writer in 60 U. PA. L. REV. 468-72. See also Lord Herschell, in *Allen v. Flood*, [1898] A. C. 125-26. Sir F. Pollock, though recognizing the law to be now established as above stated, evidently entertains some doubt as to its beneficial operation. See 60 U. PA. L. REV. 468, n. 23; 472, n. 31.

<sup>5</sup> Of course questions of fault may arise in rebutting the defense of conditional privilege.

<sup>6</sup> Better substitute "Disparagement" for "Slander." See 13 COL. L. REV. 13.

<sup>7</sup> See article by the present writer, 13 COL. L. REV. 29-31.

divisions. Slander of Title against a rival claimant remains under tort. Slander of Title against a stranger belongs under the third class.

As to intermeddling with, or damage to, personal property, we believe that fault is now, as a general rule, requisite to liability.<sup>8</sup>

As to entry upon, or actual damage to, real estate:

Because the law does not require a plaintiff, in an action for entry upon real estate, to prove that he suffered actual damage (in the sense of pecuniary loss), it sometimes seems to be supposed that plaintiff need not prove that defendant was guilty of actual fault. It seems to be virtually argued that the commission of actual fault by the defendant is not requisite any more than the suffering of actual pecuniary damage by the plaintiff. This reasoning is erroneous. As already suggested, the two questions of damage and fault are entirely distinct from each other.

That one entering upon real estate is not liable in the absence of fault is, we believe, the prevailing rule to-day. It is subject to an exception of large scope and great importance, but it constitutes the general rule.

But we think that an *intentional* entry standing alone and unexplained involves fault. The defendant has consciously infringed the plaintiff's right to have his land free from invasion.<sup>9</sup> In the

<sup>8</sup> But this rule is subject to an exception of great scope and importance, which prevents exoneration in many cases of non-culpable conduct. That exception is the doctrine that a *bonâ fide* and non-negligent mistake as to title in the property does not generally furnish a bar to liability. This doctrine, which also applies to real estate, is referred to *post* under Absolute Liability.

This exception is, however, itself subject to an exception in the case where the articles of property are in the shape of currency. One who, in good faith and for value, receives currency which did not in fact belong to the person from whom he received it, becomes the owner of such currency, and does not become a wrongdoer because he asserts the rights of ownership. As to the reason for this doctrine, see 2 PARSONS, BILLS AND NOTES, 110.

<sup>9</sup> Of course the doing of physical harm to the land itself is not the only way of violating the owner's rights. His right of beneficially using the land may be substantially impaired without doing harm to the soil. And the owner's right of user necessarily includes the right and power of excluding others from using the land. "For a power of indefinite user would be utterly nugatory, unless it were coupled with a corresponding power of excluding others generally from any participation in the use.

"... Violations of the right of exclusion (when perfectly harmless in themselves) are treated as injuries or offences by reason of their probable effect on the rights of user and exclusion. A harmless violation of the right of exclusion, if it passed with perfect impunity, might lead, by the force of example, to such numerous violations of the right as would render both rights merely nugatory." 2 AUSTIN, JUR., 3 ed., 836, 837.



absence of any special justification<sup>10</sup> the defendant's intentional entry is faulty and tortious. In one case proof of the absence of fault will not exonerate the defendant, *viz.*, where the defendant's intention was due to a non-negligent, but mistaken, belief as to the title to the land. Mr. Salmond, apparently, would not confine the exception to the case of mistake as to title, but would go so far as to hold that an inevitable mistake on any subject whatever will not exonerate the defendant.<sup>11</sup> The question will be referred to later under the head of Absolute Liability.

As to *unintentional* entry: the view that it is not actionable in the absence of fault is sustained by the weight of modern authority. It "is not actionable unless due to negligence."<sup>12</sup> Of course this modern view involves a total departure from the old days when a man was held liable, "quite irrespective of moral fault," for harm "whether to another person, personal property, or real estate," which his act had caused.<sup>13</sup> At the present time, when unintentional harm is done to the person or to personal property, "the rigor of the early law" has been relaxed, and recovery must gen-

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It is common to say that the action in such a case is allowed because the law "presumes" damage. The presumption is a fiction, and it is unnecessary to resort to it. Stated without fiction, the law is that a voluntary entry on land is *prima facie* actionable, even though, in the particular instance, it has done the plaintiff not the slightest harm. "The explanation of these cases in which a right of action is conferred on a person who has sustained no harm is to be found in the fact that certain acts are so likely to result in harm that the law prohibits them absolutely and irrespective of the actual issue." See SALMOND, TORTS, 4 ed., 12.

Judge Wells, in *Walker v. Old Colony, etc. Ry. Co.*, 103 Mass. 10, 14, pronounced the right of exclusion to be "one of the valuable incidents of the ownership of land." This right of exclusion is a property right, protected by the constitutional prohibition against taking property for private use or without compensation. The Vermont Act of 1892, No. 80, Section 31, provides that "no action shall be maintained against any person for crossing uncultivated land to reach public waters for the purpose of taking fish, unless actual damage has been sustained." In *Trout & Salmon Club v. Mather*, 68 Vt. 338 (1895), this act was held unconstitutional.

<sup>10</sup> As to various justifications of entry on land, see BIGELOW, TORTS, 7 ed., §§ 478-89.

<sup>11</sup> SALMOND, TORTS, 4 ed., 186.

<sup>12</sup> *Ibid.*, 186. The learned author adds: "No action will lie against a defendant whose horse runs away with him on a public highway and carries him without any negligence of his upon the adjoining land of the plaintiff." For this statement he cites, in note 4, two actions of trespass to the *person*, adding, "but there is no reason to doubt that the principle applies generally to all forms of trespass." An authority more directly in point is found in *Brown v. Collins*, 53 N. H. 442 (1873).

<sup>13</sup> See Professor Bohlen, 59 U. P. A. L. REV. 309, 310.

erally be based upon culpability. But in some quarters, entitled to respect, there is still a tendency to hold that, when real estate is damaged or invaded, the old rule of absolute liability remains unchanged.<sup>14</sup>

On principle, and on the weight of modern authority, there is (in the absence of culpability) no liability for accidental damage or entry in the case of real estate any more than in the case of damage done to personalty or to the person.<sup>15</sup>

If fault is requisite to an action for defendant's personal entry upon plaintiff's land, there can be no reason why it should not be requisite to an action for damage to plaintiff's land, due to acts done by defendant upon defendant's land without personal entry by defendant upon plaintiff's land. Suppose that acts are done by defendant upon defendant's land, which have the effect of causing deleterious things to pass from defendant's land upon or over plaintiff's land, thereby damaging plaintiff's land or impairing plaintiff's comfortable enjoyment of his land. Such a case is generally classed under the head of nuisance, as distinguished from trespass. Mr. Salmond speaks of it as a nuisance "in the strict sense of that term."<sup>16</sup> Is it requisite to defendant's liability that his acts done upon his own land should be blameworthy? We should say yes, as a general rule, subject, however, to an exception in those cases where defendant's acts fall within the so-called "extra-hazardous class." As to the requirement of fault, there is a conflict of authority. But if we are right in the position that plaintiff must prove fault in an action for personal entry, it is difficult to see how the plaintiff can claim to occupy more favorable ground in the present supposed case. Defendant is liable if, without justification,<sup>17</sup> he inten-

<sup>14</sup> See MARKBY, *ELEMENTS OF LAW*, 3 ed., § 711; and compare 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW*, 306.

<sup>15</sup> See Professor Whittier, as to real estate, 15 *HARV. L. REV.* 347; and compare as to personalty, 342; and as to the person, 339. See also, as to real estate: *Losee v. Buchanan*, 51 N. Y. 476 (1873), and see *Earl, C.*, p. 490; *Brown v. Collins*, 53 N. H. 442 (1873); *Marshall v. Welwood*, 38 N. J. L. 339 (1876); all opposing the reasoning in the House of Lords in the then recent decision in *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868). See, also, Opinion of Martin, B., in *Fletcher v. Rylands*, 3 Hurl. & Colt. 774, 793 (1865); and argument of Mr. Mellish in that case, p. 785. See further, *LAWS OF ENGLAND*, edited by Lord Halsbury, vol. 27, § 1515; *Rumbold v. London County Council*, 25 T. L. R. 541 (1909); SALMOND, *TORTS*, 1 ed., 159.

<sup>16</sup> SALMOND, *TORTS*, 4 ed., 175.

<sup>17</sup> The justification most frequently set up is that defendant's acts do not exceed his right to make a reasonable use of his own land.



tionally or negligently inflicts substantial damage upon the plaintiff.<sup>18</sup>

Would the adoption of the requirement of fault in this class of cases prevent recovery in a large proportion of litigated suits where plaintiff could have prevailed if the rule of absolute liability was adopted?

We think not; and for two reasons:

1. Fault, as heretofore defined, exists, and is easily provable, in a great majority of cases where damage has resulted. And this is so even where the damage sued for occurred as a first result of the dangerous condition.

2. In a majority of litigated cases the damage sued for was continuous, or at least occurred repeatedly.<sup>19</sup> Assuming that the defendant was not at fault for not foreseeing the first outbreak or harm, and hence was absolved from liability for damage occurring in the first instance, still, after he knows that damage has occurred and is likely to repeatedly occur, he is liable for failing to obviate the cause of the subsequently occurring damage. "If he fails to do so, his liability from such time must, upon principle, be the same as it would have been could he have foreseen the result in the first instance." His liability arises "from a continuance of the cause of injury, after its character becomes apparent."<sup>20</sup> Thus, if the defendant knew the damaging effect of a spout maintained by him, he would be answerable for the harm it subsequently did "until he stopped it."<sup>21</sup>

<sup>18</sup> As to what constitutes sufficient damage, see SALMOND, TORTS, 4 ed., 214-17.

<sup>19</sup> An author who thinks that an isolated escape of a deleterious thing on to plaintiff's land might be classed under nuisance, says: "Nuisance is commonly a continuing wrong; that is to say, it commonly consists in the establishment or maintenance of some state of things which continuously or repeatedly causes the escape of noxious things on to the plaintiff's land." SALMOND, TORTS, 4 ed., 211.

<sup>20</sup> *Crawford v. Rambo*, 44 Ohio St. 279, 286-87, 7 N. E. 429 (1886); *Davis v. Rich*, 180 Mass. 235, 62 N. E. 375 (1902), *Holmes, C. J.*, p. 238; GLEGG, REPARATION, 1 ed., 282.

<sup>21</sup> See *Davis v. Rich*, 180 Mass. 235, 238, 62 N. E. 375 (1902).

The conflict of authority as to the requirement of fault is not confined to the particular kind of nuisance above discussed, but exists as to certain other varieties of nuisance. In the books the broad question is sometimes raised, whether the requirement of fault exists as to the general subject of nuisance. See Judge Cooley in favor of the general requirement of fault; TORTS, 2 ed., 670-71. For apparently opposing views, see 29 CYCLOPÆDIA LAW AND PROCEDURE, 1155; 1 WOOD, NUISANCE, 3 ed., 48; 2 WOOD, 783; 21 LAWS OF ENGLAND (Halsbury), § 845, p. 507. But an attempt

The third class (absolute liability where there is neither breach of contract nor fault) is largely made up of two elements which have often been spoken of as if they were entirely distinct from each other.

Division 1. Cases of absolute liability which, heretofore, have usually been classed under tort.

Division 2. Cases of absolute liability which, heretofore, have been regarded as more nearly akin to breach of contract than to tort.

In both divisions there is an obligation imposed by law, in the absence of either contract or fault on the part of defendant.<sup>22</sup>

Consider now:

Cases of absolute liability in absence of fault, which heretofore have usually been classed under tort. (Division 1, *supra*.)

These cases may be divided into three classes:

- (a) Liability for non-culpable mistake.
- (b) Liability for non-culpable accident.
- (c) Vicarious liability for the wrongful acts of others.<sup>23</sup>

The last class (c) is generally dealt with under the law of master

to answer this question as to the general subject would involve hopeless confusion, on account of the ambiguity, the vagueness, and the broadness of the term nuisance. A "wide range of subject-matter" is embraced under it. The term nuisance, when used as denoting an actionable tort, is not confined to denoting a single specific kind of tort. It is "a term of classification applied to a group into which certain wrongs are gathered for convenience of reference." TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, § 434. It is used as including under one general head various subjects which, upon any scientific principles of classification, do not belong together, and most or all of which are to be found under various separate and distinct titles of the law. The wrongs classed under the general head of nuisance "are breaches of various duties." See INNES, TORTS, Preface, 4; BISHOP, NON-CONTRACT LAW, § 411, n. 1; SALMOND, TORTS, 4 ed., 210; Prof. E. R. Thayer, 27 HARV. L. REV. 326.

Legal authors admit the difficulty, not to say the impossibility, of framing a general definition of the term nuisance. Judge Cooley says: "It is very seldom, indeed, that even a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general it is likely to define nothing." TORTS, 2 ed., 672. Mr. Garrett says: "It is indeed impossible, having regard to the wide range of subject-matter embraced under the term nuisance, to frame any general definition. . . ." GARRETT, NUISANCE, 3 ed., 4.

Instead of discussing the broad question, whether the requirement of fault exists as to the general subject of nuisance, it would be better to consider separately what the rule as to fault is in regard to each of the various incongruous topics which are usually lumped together under the one general head of nuisance.

<sup>22</sup> KEENER, QUASI-CONTRACTS, 15; ANSON, CONTRACTS, 12 ed., 8.

<sup>23</sup> This division substantially agrees with SALMOND, TORTS, 4 ed., 15.



and servant and the law of domestic relations. It will not be discussed here.

To consider the two first classes (*a* and *b*) we must begin by distinguishing between accident and mistake.

"A case of accident then is one where the *effect* was neither intended nor was so probable a result as to make the conduct negligent. On the contrary, in the cases of mistake that arise the *effect* is *intended*, and the error consists in thinking that such an effect is not tortious."<sup>24</sup>

"The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care. The plea of inevitable mistake, on the other hand, is that, although the act and its consequences were intended, the defendant acted under an erroneous belief, formed on reasonable grounds, that some circumstance existed which justified him."<sup>25</sup>

"Accident, in this System, means an event happening without the concurrence of the will of the person by whose agency it was caused. It differs from mistake, because the latter always supposes the operation of the human will in producing the event, although that will is caused by erroneous impressions on the mind."<sup>26</sup>

Take first non-culpable mistake. When is there civil liability?

Mr. Salmond<sup>27</sup> says that "inevitable" (by which he means non-culpable) "mistake is commonly no defense at all" against civil liability. Later, page 14, he adds: "To this general principle of absolute liability for mistake the law recognizes a few exceptions of minor importance. . . ."

One of the fullest and ablest discussions of this topic is the article by Professor Whittier.<sup>28</sup> Looking at the question as a matter of principle, the learned writer thinks that the general rule should be that non-negligent mistake of fact constitutes a defense to civil liability. But he regards the weight of authority as *contra*. As to damage to the person, he recognizes that there is a seeming conflict of authority. He says: "On the one hand, we have certain instances where the mistake is held no excuse; on the other hand, we have even more numerous sets of circumstances in which the defendant is

<sup>24</sup> Professor Whittier, 15 HARV. L. REV. 336-37.

<sup>25</sup> SALMOND, TORTS, 4 ed., 16.

<sup>26</sup> 2 EDWARD LIVINGSTON, COMPLETE WORKS ON CRIMINAL JURISPRUDENCE, 641.

<sup>27</sup> TORTS, 1 ed., 12.

<sup>28</sup> 15 HARV. L. REV. 335-52.

not held." And he believes "that no adequate distinction can be drawn between these two lines of cases." As to damage to personalty and realty, he says that the courts "almost invariably" refuse to sustain the defense of non-negligent mistake.<sup>29</sup>

Upon the general question we differ from Salmond, and to some extent from Whittier.

It is true that, in many actions for intentionally intermeddling with property, the defense of non-negligent mistake has not been sustained. But in almost all the reported cases under this head the particular mistake set up was in regard to the title to the property. The defendant has alleged that he without negligence believed that the property belonged either to himself or to the person under whose authority he was acting. The cases overruling this defense are regarded by us as deciding only that *a mistake concerning this particular subject, i. e., a mistake concerning title*, does not avail as a defense.<sup>30</sup> These particular cases do not decide whether mistakes on other subjects do, or do not, constitute a defense to actions for damage to property or to the person.

We do not think that there is any general rule as to whether non-negligent mistake does, or does not, exonerate from civil liability. Each particular set of cases seems to us to be decided upon the special reasons of policy or expediency bearing upon that particular set of facts.<sup>31</sup>

Although two rights may be of equal intrinsic value, yet the efficient protection of one right may require the allowance of conduct which would not be so necessary to the protection of the other right. The nature of the particular right to be protected affects the method of protection to be allowed by law.

Consider now cases of non-culpable accident. Here non-liability is the general rule.<sup>32</sup>

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<sup>29</sup> See 15 HARV. L. REV. 339, 340, 341, 342, 347.

<sup>30</sup> Professor Whittier earnestly argues that this doctrine as to title is wrong on principle, but he admits it to be supported by an overwhelming weight of authority. See 15 HARV. L. REV. 343-47. As to the inexpediency or injustice of this doctrine, we are unable to concur with Professor Whittier.

<sup>31</sup> This view explains some alleged inconsistencies in the decisions relative to damage to the person, pointed out in 15 HARV. L. REV. 341-42.<sup>11</sup>

<sup>32</sup> "Pure accident will hardly seem to any one who is not a lawyer to be a special ground of exemption, the question being rather how it could ever be supposed to be a



In so-called cases of extra-hazardous user, a man is said to act at his peril, and is held absolutely liable though without fault. By "acting at peril" is here meant

"that there is some act which the law does not forbid, some act from which there is no primary duty or obligation to abstain, but for which, if a man does it and harm ensues, he will be liable to make compensation."<sup>33</sup>

"The law . . . considers, not that the act is so dangerous as to be negligent and wrongful, but that it is so dangerous as to be allowable only on the terms of insuring the public against harm."<sup>34</sup>

The modern doctrine that in certain exceptional cases a man acts at peril is a survival of the time when *all* a man's acts were done at his peril.<sup>35</sup>

Why should the law, at the present day, maintain that there is *any* extra-hazardous class of acts which are performable only at the peril of the doer? The following explanations have been suggested:

"As a matter of history, such cases cannot easily be referred to any definite principle. But the ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of the danger, coupled with the difficulty of proving negligence as the specific cause in the event of the danger having ripened into actual harm."<sup>36</sup>

"The possibility of a great danger has the same effect as the probability of a less one, and the law throws the risk of the venture on the person who introduces the peril into the community."<sup>37</sup>

In Salmond on Jurisprudence,<sup>38</sup> it is said (as to some "exceptionally dangerous forms of activity"):

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ground of liability. But it was supposed so by many lawyers down to recent times, the reason lying in a history of archaic ideas too long to be traced here." Sir F. Pollock, 27 ENCYCL. BRITANNICA, 11 ed., 65.

<sup>33</sup> MARKBY, ELEMENTS OF LAW, 3 ed., § 693.

<sup>34</sup> SALMOND, JURISPRUDENCE, ed. 1902, 457.

<sup>35</sup> Mr. Holdsworth, in 2 HISTORY OF ENGLISH LAW, 42, speaks of "the dominant conception of the Anglo-Saxon law — the idea that a man acts at his peril"; and again, in vol. 3, 303-04, "the leading principle of the mediæval common law that a man acts at his peril." Compare vol. 3, 299. See also POLLOCK, TORTS, 10 ed., 15. "The archaic law of injuries is a law of absolute liability for the direct consequences of a man's acts, tempered only by partial exceptions in the hardest cases."

<sup>36</sup> POLLOCK, TORTS, 10 ed., 505.

<sup>37</sup> HOLMES, COMMON LAW, 154, 155.

<sup>38</sup> Ed. 1902, 456.

"These may well be tolerated only on the condition of making compensation to all who suffer from them, irrespective altogether of any question of negligence."<sup>39</sup>

What is the present scope, or application, of this common-law doctrine? Which way are courts now tending—to extend it or to restrict it? How far, if at all, will the decisions of courts be influenced by recent legislation, which brings about, as to large classes of persons, results absolutely incongruous with those reached under the modern common law as to persons not affected by such statutes?

What sort of cases are now usually held to fall under this head of acting at peril, or extra-hazardous user?

No attempt is here made to give an exhaustive enumeration of all possible cases of acting at peril.<sup>40</sup>

We only call attention to some prominent instances, stated in very general terms.

1. Absolute liability of the owner of certain animals for damage done by their straying from his land onto a neighbor's land. This applies to classes of animals which, if not restrained, are liable to stray from the owner's land to his neighbor's land and are likely to do damage there. The doctrine of absolute liability in such cases is a survival of the time when every man was liable for all damage

<sup>39</sup> It has been suggested that these exceptional cases of absolute liability may be explained as "being based on a conclusive presumption of negligence." But the phrase "conclusive presumption," when employed in this connection, is objectionable. It is used to conceal the fact that the courts are laying down a rule of substantive law under the guise of a rule of evidence. In the words of Professor Williston (24 HARV. L. REV. 425), a conclusive presumption "is a rule of substantive law masquerading as a rule of evidence."

For criticism of the term "conclusive presumption" and of its use in the above manner, see 1 AUSTIN, JUR., 3 ed., 508, 509, 510; GRAY, NATURE AND SOURCES OF THE LAW, § 228; 4 WIGMORE, EVIDENCE, § 2492; 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE, §§ 1145, 1146, 1149, 1160.

<sup>40</sup> It must be remembered that we are here speaking of cases of accident as distinguished from mistake. The term "acting at peril" may also be used in reference to cases of mistake, *e. g.*, intermeddling with tangible objects of property under a *bonâ fide* and non-negligent mistake as to title (see discussion, *ante*). So as to vicarious liability; a master may be said to act at peril when he carefully selects and directs a servant. He may be liable for a tort of the servant when acting within the scope of his engagement, though in violation of his orders.

We do not here discuss "a principle of limited application that 'unlawful' acts—signifying an illegality, usually statutory, independent of the question at issue—are done at peril." See Professor Wigmore, 8 HARV. L. REV. 388. As to breach of statutory duties, see also SALMOND, TORTS, 4 ed., 557, paragraph 5.



done by him or his property, though entirely without his fault.<sup>41</sup> The doctrine does not prevail in many of our newer states. It is to-day so exceptional that it does not furnish a sufficient basis upon which to argue from analogy; and several American courts criticise the attempt of Blackburn, J., to thus use it in *Fletcher v. Rylands*.<sup>42</sup>

2. Absolute liability of the owner of certain animals for damage done by them other than trespass to land. This applies in the two following cases:

(a) If the animal belongs to a class which the court regards as having a natural propensity to do the particular kind of damage in question.

(b) If the particular animal, though belonging to a class not naturally or usually so inclined, has a special propensity to do this kind of damage, and the owner is aware of the existence of such propensity.

Until quite recently it was the general opinion that in both the above cases the owner was liable irrespective of negligence and that proof of care on his part would not exonerate him. We think that this view is still supported by the weight of authority, especially by decided cases.<sup>43</sup> But the opposite view is supported, at least as a question of principle, by the high authority of Judge Cooley, Dr. Bishop, and Mr. Beven.<sup>44</sup>

3. Absolute liability in case of blasting, when substances are thereby thrown on the land of plaintiff.

In such a case the great weight of authority imposes absolute liability.<sup>45</sup>

<sup>41</sup> See SALMOND, JURISPRUDENCE, ed. 1902, 464.

<sup>42</sup> See Doe, J., 53 N. H. 442, 449-50. Beasley, C. J., 38 N. J. L. 339, 341-42 (1876); Earl, C., 51 N. Y. 476, 483 (1873).

<sup>43</sup> See SALMOND, TORTS, 4 ed., 428; POLLOCK, TORTS, 10 ed., 520-21; CLERK & LINDSELL, TORTS, 6 ed., 479-80, 487-89; HOLMES, COMMON LAW, 154.

<sup>44</sup> See COOLEY, TORTS, 3 ed., 696-97, 706-08; BISHOP, NON-CONTRACT LAW, §§ 1225, 1230; Mr. Beven, 22 HARV. L. REV. 468, 478, 483-84. See also *De Gray v. Murray*, 69 N. J. L. 458, 55 Atl. 237 (1903). And compare *Worthen v. Love*, 60 Vt. 285, 14 Atl. 461 (1888); *Hayes v. Smith*, 62 Ohio St. 161, 182, 56 N. E. 879 (1900); *Fake v. Addicks*, 45 Minn. 37, 38, 47 N. W. 450 (1890).

<sup>45</sup> COOLEY, TORTS, 2 ed., 392; BISHOP, NON-CONTRACT LAW, § 831. For a case which does not go to this extent, see *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991 (1892), and 8 Wash. 162, 35 Pac. 621 (1894).

We do not consider here whether the throwing of substances upon plaintiff's land is the only result of blasting for which there is absolute liability.

4. Absolute liability for excavating in one's own land, with the result of subsidence in the surface of another's land, or of soil falling away from another's land.

This topic is sometimes indexed under such titles as "Withdrawal of support for land," "Right of support for land," "Right to support of soil from soil," "Liability for removal of lateral or subjacent support of land in its natural condition." "Land" here means land without any buildings upon it, or where the presence of buildings did not contribute to produce the subsidence or falling away.

In an action for causing the fall of buildings, when the land would not have given way but for the weight put upon it by the buildings, actual negligence by the excavator must be proved. But in judicial opinions and in textbooks it has almost universally been assumed that liability for excavation causing the fall of land which has no building upon it exists irrespective of negligence and that proof of care on the part of the excavator will not exonerate him.

This view is, however, controverted by Mr. Salmond,<sup>46</sup> who says:

"There is no sufficient reason for supposing that the infringement of a right of support is any exception to the general principle that liability for a tort depends on the existence of wrongful intent or culpable negligence."

An opinion of Mr. Salmond's is always entitled to consideration. But we believe that to-day the above rule of absolute liability for damage to land by excavation would be applied in most common-law jurisdictions.<sup>47</sup>

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<sup>46</sup> TORTS, 4 ed., 279.

<sup>47</sup> It must be admitted that, until a comparatively recent date, the precise question was hardly ever the subject of express adjudication. In a majority of the cases the precise point in judgment was "the extent of the right where buildings had been erected on the land for which support was claimed." See Monographic Note, in 33 Am. St. Rep. 446 *et seq.*, especially p. 447. But in these cases, "complicated by the existence of artificial structures," judges have repeatedly said that negligence was not essential to an action when the land which gave way had no buildings upon it; and this proposition has been stated by text-writers as undoubted law. And there are now American cases where this point has been directly decided. See *Foley v. Wyeth*, 2 Allen (Mass.) 131 (1861); *Mosier v. Oregon Nav. Co.*, 39 Ore. 256, 61 Pac. 453 (1901);



5. Absolute liability for defamatory statements actually or theoretically damaging, published on an unprivileged occasion, and not justifiable on the ground of truth.

Defendant is not exonerated by proof that the statements were published under a non-negligent but mistaken belief, either (1) that facts existed creating a privilege, or (2) that the statements were true.<sup>48</sup>

6. Absolute liability in an action for slander (disparagement) of title, brought against a stranger.

Defendant is not exonerated by proof that he was acting under a non-negligent but mistaken belief in the truth of his statement.<sup>49</sup>

As to the three following topics, there has been much discussion, and some conflict, as to whether absolute liability should be imposed for damage, irrespective of negligence.

7. Use of Fire. 8. Manufacture and Storage of Dangerous Explosives. 9. Collecting and Keeping Water in a Reservoir.

The discussion has occupied more space in the reports than that

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*Nichols v. City of Duluth*, 40 Minn. 389, 42 N. W. 84 (1889); *Schultz v. Bower*, 57 Minn. 493, 496, 59 N. W. 631 (1894); *Matulys v. Philadelphia Coal and Iron Co.*, 201 Pa. St. 70, 76, 50 Atl. 823 (1902); *Richardson v. Vermont Central R. Co.*, 25 Vt. 465, 471 (1853).

In the leading case of *Humphries v. Brogden*, 12 Q. B. 739 (1850), the court, in allowing an action for withdrawal of subjacent support, relied largely upon the analogy of liability for withdrawal of lateral support, and expressly said (p. 757) "that the present action is maintainable notwithstanding the negating of negligence in the working of the mines."

There are several English cases which carry the rule of liability without negligence so far as to apply it to buildings, in cases where the presence of the building did not contribute to the giving way of the land. They hold that, in an action for causing soil to sink which would have sunk if there had been no building upon it, the damages recovered may include the harm to the buildings also. And they distinctly hold that proof of negligence is not requisite for that purpose. See *Haines v. Roberts*, 7 El. & Bl. 625 (1857), affirming 6 El. & Bl. 643 (1856); *Stroyan v. Knowles*, 6 Hurl. & Norman 454 (1861); *Brown v. Robins*, 4 Hurl. & Norman 186 (1859); *Hunt v. Peake*, N. V. R. Johnson, Ch. 705 (1860).

In Massachusetts the unqualified rule of liability in the absence of negligence "is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures." In the latter case there must be proof of actual negligence. *Gilmore v. Driscoll*, 122 Mass. 199 (1877). But in this very case plaintiff was held entitled to recover damages occasioned "by loss of and injury to her soil alone," although there was no proof of negligence. See Gray, C. J., pp. 207-08.

<sup>48</sup> See *ante*, p. 320.

<sup>49</sup> See *ante*, p. 320, as to action against a rival claimant.

concerning some of the instances of absolute liability enumerated *ante*. As to the three topics just named, our purpose is to indicate, in a very general way, what we regard as the rule established, or likely to be established, by the weight of American authority.

7. As to use of fire. Whatever the English law may be, the American common law is tolerably well settled. One who sets a fire on his own premises, indoors or out-of-doors, for a lawful purpose, is not held to insure his neighbors against damage from the spreading of such fire. He is not regarded as making an extra-hazardous use of his property, and hence acting at peril. He is liable only for negligence in setting or watching the fire. If he used reasonable care, under the circumstances, as to the place, time, and manner of setting the fire, and as to his preventing it from spreading, he is not liable.<sup>50</sup> By the weight of American authority the above rule of non-liability in the absence of negligence is applied to the use of fire for mechanical or manufacturing purposes, as well as to the use of fire for ordinary domestic or agricultural purposes.<sup>51</sup>

8. As to the manufacture and storage of dangerous explosives, it can hardly be said that any definite rule is yet established by a decisive weight of authority.

Some years ago the present writer suggested the following rule as likely to be established:

One who manufactures dangerous explosives, or who stores them in large quantities, in such a locality or under such circumstances as to cause reasonable fear to persons living in the vicinity, is liable, irrespective of negligence in manufacturing or in keeping, for all damages resulting from explosion — unless the factory or the magazine is located "so as to endanger as few persons and as little property as possible, and yet be reasonably accessible as a point of supply and distribution."

9. Does a person maintaining a reservoir act at peril?

If this question must be categorically answered, an English lawyer would probably say "Yes," citing *Rylands v. Fletcher*,<sup>52</sup> while

<sup>50</sup> COOLEY, TORTS, 3 ed., 1221-22; BURDICK, TORTS, 2 ed., 451; 2 JAGGARD, TORTS, 842; BISHOP, NON-CONTRACT LAW, § 833.

<sup>51</sup> COOLEY, TORTS, 3 ed., 1224.

<sup>52</sup> L. R. 3 H. L. 330 (1868).



an American lawyer would probably say "No, by the weight of American authority." But both lawyers would desire further information as to the location, purpose, size, and capacity of the "reservoir." Even in England it is held that maintaining a cistern on the top floor of a house for the supply of water to the occupants does not involve absolute liability to an adjoining owner if the water escapes without fault.<sup>53</sup> The Blake case was decided by a single judge. But in later cases in the higher English courts, where occupants of the house were held barred from recovery, the language of the court clearly indicates that an adjoining owner would also have failed to recover in the absence of negligence.<sup>54</sup>

Where a riparian owner builds a dam across a natural water-course in order to utilize water for manufacturing purposes, the effect is to collect and maintain in the mill pond a much larger quantity of water than would otherwise be found there. But if the dam is carefully constructed and maintained, it is settled law in the United States that the builder is not liable for harm done by its giving way.<sup>55</sup> This, says Professor Bohlen, is "a class of case on the surface practically indistinguishable from *Rylands v. Fletcher*."<sup>56</sup>

A general rule enunciated by the court in *Rylands v. Fletcher* will be commented upon later.

(To be continued.)

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CAMBRIDGE, MASS.

<sup>53</sup> *Blake v. Land, etc. Corporation*, 3 T. L. R. 667 (1887); *McCord Rubber Co. v. St. Joseph Water Co.*, 181 Mo. 678, 81 S. W. 189 (1904).

<sup>54</sup> See *Wright, J.*, in *Blake v. Woolf*, [1898] 2 Q. B. 426, 428; *Lord Moulton*, in *Rickards v. Lothian*, [1913] A. C. 263, 280.

<sup>55</sup> See cases collected in 59 U. PA. L. REV. 315, n. 22, and *City Water Power Co. v. City of Fergus Falls*, 113 Minn. 33, 128 N. W. 817 (1910).

<sup>56</sup> 59 U. PA. L. REV. 315.

## VOLUNTARY TRANSFERS OF CORPORATE UNDERTAKINGS

A CORPORATION, X, has sufficient liquid assets to meet its obligations as they mature, and is making large net profits. An offer is made by Y to purchase its assets. The directors, and the holders of a large majority of its stock, vote to accept the offer. Should a court, in a suit by a minority stockholder, enjoin the proposed transfer of assets?

Again. A corporation, X, formed in state R, has sufficient liquid assets to meet its obligations as they mature, and is making large net profits. But its business is being transacted chiefly in state S, and both R and S are collecting large sums in taxes from it. The directors, and the holders of a large majority of its stock, wish to form a corporation, Y, in state S and transfer the assets of X to Y. If a minority stockholder objects, is there any way in which such object may be accomplished?

## I

It has been stated that, at the common law, a corporation could not be dissolved without the unanimous consent of its members. In attempting to decide the cases, put above, it is wise to inquire at once whether such statement is correct.

Two questions present themselves. First, did a corporation at common law have the capacity or power to dissolve itself by its voluntary action? It did not. But it did have, at common law, the capacity or power to surrender its corporate franchise, and when this surrender was accepted by the Crown (and duly enrolled) the corporation was dissolved.<sup>1</sup>

Second, by what human beings was the corporate power to surrender its franchise to be exercised? The powers of a corporation

<sup>1</sup> See BLACKSTONE, COMMENTARIES, Book I, c. XVIII. It was indeed questioned by counsel in *Quo Warranto v. City of London* (p. 92, Pollexfen *arguendo*) whether a corporation had such capacity; but there seems to be no doubt of the accuracy of Blackstone's statement. See 2 KYD, CORPORATIONS, 465; GRANT, CORPORATIONS, 306; LINDLEY, COMPANIES, 6 ed., 138.



are, at common law, vested in its members, and the decision of the majority of the members binds the minority and is the decision of the corporation. To be sure, different arrangements may be made in the charter or by-laws, or by statute, — on the one hand, it may be provided that certain corporate acts shall be done only when two thirds, or three fourths, or all the members agree; on the other hand, it may be provided that many or all the powers may be exercised by a committee of management. But we are speaking of the common law.

Thus Blackstone said that the incorporators are considered as one person in law, and

“as one person, they have one will, which is collected from the sense of the majority of the individuals.”<sup>2</sup>

And again:

“In aggregate corporations also, the act of the major part is esteemed the act of the whole. By the civil law this major part must have consisted of two-thirds of the whole. . . . But, with us, *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations have made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act (which King Henry VIII found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations), it was therefore enacted by Statute 33 Hen. VIII, c. 27, that all private statutes shall be utterly void whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority.”<sup>3</sup>

Kyd, in his “Treatise on the Law of Corporations,” published in 1793, considered what would happen if “the acting part of the corporation” put the common seal to a deed of surrender, laid all the charters at the King’s feet, and procured the surrender to be enrolled. He was of opinion that thereby the corporate existence would have been destroyed. And he makes this comment (*italics ours*):

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<sup>2</sup> COMMENTARIES, Book I, c. XVIII.

<sup>3</sup> COMMENTARIES, Book I, c. XVIII. For further authorities in support of the text, see GRANT, CORPORATIONS, 68 and cases cited; LINDLEY, COMPANIES, 6 ed., 435, 436 and cases cited.

"It would no doubt be a breach of trust in the acting part of the corporation to make such a surrender without the authority of *the major part of all the individual members*." <sup>4</sup>

It did not occur to Kyd to doubt the propriety of a surrender, authorized by the major part of the members.

Grant, in his "Treatise on the Law of Corporations," published in 1850, said <sup>5</sup> that incorporated persons can rid themselves of corporate character by surrendering their charter into the hands of the Crown, if such surrender be accepted, and there be due enrollment. He adds in a note:

"The surrender must be the act of the majority of the whole corporation, not merely of the governing body."

Adler, in his "Summary of the Law Relating to Corporations," published in 1903, said: <sup>6</sup>

"All corporations, with the exception of municipal corporations, may surrender their charters, and (though doubt has been expressed upon the point) the best opinion seems to be that a surrender needs only a resolution of the majority like any other corporate act."

The doubt on the point is traceable to the case of *Ward v. Society of Attornies*.<sup>7</sup> A society had been chartered, and the corporation had, for value received, issued shares, upon which dividends were expected to be declared. A majority of the members came to believe that it was more fitting that no profit should accrue to the members and voted (a) that the charter be surrendered, and (b) that, prior to the delivery of the deed of surrender, all the property of the corporation should be conveyed to trustees who should ultimately convey it to a new corporation so organized that the members would "not any longer possess any individual right of property in its capital or possessions, nor be entitled to derive any individual pecuniary advantages" from the revenues. A minority stockholder obtained a preliminary injunction against such transfer and surrender.

The majority were proposing to give away the assets of the corporation, thus making valueless the shares of the minority. It is plain that such an act could not be sanctioned.

The surrender of the charter was only to take place after the con-

<sup>4</sup> Vol. 2, p. 466.

<sup>5</sup> Page 306.

<sup>6</sup> Page 134.

<sup>7</sup> 1 Collyer 370 (1844).



veyance of the property. If the conveyance was enjoined, that was an end of the matter. But the Vice-Chancellor discussed the power of the majority to make a surrender, and was of opinion (he was careful to say that he was merely stating his first impressions) that the majority had no such power.

But this opinion was not based on the ground that the majority of the members of a corporation did not, at common law, have power to surrender its charter. It was based solely on the ground that the provisions in the charter of that particular corporation were so framed that the majority had no such power. We may assume that his construction of those provisions was correct; but, even so, it is obvious that his decision has no bearing upon the question before us.

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The English courts have had occasion to consider (a) corporations created by royal charter; (b) corporations created by special act of Parliament; and (c) corporations created under general laws passed by Parliament.<sup>8</sup> Corporations created by royal charter are spoken of as corporations at common law; corporations created by special act or under general laws are spoken of as statutory corporations.<sup>9</sup> It is doubtful if a corporation created by special act could be dissolved except by statute.<sup>10</sup> The general laws permit-

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<sup>8</sup> This enumeration of the ways in which corporations may be created is not complete. Thus Blackstone says that there may be a corporation by prescription, "such as the city of London, and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created." COMMENTARIES, Book I, c. XVIII.

Thus too there is an ancient doctrine that some corporations exist by force of the common law alone—for example, church wardens were recognized by the courts as a legal unit for some purposes although they were uncharted. See BLACKSTONE, COMMENTARIES, Book I, c. XVIII; *Conservators of River Tone v. Ash*, 10 B. & C. 349, 383 (1829); WARREN, CASES ON CORPORATIONS, 2 ed., p. 3, note. There is some danger of confusion in the use of the expression "corporation at common law." It might well be used to indicate corporations which exist by force of the common law alone. But the English courts (as is stated in the text) have come to use it to indicate chartered corporations, as distinguished from statutory corporations.

The consideration of the authorities as to corporations by prescription and corporations which exist by force of the common law alone yielded nothing of value for the purposes of this article; and mention of them is therefore made only in a note.

<sup>9</sup> See *Riche v. Ashbury Railway Carriage Co.*, L. R. 9 Exch. 224, 264 (1874); *British South Africa Co. v. De Beers Mines Ltd.*, [1910] 1 Ch. 354.

<sup>10</sup> See LINDLEY, COMPANIES, 6 ed., 822. But cf. the general language used by Blackstone as to the ways in which "a" corporation may be dissolved.

ting the formation of corporations have express provisions giving the holders of three fourths of the shares of any corporation formed thereunder power to bring about its voluntary dissolution.<sup>11</sup>

The important fact for us from the English law is this: a chartered corporation, commonly called a corporation at the common law, had power to surrender its franchise to the Crown; and (in the absence of provisions to the contrary in the charter or by-laws or by statute) this power, like all other corporate powers, was vested by the common law in the members, and the decision of the majority of the members as to the exercise of this power bound the minority and was the decision of the corporation.

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Since the Revolution corporations have been created in the United States only by the legislatures of the several jurisdictions.<sup>12</sup> The executives have no power to grant charters of incorporation. We have nothing to correspond to the chartered corporations of England. Our corporations are statutory corporations (although, as a question of language, it is usual to speak of a special act by which a corporation is created as its charter). Until the middle of the eighteenth century general laws for the formation of corporations were rare. Therefore, in our early law, the courts had occasion to consider only corporations created by special act.

Did a corporation created by special act have capacity or power to dissolve itself by its voluntary action? It did not. The consent of the legislature which had created the corporation was a condition precedent to its dissolution. Thus a corporation was not dissolved, even if it ceased to do business, disposed of all its property, and notified the executive department of the government that the charter was surrendered.<sup>13</sup>

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<sup>11</sup> This is a very rough summary. For the precise provisions, see Companies (Consolidation) Act, 1908, §§ 69, 182.

<sup>12</sup> The only qualifications to be made to this statement are (1) that there are some traces in our law of the ancient doctrine that corporations may exist by force of the common law alone (see *Terrett v. Taylor*, 9 Cranch. (U. S.) 43, 46 (1815); *The Governor v. Allen*, 8 Humph. (Tenn.) 176 (1847)); and (2) that some judges, in what seems to the writer to be an unconscious revival of this doctrine, have held that a court might properly treat some associations as legal units, although there was no legislative authority therefor. See the opinion of O'Brien, J., in *Hibbs v. Brown*, 190 N. Y. 167, 184, 82 N. E. 1108 (1907). Neither of these qualifications is important for the purposes of this article.

<sup>13</sup> *Revere v. Boston Copper Co.*, 15 Pick. (Mass.) 351 (1834). For further authori-



If the legislature consented, that consent would be expressed by a statute. As a practical matter, if a corporation desired to be dissolved, it would procure the passage of a statute dissolving it. Until general laws permitting voluntary dissolution were passed, that was the only method by which corporations in this country could be voluntarily dissolved.

An act of Parliament dissolving a corporation is effective, without more. But with us, under the doctrine of the Dartmouth College case, it was not effective unless the corporation accepted the act (or the state had reserved power to repeal).

It is clear that a corporation created by special act had the capacity or power to accept a subsequent act by which it was dissolved. A corporation created by a legislature has such capacities or powers as the legislature intended it to have; and it may fairly be inferred that the legislature intended it to have power to accept acts which the legislature might subsequently pass respecting it.<sup>14</sup>

Therefore the question becomes: by what human beings was the corporate power to accept a repealing act to be exercised?

All that has been said above as to the power of a majority of the members of a chartered corporation to surrender its franchise is

ties that the consent of the legislature was necessary, see *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 28, 45 (1828); *Mechanics' Bank v. Heard*, 37 Ga. 401 (1867); *Economy Ass'n. v. Paris Ice Mfg. Co.*, 113 Ky. 246, 254, 68 S. W. 21 (1902); *Curien v. Santini*, 16 La. Ann. 27 (1861); *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49 (1834); *Town v. Bank of River Raisin*, 2 Doug. (Mich.) 530, 538 (1847); *Campbell v. Mississippi Union Bank*, 7 Miss. 625, 681 (1842); *Lake Ontario Bank v. Onondaga Bank*, 7 Hun (N. Y.) 549 (1876); *Norris v. Smithville*, 1 Swan (Tenn.) 164 (1851).

The cases of *Slee v. Bloom*, 19 Johns. (N. Y.) 456 (1821), and *Penniman v. Briggs*, 1 Hopk. (N. Y.) 300 (1824), are not *contra* to the text. They turned upon the interpretation of a statute, and held that, for the sake of the remedy given to creditors by that statute, a cessation of business and transfer of all property might be deemed to be what the legislature had in mind when it spoke of "dissolution."

<sup>14</sup> *Mobile & Ohio R. R. Co. v. State*, 29 Ala. 573, 586 (1857); *Mechanics' Bank v. Heard*, 37 Ga. 401 (1867); *Portland Co. v. Portland*, 12 Mon. B. (Ky.) 77, 79; *Revere v. Boston Copper Co.*, 15 Pick. (Mass.) 351, 360 (1834); *Town v. Bank of River Raisin*, 2 Doug. (Mich.) 530, 538 (1847); *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590 (1870); *Attorney-General v. Society*, 10 Rich. Eq. (S. C.) 604, 608 (1859); *Mumma v. The Potomac Company*, 8 Pet. 281, 287 (1834).

Of course where a corporation petitions for an act dissolving it, and such act is passed, the corporation is bound thereby, quite as much as if a formal acceptance were made after the passage of the act.

here pertinent. The principle that, unless other provisions are made by statute or by the agreement of the members, all corporate powers are vested in the members, and that a decision of the majority binds the minority and is the decision of the corporation, is a principle as fundamental in the law of statutory corporations as in the law of chartered corporations.<sup>15</sup>

It follows that, at common law, a decision of a majority of the members of a corporation to accept an act dissolving it binds the minority and is the decision of the corporation.

Reference is made to the following authorities, which are stated in chronological order (except that cases in the same jurisdiction are grouped):

*Smith v. Smith*.<sup>16</sup> The legislature had incorporated a Grand Lodge of Masons and the subordinate lodges composing the same. The Grand Lodge assumed to surrender the charter. The court was of opinion that the Grand Lodge was only one of the component parts of the corporation, that the subordinate lodges were also component parts, and that as *a majority* of those lodges had not assented to the surrender, the surrender by the Grand Lodge was not a corporate act.

"Doubtless when the whole body of a corporation chooses to surrender its rights, it is at liberty to do so, and it will be valid; but *a majority must concur who have an interest or a right* (italics ours). The officers of a corporation, or an integral portion of it . . . are not the corporation, they have no right to make the surrender."<sup>17</sup>

We are all familiar with the fact that to-day, by statute or agreement of the corporate members, the powers of a corporation are usually vested in directors (the successors of a managing committee from the members); but that, even where there are grants of powers to directors in very broad terms, the courts incline to hold that it was the intent to give directors only powers of ordinary management and that it was not the intent to take from the members the power to decide on "fundamental" matters. *Chicago City Railway Co. v. Allerton*.<sup>18</sup> And doubtless the power voluntarily to dissolve the corporation would not be held to be in directors, unless there were

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<sup>15</sup> This principle is universally conceded, and the citation of authorities seems unnecessary.

<sup>16</sup> 3 Desaus. 557 (1813).

<sup>17</sup> Pages 576-577.

<sup>18</sup> 18 Wall. 233 (1873).



very clear and express provisions to that effect. *Jones v. Bank of Leadville*.<sup>19</sup>

Now *Smith v. Smith* has been cited as authority for the proposition that a corporation cannot at common law be dissolved except by the unanimous consent of its members. But it is not an authority for that proposition, and, indeed, may fairly be cited as a *dictum* against it. When the court said that "the whole body" must consent, it referred to the body made up of all the lodges, grand and subordinate; it was simply deciding that the action of the Grand Lodge did not bind the other lodges. It was analogous to a decision that, not simply the stockholders who are directors, but the "whole body" of stockholders must decide whether there is to be a surrender. But if that "whole body" acted, the court shows plainly that it considered that a decision of a majority of its members would be the decision of the corporation.

In *Town v. Bank of River Raisin*,<sup>20</sup> the court said that "a resolution to surrender by the great body of the corporation," assented to by the legislature, would dissolve the corporation.

*Mobile & Ohio R. R. Co. v. State*.<sup>21</sup> The court decided that it was constitutional for a legislature to require a corporation, as a condition precedent to securing the extension of a loan from the state, to consent in advance to a forfeiture of its charter in case of default. It said, p. 586:

"The authorities do not sustain the proposition that there is no power in a corporation to consent to a destruction of the corporate life by forfeiture or surrender. It may be that such a consent could not be given by a majority of the corporators, and the authorities seem to go to that extent."

The court cited two cases for this statement. One case was *Ward v. Society of Attornies*, which we have already seen is, at most, only an authority that the majority may not surrender the charter if it appears from the provisions of the particular charter that they were not intended to have such power. The other case was *New Orleans R.R. Co. v. Harris*,<sup>22</sup> in which the court decided that a stockholder in one corporation cannot be made a stockholder in

<sup>19</sup> 10 Colo. 464, 17 Pac. 272 (1887).

<sup>20</sup> 2 Doug. 530, 538 (1847).

<sup>21</sup> 29 Ala. 573 (1857).

<sup>22</sup> 27 Miss. 517 (1854).

another corporation without his consent, and in which there is not even a *dictum* on the subject of dissolution.

*Lauman v. Lebanon Valley R. R. Co.*<sup>23</sup> The court considered whether, treating a sale of all the corporate property as equivalent to a dissolution of the corporation, a minority stockholder could prevent it, and decided that he could not.

"It is of the nature of his contract with his associates, by which, under legislative authority, they constituted themselves into a corporation that it is dissoluble."

The power of dissolution is in the majority,

"and without it one member of a corporation would, under some circumstances, have an almost absolute power over the investments of all the others."

*Polar Star Lodge v. Polar Star Lodge.*<sup>24</sup> The Grand Lodge of Masons had authority to grant charters to subordinate lodges, and, by force of the statute, such lodges thereupon became corporations, the corporate existence to continue so long as such lodges remained under the jurisdiction of the Grand Lodge. A majority of the members of a subordinate lodge, X, formed another corporation, Y, and assumed to donate the property of X to Y. The court, at the instance of the minority, upset this donation. In the opinion there is this *dictum*, p. 76:

"There is no doubt of the right of individual members to withdraw themselves from the lodge and from the jurisdiction of the Grand Lodge. And doubtless the whole of the members might do the same thing by their unanimous resolution. But so long as a sufficient number of members to represent and continue the corporation exists, it does not appear to us to be within the power of the majority to dissolve the corporation."

*Trisconi v. Winship.*<sup>25</sup> A minority stockholder complained because the majority had suspended the operations of the company, and voted to liquidate. The court held that he had no ground for complaint.

"Section 687 of the Revised Statutes expressly authorizes three-fourths of the stockholders of a corporation to dissolve it altogether. . . . In the absence of any express statutory prohibition, a majority of the stockholders may wind it up, for reasons by them deemed sufficient."

<sup>23</sup> 30 Pa. 42, 46, 47 (1858).

<sup>24</sup> 16 La. Ann. 53 (1861).

<sup>25</sup> 43 La. Ann. 45, 49, 9 So. 29 (1891).



*Pringle v. Construction Co.*<sup>26</sup> The court said:

"It is a fundamental principle that in a corporation organized for the exclusive benefit of the corporators, or stockholders, the majority of the members may, in their discretion, wind up its business whenever they deem this step to be in the interests of the whole association."

Considering all the Louisiana cases, it is fair to say that the court has not given sanction to the proposition that, at common law, a corporation cannot be dissolved except by the unanimous consent of its members. With regard to business corporations, the opinion of the court is expressed to the contrary.

*Abbot v. American Hard Rubber Co.*<sup>27</sup> The court decided that a certain transfer of corporate assets could not stand. In the course of the opinion it said:

"It is certain that the officers could not directly, and without the assent of the great body of the society, dissolve it; and a majority of the stockholders could not do it, against the dissent of the minority."

In support of this statement, it cites the cases of *Smith v. Smith* and *Ward v. Society of Attornies*, which we have already seen do not justify any such statement.

*Wilson v. Proprietors of Central Bridge.*<sup>28</sup> A majority of the members of a corporation voted to surrender its franchise, and the court decided, over the protest of a minority stockholder, that they had the power to make the surrender. The court considered *Smith v. Smith* and *Ward v. Society of Attornies*, and concluded that there was no authority, in cases or textbooks, that a surrender cannot legally be made, except by unanimous consent.

*Black v. Delaware Canal Co.*<sup>29</sup> The court said:

"Such a radical change as the abandonment of business cannot generally be effected by directors; their duty in most charters is to manage and conduct the business. It requires the action of the corporators themselves. In corporations where there is no provision to the contrary in the charter, the rule is that the majority governs. The assent of all is therefore not required."

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<sup>26</sup> 49 La. Ann. 301, 303, 21 So. 515 (1897).

<sup>27</sup> 33 Barb. (N. Y.) 578, 591 (1861).

<sup>28</sup> 9 R. I. 590 (1870).

<sup>29</sup> 22 N. J. Eq. 130, 407 (1871).

Nothing is said as to dissolution of the corporation, but it may fairly be inferred that the court would have held that the majority had a right to surrender the corporate franchise.

*Hancock v. Holbrook*.<sup>30</sup> The court said, p. 358:

"At the common law the right of the majority of the stock to control the operations and winding-up of corporations like this [business corporations], not of a public character, is undoubted."

*Barton v. Enterprise Loan Association*.<sup>31</sup> The articles of association provided that

"this association shall continue in operation eight years, unless the funds of the association shall be sufficient to pay all its debts and to redeem all its stock in a shorter time."

The court held, of course, that this provision must be respected by the majority.

*Parker v. Bethel Hotel Co.*<sup>32</sup>

"An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs, whenever a majority of the stockholders may deem it advisable."

*State v. Woolen Mills Co.*<sup>33</sup> A corporation, X, was formed, and nearly all its stock was subscribed. Another corporation, Y, which would be hurt by the competition of X, offered to let the stockholders of X become stockholders of Y if they would not proceed with their own undertaking. The offer was open to all the stockholders of X. The majority (272 shares) over the protest of the minority (184 shares) voted to dissolve X, and this action was brought to obtain a declaration that the corporation was dissolved. The court so declared.

"We think there can be no doubt that the majority of the stockholders have the right to control the corporation, provided they act in good faith; that is, without any attempt to take advantage of the minority for the benefit of the majority."<sup>34</sup>

The court further said,<sup>35</sup> that it thought this was a general rule, and that such rule was particularly applicable in the circumstances of the case, where the business of the corporation had not begun.

<sup>30</sup> 9 Fed. 353, 358 (1881).

<sup>32</sup> 96 Tenn. 252, 273, 34 S. W. 209 (1895).

<sup>34</sup> Page 272.

<sup>31</sup> 114 Ind. 226, 16 N. E. 486 (1887).

<sup>33</sup> 115 Tenn. 266, 89 S. W. 741 (1905).

<sup>35</sup> Page 275.



From this review of the authorities it is seen that there are three decisions, *Lauman v. Labanon Valley R. R. Co.*,<sup>36</sup> *Wilson v. Proprietors of Central Bridge*,<sup>37</sup> and *State v. Woolen Mills Co.*,<sup>38</sup> that at common law the majority of the members of a corporation have a right to consent to the dissolution of the corporation, and that their consent binds the minority, and is the consent of the corporation. There are no decisions to the contrary. While there are *dicta* both with and against the decisions, the weight of the *dicta* is with the decisions; and the *dicta* against the decisions show on their faces that they were made from misapprehension of such cases as *Ward v. Society of Attornies*<sup>39</sup> and *Smith v. Smith*.<sup>40</sup>

The general rule at common law is that (apart from some agreement of the members to the contrary) *all* corporate powers are vested in the members of the corporation, and that a decision of the majority as to the exercise of such power binds the minority. There is no exception to such general rule with respect to the power of consenting to a dissolution.

We thus conclude our consideration of the question whether it is a rule of the common law that corporate consent to dissolution can be established only where all the members consent. The answer to that question is: No.

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We have in terms considered above only the question of the dissolution of a corporation created by special act. This seemed desirable both because the question of dissolution first arose as to such corporations, and because general laws providing for the formation of corporations usually provide also for their dissolution. But if a corporation were formed under a general law, and the common law of dissolution remained, the dissolution of such corporation would be governed by the same principles as are applicable to a corporation created by special act. Thus, for example, in *State v. Woolen Mills Co.*<sup>41</sup> the corporation was formed under a general law.

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In the several states of the United States there are now express statutory provisions respecting the voluntary dissolution of corporations. The state consents to accept the surrender on terms.

<sup>36</sup> 30 Pa. 42 (1858).

<sup>38</sup> 115 Tenn. 266, 89 S. W. 741 (1905).

<sup>40</sup> 3 Desaus. 557 (1813).

<sup>37</sup> 9 R. I. 590 (1870).

<sup>39</sup> 1 Collyer 370 (1844).

<sup>41</sup> 115 Tenn. 266, 89 S. W. 741 (1905).

There is no uniformity in these statutes, but the following classification may be made:

In Indiana, Iowa, and Ohio it is provided that the dissolution may only be by the unanimous consent of the members.<sup>42</sup>

In Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, Pennsylvania, Rhode Island, and Vermont it lies in the discretion of a court to decree a dissolution. The matter may be brought before the court in various ways, usually by vote of a majority.<sup>43</sup>

In Alabama, Arkansas, California, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, and Washington a vote of the holders of a specified proportion of the stock is required, and the matter is then brought before the court for confirmation. But the statutes (if they may be taken at their language value) limit the function of the court to determining whether the provisions of the statutes have been complied with.<sup>44</sup>

In Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Kansas, Kentucky, Louisiana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, South Carolina, Texas, Virginia, West Virginia, Wisconsin, and Wyoming a vote of the holders of a specified proportion of the stock is required, and there is no necessity of confirmatory court action.<sup>45</sup>

<sup>42</sup> Indiana, BURNS, ANNOTATED STATUTES, § 5065; Iowa, CODE, § 1617 (but it may be otherwise provided in the articles); Ohio, PAGE & ADAMS, ANNOTATED GENERAL CODE, § 8741 (but see, as to buying out the minority, LAWS OF 1906, p. 229).

<sup>43</sup> Florida, COMPILED LAWS, 1914, § 2679 (majority); Maine, REVISED STATUTES OF 1904, c. 47, § 80 (majority); Maryland, LAWS OF 1908, (p. 45) c. 240, §§ 51, 52 (majority); Massachusetts, ACTS OF 1903, c. 437, § 51 (majority of each class of stock); Michigan, HOWELL, STATUTES, 1913, §§ 13560 *et seq.* (directors may petition court); Minnesota, GENERAL STATUTES, 1913, §§ 6636, 6637 (majority); Mississippi, CODE OF 1906, § 932 (two thirds); Missouri, REVISED STATUTES, § 2996 (two thirds); New Hampshire, PUBLIC STATUTES, 1901, c. 147, § 10 (one quarter may petition court); Pennsylvania, 1 PURDON, DIGEST, 818 (majority); Rhode Island, GENERAL LAWS, 1909, c. 213, § 27 (majority); Vermont, PUBLIC STATUTES, 1906, §§ 4281 *et seq.*

<sup>44</sup> Alabama, CODE OF 1907, § 3511 (two thirds); Arkansas, KIRBY, DIGEST OF STATUTES, § 954 (majority); California, CODE OF CIVIL PROCEDURE, § 1228 (two thirds); Idaho, REVISED CODES, §§ 5185 *et seq.* (two thirds); Montana, REVISED CODES, 1907, §§ 7232 *et seq.* (two thirds); North Dakota, CIVIL CODE, COMPILED LAWS, 1913, § 4565 (two thirds); Oklahoma, REVISED LAWS, 1910, § 1270 (two thirds); South Dakota, CIVIL CODE, COMPILED LAWS, 1913, § 446 (two thirds); Utah, COMPILED LAWS, 1907, §§ 3661 *et seq.* (two thirds); Washington, REMINGTON, CODE & STATUTES, 1915, § 3708 (two thirds).

<sup>45</sup> Arizona, CIVIL CODE, REVISED STATUTES, 1913, § 2105 (majority); Colorado, MILLS, STATUTES, § 1031 (two thirds); Connecticut, LAWS OF 1903, c. 194, § 29 (three



In Georgia the statutes do not provide any method of voluntary dissolution.<sup>46</sup> In Tennessee the statute has been interpreted to give the court authority to declare a corporation dissolved, upon a surrender. But the statute is silent as to how the surrender may be made. Therefore the decision in *State v. Woolen Mills Co.*<sup>47</sup> (noted above) is a decision on how a surrender may be made at common law.

## II

The members of a corporation may, of course, make any agreement they please among themselves (in the absence of statute) as to the time or mode of surrendering the corporate franchise. Such an agreement is not necessarily express; it may be implied if there be a proper basis for implication.

It has been said that there is an implied agreement between the members of every corporation organized for profit that, barring business disaster, there shall be no voluntary dissolution except by the unanimous consent of the members; and the case of *Natusch v. Irving* is cited in support of this statement. Our second inquiry is whether such statement is correct.

Persons who desire to associate for the conduct of a business undertaking may, by force of their own agreement, become partners; or they may obtain from the state the corporate franchise, in which case the undertaking is conducted by a legal unit distinct from the associates but controlled by them.

In the absence of any agreement between the partners to the contrary, each partner has, at common law, the right to bind all

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fourths); Delaware, REVISED CODE OF 1915, c. 65, § 39 (two thirds); Illinois, REVISED STATUTES, c. 32, 49 b (two thirds); Kansas, GENERAL STATUTES, § 1727 in connection with § 1714 (two thirds); Kentucky, CARROLL, STATUTES, 1915, § 561 (majority); Louisiana, ACT 267, 1914, § 28 (two thirds); Nebraska, REVISED STATUTES, 1913, § 575 (two thirds); Nevada, REVISED LAWS, 1912, § 1190 (two thirds); New Jersey, COMPILED STATUTES, 1910, Corporations, § 31 (two thirds); New Mexico, STATUTES, 1915, c. XXIII, § 36 (two thirds); New York, General Corporation Law (CONSOLIDATED LAWS OF 1909), § 221 (two thirds); North Carolina, STATUTES (PELL'S REVISAL, 1908), § 1195 (two thirds); Oregon, LORD, OREGON LAWS, 1910, § 6701 (majority); South Carolina, CIVIL CODE, 1912, § 2812 (majority); Texas, CIVIL STATUTES, 1911, art. 1205 (four fifths); Virginia, CODE, 1904, 1105 a (11) (two thirds); West Virginia, CODE (Hogg, 1913), § 2888 (majority); Wisconsin, STATUTES, 1911, 1789 (two thirds); Wyoming, COMPILED STATUTES, 1910, § 4242 (two thirds).

<sup>46</sup> See *White v. Davis*, 134 Ga. 274, 67 S. E. 716 (1910).

<sup>47</sup> 115 Tenn. 266, 89 S. W. 741 (1905).

the partners within the scope of the partnership business; and each partner has the right to dissolve the partnership.

In the absence of any agreement between the stockholders to the contrary, a single stockholder has, at common law, no such power to bind the corporation or to dissolve it as corresponds to the power of a single partner. The power to bind the corporation is in the majority of its members; the power to dissolve it (with the state's consent) is in the majority of the members.

In a partnership, any partner may dissolve. In a corporation, the majority may dissolve. If business associates were incorporated who would otherwise be partners, a court might conceivably have held that there was an implied agreement that dissolution should be regulated according to the common law of partnership; but a court could not rationally hold that there was an implied agreement that dissolution should be regulated in a manner unknown to the common law of corporations and unknown to the common law of partnerships.

The juxtaposition of the principle that any one member may dissolve, and the principle that a majority of the members may dissolve, cannot, in the nature of rational things, produce a principle that there shall be no dissolution except by the unanimous consent of the members.

Suppose there is an existing partnership, and the partners incorporate. Any one partner has now given up his right to force a dissolution; he has consented to abide by the judgment of the majority. But there is no basis for implying an agreement on his part that there shall be no dissolution unless all the stockholders agree.

The law has had occasion to consider joint-stock companies having transferable shares. These are large partnerships the organization of which is usually so molded as to produce without incorporation (so far as that is legally possible) facilities which approximate the facilities obtained through incorporation. May any member of a joint-stock company dissolve it? The courts might, within the bounds of reason, have held that there was a sufficient basis for implying an agreement that the question of dissolution should be decided as though the members were incorporated. But Lord Eldon, while he insisted that the member who desired dissolution should satisfy the common-law require-



ment of giving notice to all the partners, was of opinion that any member did have the partner right of bringing about a dissolution;<sup>48</sup> and in Massachusetts the court was of like opinion.<sup>49</sup> If the member of a joint-stock company retains his individual right to bring about a dissolution, and does not even subject himself to the will of the majority, is it proper to hold that a member of a business corporation has impliedly agreed that, even if he is one of a majority that desires to dissolve, the decision of such majority shall be subject to veto by any one of the minority?

It is also pertinent that the law has never been quick to imply agreements between partners varying the common law as to dissolution. In *Crawshay v. Manle*,<sup>50</sup> Lord Eldon said:

"Without doubt, in the absence of express, there may be an implied contract as to the duration of a partnership; but I must contradict all authority if I say that wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration is a circumstance from which is to be inferred that the partnership shall continue so long as the lease. On that argument, the court holding that a lease for seven years is proof of a partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold, that if the partners purchase in fee simple, there shall be a partnership forever."

Similarly, if the associates procure from the state a corporate franchise for a term of years or in perpetuity, this is simply a convenient instrument for the conduct of business and affords no proper basis for implying an agreement between the associates that this franchise is not to be surrendered except by unanimous consent.

The fact of accepting a franchise which may at the common law be surrendered by the majority cannot be a proper basis for implying an agreement that it shall not be surrendered except by unanimous consent.

We turn now to the case of *Natusch v. Irving*.<sup>51</sup> A prospectus was issued for the formation of an unincorporated company to grant fire and life insurance, with a capital divided into fifty thousand shares. Plaintiff subscribed for fifteen shares, paid the re-

<sup>48</sup> See *Van Sandau v. Moore*, 1 Russ. 441, 463 (1826); *LINDLEY, COMPANIES*, 6 ed., 820.

<sup>49</sup> See *Tyrrell v. Washburn*, 6 All. (Mass.) 466, 474 (1863).

<sup>50</sup> 1 Swanst. 495, 508 (1818).

<sup>51</sup> *GOW, LAW OF PARTNERSHIP*, 3 ed., Appendix, Item No. VI.

quired deposit, insured his life in the company, paid the insurance premium, and was willing to execute a proper deed of settlement. The majority of the members then undertook to carry on the additional business of marine insurance. The directors informed plaintiff that, if he was dissatisfied with the course the majority proposed to pursue, he might receive back his deposit and interest, and also have his life-insurance policy canceled and the premium returned. The plaintiff thereupon filed his bill against the president and directors for an injunction to restrain them from carrying on the business of marine insurance in the name or on the account of the company and from applying the capital of the company to any such purpose. Lord Eldon granted the injunction.

Here a minority shareholder was allowed to block the majority. Why? The associates had agreed upon a defined business venture. The plaintiff had consented to participate in that defined venture — he had not consented to participate in any ventures the majority might determine. He could not be embarked upon a strange venture; he could not be made a shareholder in a company having different purposes from those to which he had agreed.

No one questions the soundness of this decision. *Natusch v. Irving* was the case of an unincorporated company, but the principle is applicable to members of an incorporated company and has repeatedly been so applied.

The decision is that the company cannot proceed to accomplish purposes different from the original purposes without the unanimous consent of the members. It is sometimes cited as though the decision was that the company must proceed to accomplish the original purposes until there is unanimous consent to stop. This is a grave misapprehension.

What can be done in such a situation? The minority can prevent the majority from proceeding to accomplish the different purposes. But if the majority believe that it is not wise to proceed further under the original plan, they may dissolve the company and liquidate its affairs. This will put them to considerable expense and trouble. They cannot simply determine, by their own appraisal, how much the plaintiff shall receive on such liquidation and rid themselves of him by paying him such amount. He has a right to insist that the liquidation proceed according to law. But that is the extent of his right.



It is plain that this was the way the matter lay in Lord Eldon's mind. A misapprehension of this case is so fatal to proper answers to the questions considered by this article that the pertinent parts of the opinion will be given in full (*italics ours*).

"An offer is made to the plaintiff that he may receive back his deposit with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by compelling them to retire upon such terms, so to form a new company. This would as to partnership be a most dangerous doctrine. Where a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve is given) *it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means and assets of the partnership existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him, to whom they have given an offer of his deposit and interest, 'Take that, and we are a new company,' keeping the effects, means, assets and property of the old, as the property of the new partnership.*

"The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners, *whilst the partnership continues*, and not to rest upon indemnities with respect to what he has not contracted to engage in.

"A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the *loss which his partners would suffer by a dissolution* is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares."<sup>52</sup>

In a word, the minority shareholder can say to the majority: "Proceed under the original plan, or dissolve." This is an entirely

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<sup>52</sup> Pages 404-05.

different proposition from permitting him to say to the majority: "Proceed under the original plan until I say the word to quit."

### III

We return to the first case put at the opening of the article. A corporation, X, has sufficient liquid assets to meet its obligations as they mature, and is making large net profits. An offer is made by Y to purchase its assets. The directors, and the holders of a large majority of its stock, vote to accept the offer. Should a court, in a suit by a minority stockholder, enjoin the proposed transfer of assets?

The courts have sometimes reasoned thus: at common law a corporation may not be dissolved without the unanimous consent of its members; a transfer of all the assets is equivalent to dissolution; therefore at common law a corporation may not transfer all its assets without the unanimous consent of its members.

Of course a surrender of the corporate franchise and a transfer of all its assets are different things, and there is authority for the proposition that, although by statute a corporation may not be dissolved except by unanimous consent of its members, nevertheless a majority may transfer all its assets.<sup>53</sup> But no conclusion reached in this article is dependent on this distinction, — we will assume that a surrender of the corporate franchise and a transfer of all its assets are so closely associated that they should be governed by the same rules.

At common law the surrender may be made on a vote of the majority of the members; then the transfer may be made by like vote.

The power of the majority to transfer corporate assets was considered in *Treadwell v. Salisbury Mfg. Co.*<sup>54</sup> The plaintiffs, as trustees, held stock in the Salisbury Manufacturing Company, a corporation. A majority of the stockholders voted to authorize the directors to sell, at public or private sale, all the property of the corporation connected with the manufacture of goods providing, "that in case a sale be made to a new company, provision shall be made that the stockholders in this company, at the time of such sale, shall

<sup>53</sup> *Beidenkopf v. Insurance Co.*, 160 Iowa 629, 142 N. W. 434 (1913). See also *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393, 406 (1856).

<sup>54</sup> 7 Gray (Mass.) 393 (1856).



have a right to take an interest in the new one, in proportion to their respective interests in this." The plaintiffs averred that the directors proposed to sell such property, at private sale, to a new corporation composed mainly of the members of the old corporation, for \$250,000 payable in stock of the new corporation, and that this stock was to be divided among the stockholders of the old corporation.

The court seems to have accepted the contentions of the defendants as to the financial condition of the corporation. It was solvent; it could pay its debts and have a surplus "if prudently and discreetly conducted"; but a large amount of additional capital was needed for the successful prosecution of the business; the old corporation had great difficulty in procuring money; the proposed arrangement was, in the judgment of the directors, "the only proper and feasible course," and, if it were not adopted, the corporation "must stop business."<sup>55</sup>

The court said:

"We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity."<sup>56</sup>

The court also said:

"By accepting a charter, they do not undertake to carry on the business for which they are incorporated, indefinitely, and without any regard to the condition of their corporate property. . . . Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs."<sup>57</sup>

This case has frequently been cited as establishing the proposition that the holders of a majority of the stock may cause the corporate assets to be transferred if the corporation is in financial embarrassment. But the court expressed its opinion in favor of the large proposition that the majority could transfer all the cor-

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<sup>55</sup> Pages 397-98.

<sup>56</sup> Page 404.

<sup>57</sup> Pages 404, 405.

porate assets whenever they deemed it expedient to do so. The majority must act fairly toward the minority; it is pertinent to inquire if the majority have any legitimate business reasons for making the transfer; in its examination of the facts, the court found there was a legitimate business reason. This opinion cannot justly be interpreted as stating that a majority may cause the corporate assets to be transferred *only* in case the corporation is financially embarrassed. Such embarrassment may be a legitimate reason for the transfer; but there may be legitimate reasons unconnected with financial embarrassment.

Shortly before the Treadwell case, *Kean v. Johnson*<sup>58</sup> had been decided. The legislature of New Jersey authorized X, a railroad corporation, to purchase the road of Y, another railroad corporation. X took a conveyance authorized by the holders of a majority of the stock of Y. A dissenting stockholder of Y prayed that this conveyance be upset. As the Chancellor had been concerned in the cause as counsel, the matter was referred to a master, who advised that a demurrer to the bill should be overruled.

One possible interpretation of the master's report is that he was of opinion that as Y was a public-service corporation, its assets could not be transferred without the consent of the state; that the state could condition its assent in any way it saw fit; and that a proper construction of the legislative act showed that the legislature authorized the transfer only if all the stockholders of Y assented.

But the master's report may be interpreted as expressing the opinion that the legislature intended the sale to be made only if the rights of the stockholders, whatever they were by agreement between themselves, were respected; and that by agreement between themselves a sale of the assets of Y was not to be made, so long as it was prosperous, except by the unanimous consent of its members. We will adopt this interpretation of the report.

If, the master said, the stockholders

"had any right as partners or beneficiaries, it would seem to be this, that their money should be devoted to that use, and never employed in any other, *nor returned to them before they desire it.*"<sup>59</sup> (Italics ours.)

"The mere statement of the proposition," said the master, seemed to him to prove it. But, with deference to the learned

<sup>58</sup> 9 N. J. Eq. (1 Stockton) 401 (1853).

<sup>59</sup> Page 408.



master, it must be said that he treated as the same two things which are radically different.

If associates have contributed their money for the prosecution of one enterprise, of course the majority cannot vary that enterprise. If a stockholder has invested his money in a corporation authorized to run a railroad from A to B, the majority have no authority to vary the enterprise so that the railroad shall run from A to C. And if there is one corporation, Y, authorized to run a railroad from A to B, and another corporation, X, authorized to run a railroad from B to C, the majority of Y have no authority to consolidate the assets and stocks of X and Y, so that a person who consented to become a stockholder in Y shall find himself a stockholder in the consolidated corporation.

But it is a radically different matter to hold that, if persons become the stockholders of a corporation, Y, authorized to run a railroad from A to B, and the holders of a majority of the stock, come to believe, for legitimate business reasons, that it is wise to sell the corporate assets, nevertheless a minority stockholder shall have the right to compel them to continue with the enterprise, until he desires the return of his money invested in the enterprise.

If, said the master, the majority may sell the corporate assets when they see what they deem to be a better investment for their money, the minority must either join in the new enterprise "or take back their money to lie profitless on their hands, until they find another investment."<sup>60</sup> The master apparently regarded this as a great evil, and thought any such rule of law would deter persons from making corporate investments. But if the matter is to be viewed from the point of view of public policy, consider the effect of the master's doctrine upon the majority. If the majority believe that it is wise, for business reasons which seem to them plain, to terminate the venture, any minority stockholder is (under this doctrine) entitled to say to them: "As a question of judgment, you may be right and I may be wrong; but I have a legal right to be wrong, and I propose to stand upon that right." The dread of being obliged at a future date to reinvest his money might have some slight effect upon deterring an investor from making a corporate investment; but the dread of being obliged to continue the enterprise indefinitely, even if the majority believed there

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<sup>60</sup> Page 413.

were legitimate business reasons for ending it, would have a much greater effect in deterring corporate investments.

Moreover, a majority have a power at common law to surrender the corporate franchise. It cannot rationally be held that the transfer of the corporate assets requires any authorization in excess of that required for the surrender of the corporate franchise. Persons who become stockholders in a corporation must be taken to have contemplated that their affairs should be regulated by the common law, unless they show a contrary intent.

"The contract between the parties is," said the master, "that so long as the affairs of the corporation are prosperous, it shall go on unless all consent to the contrary." But what basis is there for such a *dictum*? If the corporation becomes insolvent, the sale of assets becomes a question affecting creditors rather than stockholders: why should the power of the majority of stockholders to make a sale arise only when that condition is approached? The legal right of the minority to insist upon his own judgment, though it be wrong, admittedly ceases when disaster approaches. It is not good sense to hold that he may insist upon his own judgment until disaster approaches.

All questions involving an exercise of business judgment to be decided by the stockholders are to be decided by a majority vote. When to stop is as much a question of business judgment as how to proceed.

Perpetuity or disaster. The doctrine of the master that the members are to be deemed to have agreed that the corporate enterprise should be continued forever, or until disaster approaches, finds no support in public policy, or in the common law, or in business sense.

In *Black v. Delaware Canal Co.*,<sup>61</sup> Chancellor Zabriskie strongly criticised this doctrine.

"There is no case that holds that a majority of corporators, when a time is not specified for which the enterprise must be continued, may not abandon the enterprise and sell out the property of the company. The dictum of Parker, Master, in *Kean v. Johnson*, is the only authority which I find in support of the doctrine. . . . Becoming incorporated for a specified object, without any specified time for the continuance

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<sup>61</sup> 22 N. J. Eq. 130 (1871).



of the business, is no contract to continue it forever, any more than articles of partnership without stipulation as to time."<sup>62</sup>

The corporation involved in the litigation before the Chancellor was a prosperous corporation.

It is submitted that the holders of a majority of the stock of a corporation organized for profit have the power to cause a transfer of all the corporate assets and a distribution of the proceeds (after satisfying creditors) to the stockholders whenever, for legitimate business reasons, they deem such a course wise. Financial embarrassment is not the only legitimate business reason for such a transfer. If such a corporation is engaged in a public employment, the consent of the state to the transfer becomes necessary; but this is simply an additional requirement, and in no wise affects the relation of the majority of the stockholders toward the minority.

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Some questions remain as to the mode of such transfer.

1. Each minority stockholder should receive in cash his fair proportion of the price paid for the corporate assets, if he desires cash. In the *Treadwell* case, the purchasing corporation was to pay nothing but stock; the selling corporation simply proposed to sell such shares as the minority were unwilling to receive and to give the proceeds of those shares to the minority. This strikes the writer as unfair. The corporate assets, as a whole, might have a market value of \$250,000, but if this is paid in stock having a par value of \$250,000, and some of that stock is then sold, it does not follow that this minority stock will bring par in cash — it probably will not. The price must be a fair price, and it should be computed on a cash basis. Then all stockholders may use their cash to make such new investments as they please. If the majority wish to use their cash to purchase stock in the purchasing corporation, it is proper for them to do so. Therefore it is proper for the purchasing corporation to give an option of its own stock instead of cash to those of the stockholders of the selling corporation who desire it.

In *Kean v. Johnson* no provision was made for the minority stockholder to receive anything but the stock of the purchasing corporation.

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<sup>62</sup> Pages 404-05.

2. The terms of the sale should not be more advantageous for the majority stockholders than for the minority. The majority must not, directly or indirectly, appropriate the corporate assets to themselves. Therefore if the purchasing corporation offers any option or right to the majority stockholders, it must offer such option or right to all the stockholders.

3. On the dissolution of a partnership, the court usually orders the partnership assets to be sold at public auction, unless all the partners have otherwise agreed. But the power of a single partner, we have already seen, is much greater than the power of a single stockholder. As the majority stockholders may determine whether the corporate assets are to be transferred, they should also determine on what terms the transfer is to be made. A specific offer is made for the corporate assets. The question is: should that offer be accepted? The majority should have power to close with the offer.

A prospective purchaser may be willing to pay a specified price, if the corporation will contract to convey for that price. But it by no means follows that he will be willing to make that offer at public auction when he is exposed to the competition of others.

It is common experience that sales at public auction are usually not so advantageous to the seller as private sales. The majority of the stockholders should not be stripped of the power of making a private sale.

If a minority stockholder questions the propriety of a private sale the court must inquire whether the price is a fair one — whether there is so great a chance that the property will bring more at a public sale than at this private sale that it should not abide by the judgment of the majority as to the mode of sale.

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It is impossible within the scope of this article to discuss adequately all the authorities. In support of the opinion of the master in *Kean v. Johnson*, see *Abbot v. American Hard Rubber Co.*,<sup>63</sup> *People v. Ballard*,<sup>64</sup> *Forrester v. B. & M. Co.*,<sup>65</sup> *Theis v. Spokane Gas Co.*<sup>66</sup>

On the other hand, the reasoning of the court in the *Treadwell* case has often been approved, and in some recent cases the courts

<sup>63</sup> 33 Barb. 578

<sup>64</sup> 134 N. Y. 269, 32 N. E. 54 (1892).

<sup>65</sup> 21 Mont. 544, 55 Pac. 229, 353 (1898).

<sup>66</sup> 34 Wash. 23, 74 Pac. 1004 (1904).



have recognized that the majority may cause all the assets of a corporation to be sold, even if the corporation is prosperous, and that the sale may be a private sale. See *Beidenkopf v. Insurance Co.*,<sup>67</sup> *Bowditch v. Jackson Co.*<sup>68</sup>

#### IV

We return to the second case put at the opening of this article. A corporation, X, formed in state R, has sufficient liquid assets to meet its obligations as they mature and is making large net profits. But its business is being transacted chiefly in state S, and both R and S are collecting large sums in taxes from it. The directors and the holders of a large majority of its stock wish to form a corporation, Y, in state S and transfer the assets of X to Y. If a minority stockholder objects, is there any way in which such object can be accomplished? The writer knows of no way in which this object can surely be accomplished; but if the suggestions made below are sound, the majority may either (1) accomplish this object, or (2) retire with the value of their shares in cash.

A transfer of the assets of X to Y at private sale should, it is submitted, be enjoined. X and Y are controlled by the same human beings — they are on both sides of the bargain. There are no two legal units dealing with each other at arms' length, each selfishly striving to make the best terms possible. To permit such private sale would be to permit the majority to appraise the corporate assets at their own figure and to give the minority stockholder only his share in the value of the assets as so appraised. In *Natusch v. Irving*, Lord Eldon said that it was not competent for a majority of partners, who proposed to form a new partnership on different terms, "to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by compelling them to retire upon such terms to form a new company." Such summary liquidation, at values fixed by the say-so of the majority, is not permissible. There must be a winding-up under the rules of law, and such winding-up must include "converting all the property, means and assets of the partnership existing at the time of dissolution, as beneficially as may be for the benefit of all who were partners."

<sup>67</sup> 160 Iowa 629, 142 N. W. 434 (1913).    <sup>68</sup> 76 N. H. 351, 82 Atl. 1014 (1912).

The associates have disagreed. The minority believe that a further prosecution of the venture, under the original terms, is wise; the majority do not. Under these circumstances the majority have the right to say whether the venture, under the original terms, is to be terminated; but, if it is terminated, the minority as well as the majority must be given a chance to bid for the assets. The majority must take the risk of losing control of the assets. Therefore the sale must be at public auction. If Y wins the assets, it must be because Y has outbid all others at such a sale.

There are two other requirements which, it is submitted, the majority should satisfy.

First. If the assets are exposed to sale at public auction, there is danger that there will not be any active competition from any outsiders against the bidding by Y and that the minority stockholders will not have the means to make effective competition. The result would be that the assets would go for a low figure, and the minority stockholders would receive only their share of the small proceeds realized by the sale. If this were permitted, it would put the majority in a position to say to the minority: consent to the variation of the original agreement with us, or we will sell all the assets at auction, buy at a low figure, and you will have nothing but your share of the small proceeds. This would subject the minority to great pressure to consent to the variation of the original agreement. This could, and should, be prevented by fixing an upset price which the court (if the matter is tested) finds is the present value in cash of the assets, treated as the assets of a going concern.

Second. The minority (who waive the right to bid, or to be interested in any bid, adverse to the majority) should have the right to subscribe to the securities of Y on the same terms as those enjoyed by the majority.

Under these conditions the liquidation sale would be conducted in a manner entirely fair to the minority. If a shareholder desires it, he retires with the fair value of his share in cash. If he wants to go on with the new venture, on equal terms with the others, he stands no danger of being squeezed out. If he wants by himself or with associates to bid for the assets, that is open to him.

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There are two cases which are sometimes spoken of by lawyers as holding that there can be no sale of the assets of a prosperous corporation to another corporation controlled by the majority — *Theis v. Spokane Gas Co.*<sup>69</sup> and *Riker & Son Co. v. United Drug Co.*<sup>70</sup>

In *Theis v. Spokane Gas Co.* three financial houses desired to purchase all the bonds and stock of a corporation. They purchased all the bonds and all the shares of stock except eight, but the holder of the eight refused to sell. By statute the holders of two thirds of the stock could institute proceedings for voluntary dissolution; if specified acts were done the statute provided that the court "must" decree dissolution. The holders of two thirds of the stock voted to sell the corporate assets, and they were sold at public auction to a representative of the majority; it was intended that he should transfer the assets to a new corporation, and that the owner of the eight shares should be excluded from any interest in the new corporation. The appellate court upset the transfer.

The writer cordially agrees with this result. It follows from what has been said above that such a transfer was made in a manner that was not fair to the minority stockholder.

But the court said many things which, it is submitted, are erroneous. "It is conceded," said the court, "that at common law a corporation had no power to dissolve except by universal consent of stockholders." In the first part of this article we carefully examined the common law on this point and found that, contrary to what the court here says, at common law the majority of the members had power to surrender the corporate franchise. This statement was made at the opening of its discussion of the law applicable to the case, — the court started with a conception fundamentally wrong.

The court quoted extensively from *Kean v. Johnson* and adopted the conception that the stockholders of a corporation impliedly agree with each other that the assets of the corporation shall not be sold, so long as it is prosperous, without unanimous consent. If one starts with the conception that the corporate franchise cannot be surrendered without the unanimous consent of the members, it is easy to adopt the second conception that the assets may not be transferred without unanimous consent. As, however, a majority of the members have a right at common law to surrender the

<sup>69</sup> 34 Wash. 23, 74 Pac. 1004 (1904).

<sup>70</sup> 79 N. J. Eq. 580, 82 Atl. 930 (1911).

corporate franchise, it is not rational to imply an agreement between the members, from the mere acceptance by them of the corporate franchise, so surrenderable, that the assets shall be transferred only on unanimous consent.

The court concluded that the statute permitting voluntary dissolution should be taken to alter the common law only in a case where the business was to be discontinued. There must be disintegration, a discontinuance of the business to make it a dissolution "within the meaning of the statute."

This comes close to holding that the rights of the minority stockholders are, notwithstanding the statute, the same as they are at common law. It is submitted that such a construction was unjustified; but whether it was justified or not is not the main question which interests us. Assume it is proper to construe the statute as not (for the purpose in hand) altering the common law. The question remains: What was the common law? And the answer of the court to that question was wrong.

There is danger that *Theis v. Spokane Gas Co.* may be regarded as an authority that no dissolution is a *bonâ fide* dissolution unless there is a disintegration of the business.

Any such doctrine would be so destructive of values as to be very deplorable. All courts have heretofore concurred in holding that, certainly if the corporation were financially embarrassed, the majority may cause the corporate assets to be transferred. The very idea of such a transfer is to prevent disintegration and a discontinuance of the business. The assets are transferred with intent that the business shall be continued by another legal unit. The fact that the purchasing corporation is controlled by the majority in the selling corporation does not make the transfer objectionable.<sup>71</sup>

So where the assets of a prosperous corporation are transferred to an outside purchaser (the first case put in this article) they are of course transferred with intent that the business shall be continued by another legal unit.

Now if the assets of a prosperous corporation are bought in by the majority of the stockholders at a sale by public auction (under the safeguards suggested above), what ground is there for the

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<sup>71</sup> *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393 (1856); *Phillips v. Providence Steam Engine Co.*, 21 R. I. 302, 43 Atl. 598 (1899).



charge that this is not done in good faith? To use a term like "good faith" with a vague moral flourish is very unfair. The question whether the majority have acted properly depends on the answer to two specific questions. First, had they a right to cause the assets to be so offered for sale? Second, had they a right to bid at such sale?

The person to conduct the sale should be selected by the corporate officers. If there were any question of the independence of this person, no doubt the court would enjoin a sale until a proper person was selected. But this point presents no real practical difficulty. And if the sale is being properly conducted, it is submitted that there is no valid objection to any stockholder participating in the bidding. In sales of partnership property, on dissolution, the usual course is for all partners to have leave to bid.

Therefore we are remitted to the first question: Did the majority have a right to cause the assets to be offered for sale? Did the majority have the power to bring to a termination the conduct of the enterprise *by this corporation*? It is submitted that they did, and that their hope of resuming control of the assets through purchase at the sale and using those assets in what they believe will be a more advantageous manner carries with it no taint of impropriety. They have the control under present conditions; they are risking that control in the hope of getting better conditions.

In *Riker & Son Co. v. United Drug Co.*<sup>72</sup> the directors of the United Drug Company, a New Jersey corporation, were of opinion that it was desirable that all the assets of the New Jersey corporation should be transferred to a Massachusetts corporation formed primarily for the purpose of receiving such assets and continuing the business. The plan proposed that the assets should be paid for "by delivering to the holders of stock of the New Jersey corporation in exchange for that stock shares of the stock of the Massachusetts corporation."

The court treated this as amounting to a consolidation of the New Jersey corporation with the Massachusetts corporation; held that there was no authority for the consolidation of a New Jersey corporation with a foreign corporation; and enjoined the holding of a meeting of the stockholders to vote upon dissolving the New Jersey corporation as a part of this plan. (In New Jersey the

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<sup>72</sup> 79 N. J. Eq. 580, 82 Atl. 930 (1911).

holders of two thirds of the stock may voluntarily dissolve the corporation.)

This plan was doubly objectionable. It was proposed to transfer the assets at private sale to a corporation which would be controlled by a majority of the old stockholders; and the consideration was to be the stock of the new corporation.

It is unlawful that a stockholder should, directly or indirectly, be embarked upon a venture different from that to which he agreed. If the assets and stocks of corporations X and Y are consolidated, so that a stockholder of X finds himself a stockholder in the consolidated corporation, he has been so embarked. If the assets of a New Jersey corporation are transferred to a Massachusetts corporation, and the stockholder in the New Jersey corporation finds that all he has is a right to stock in the Massachusetts corporation, he has been so embarked.

To this all would agree. But we find this language:

"The prime purpose of the scheme . . . is not the winding up of the New Jersey corporation and the distribution of its assets, or the proceeds of the sale thereof, among its stockholders, but the absorption of that company by the Massachusetts corporation, the transfer not only of its assets but of its business, to that corporation, and the future carrying on of that business by the Massachusetts corporation under the name of the defendant company. The scheme, in its essence, whatever it may be in form, is not a plan for the re-organization of the New Jersey company, nor even for the winding-up of its business and its dissolution within the meaning of the latter word as used by our Corporation act, but is a scheme for its merger into or consolidation with the Massachusetts corporation. . . . The scheme, in the carrying out of which the dissolution of the company is a proposed step, is a fraud upon the statute (the word is used in a legal, not a moral, sense)." <sup>73</sup>

Would the New Jersey court say that a sale at public auction, with the safeguards suggested above, was a fraud on the statute?

It is submitted that such a sale would not be a fraud on the statute, or on the minority stockholders. If, indeed, at common law a minority stockholder has the right that his money shall not be returned to him before he desires it, and the statute has not changed the common law, such a sale should be enjoined. But this rule, stated by the master in *Kean v. Johnson*, was repudiated in *Black v. Delaware Canal Co.*<sup>74</sup>

<sup>73</sup> Pages 582, 583.

<sup>74</sup> 22 N. J. Eq. 130 (1871).



That is the nub of the whole matter. If a minority stockholder has such a right, then he has a strangle hold. But if not, then while he may insist, on his side, that there be no variation in the terms of the undertaking by the corporation of which he is a member, the majority, on their side, may insist that the undertaking, as so conducted, be brought to a termination. The right of the minority that there shall be no change is balanced against the right of the majority that there may be a termination.

The right of the minority that there should be no change has always been clear, and conceded by everyone. The right of the majority to terminate has been clouded by misstatements and cumulative misconceptions. But the majority did have that right at common law. Nor has this been essentially altered by the statutes; the statutes may make, for example, two thirds necessary to a dissolution, where any majority was sufficient at common law; and it may be that such statutes should be construed to require that a sale made as a step preliminary to dissolution should be authorized in the same manner as a dissolution; but this is the extent of the statutory changes.

The right of the minority that there shall be no change while the corporation continues to conduct the undertaking must not be infringed, directly or indirectly. But the right of the majority to terminate the conduct of the undertaking by the corporation is entitled to equal respect, and must not be infringed, directly or indirectly.

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This is a subject fit for a treatise. It would be interesting to speak of the lease of corporate assets; of the statutes that have been passed in some states giving the majority a right to purchase the shares of minority stockholders; of agreements that may be included in organization papers which will make plain the right of the majority to sell the corporate assets; and of the possibility of amending organization papers so as to introduce such agreements. But to speak of these matters would be to prolong this article to altogether undue length.

*Edward H. Warren.*

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THE LAW SCHOOL. — A matter that should be of particular interest to the profession of law generally is the memorial pamphlet to Dean Thayer recently published by the Harvard Law School Association. The pamphlet is intended to describe Thayer's work as Dean and as law teacher, and the work of the School under his leadership. It contains a reproduction of the portrait that now hangs in Langdell Hall, together with a note of the proceedings on its presentation to the School, Mr. Dunbar's sketch of Thayer's life, Thayer's last report as Dean to the President of the University, reprints of his articles "Public Wrong and Private Action," "Judicial Administration," "Observations on the Law of Evidence," and "Liability Without Fault," and an account of Roscoe Pound, Thayer's successor in the Deanship. Dean Pound's brief address on the acceptance of the portrait is noteworthy:

"The law teachers of the second third of the nineteenth century, whose portraits hang in the reading room of Austin Hall, had to do with a body of rules received from the mother country, which, though they had been selected and adapted to America, were received and conceived of as rules, proved by their antiquity and justified in that they afforded a certain basis for human conduct even if sometimes an arbitrary one. It was enough for this generation of teachers to take the body of legal rules as they found it, to arrange if for convenient exposition, and to set forth these rules in such form as to enable the student to grasp them. We were still primarily an agricultural country. Problems of urban life were not of moment until after the Civil War, and were not pressing



till the last decade of the century. A body of rules governing property and contract and the relatively simple wrongs known to a simple, homogeneous, law-abiding community sufficed for a legal system.

"The law teachers of the last third of the nineteenth century, whose portraits hang in this hall, had a more difficult task. It was for them, as for their predecessors, to expound a received body of law. But they could not take it wholly as they found it, nor could they be content with the relatively crude systematic arrangement of the law, which sufficed for their predecessors. In all but a few jurisdictions the system of elective judges had gradually altered the character of the bench; the dockets of our appellate tribunals were choked with arrears; lawyers were beginning to be men of business quite as much as counsellors-at-law. Thus the machinery of judicial finding of law was no longer equal to the whole task imposed upon it, while at the same time the expansion of business, the development of industry, and the great mechanical advance that came in the last half of the nineteenth century made the law complex and compelled us to break over the simple procedural categories that had sufficed in the past. The teacher of law was compelled to work out analytical and historical methods; to work over the traditional mass of rules, putting them into logical coherence where possible and pointing out the historical reasons for anomalies that resisted analysis. And yet this period was closely connected with the foregoing. In each the public was chiefly concerned in certain, stable, sharply outlined rules, and the law had chiefly to secure property and contract.

"When Ezra Thayer came to teach law, thoroughly grounded in the analytical and historical methods of his teachers, the difficulty of the task had grown once more. He again could not take things wholly as he found them. New demands upon the law were making. It was no longer enough to secure property and contract. Wider interests of all kinds were clamoring for recognition, and society was calling upon the law to secure them. Administrative tribunals were springing up on every hand to compete with the courts in the administration of justice, and rising professions seeking a place in the sun were contesting the political hegemony of the bar. The teacher of law was compelled to take account of much more than the traditional common law materials and to have many weapons in his armory besides analysis and history. Others have told on other occasions how resolutely, how loyally, how tirelessly Thayer set himself to this task. In a brief five years of service he had definitely put the teaching of law in America in the path which it must pursue in another stage of development. Yet he was as closely connected with those who went before him in spirit as he was in time, and his portrait hanging beside theirs may remind us that he marks the end of one stage as well as the beginning of the other; it may remind us of that solid continuity of growth from which alone a permanent structure can result.

"Ezra Thayer's portrait belongs with those of James Bradley Thayer, and Gray and Ames in another respect. Like them he belonged to the period of scholarly lawyers with cultivated interests outside of the law; to the period when the multiplication of legal literature and complexity of legal systems and pressure of novel demands upon the law had not gone so far as to cut the law teacher off wholly from the humanities.

"As we look upon Thayer's portrait, hanging beside those of Langdell and Ames, we may be reminded of another difference between the task to which Thayer was called and that which confronted those who went before. In Langdell's time the small, homogeneous group of mature, college-trained men chiefly from New England, brought up to be self-reliant individualists, raised few problems of administration. The rapid growth of the School in numbers under Ames, bringing to it a large body of students from the whole English-speaking world, with little cohesion, many of them trained in college to be anything but self-reliant, called for a large measure of administrative activity. But this

situation grew up so gradually that the function of the Dean as a sort of father to the student body — the zealous and generous performance whereof shortened the years of Ames — was a crushing weight on the shoulders of Thayer, already called upon to bear heavy burdens in teaching and in molding new policies. While we are proud to think that the School could command the loyal, whole-hearted service of Ezra Thayer even at the cost of such a life, may we escape some feeling of humiliation? Was it necessary for a great university to put upon a highly organized, sensitive, conscientious nature the staggering burden of teaching, planning, and administering which fell upon him? It was a hard fate that sent him to the headship of the School at a time when the proportion of teachers to students had become too small, when the law was for a season in a state of fluidity, making teaching doubly difficult, when it had not yet been perceived that a large and heterogeneous body of students could not longer be dealt with by the direct contact and personal methods that had obtained in the past. It was indeed as if a race horse, having run his allotted course with all the skill and endurance that breeding and training had given him, were to be put for the rest of the day to pulling a plow.

"May his portrait urge upon those who remain and those who come after the duty of seeing to it that his devoted labors have not been in vain, of striving loyally that the passing of those who made the School what it was in the last century shall not mean the passing from these halls of what Maitland called 'the glory of Bologna, the glory of Bourges, and the glory of Harvard.'"

It is striking that the changes that Dean Pound sets forth should be taking place just as the School is completing the first century of its existence; but that striking thing is true, for the School was founded in the year 1817. A celebration of the centennial anniversary of that event, which is in preparation for next June, is hoped to give an opportunity as well for reunion meetings of many Law School classes as for the presentation of the School's work to the profession generally.

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SUSPENSION OF SENTENCE. — An historical question of great practical application to-day has just been answered by the Supreme Court in a decision holding that federal courts have no power to suspend the sentence of a convicted person during good behavior.<sup>1</sup> There had been a split of opinion among the state courts as to whether the common law conferred on them this power.<sup>2</sup> In the absence of express legislation, the judicial power of the federal courts must be determined in the light of the common law and of the history of our institutions anterior to and at the adoption of the Constitution and with due regard to the long exercise of claimed power.<sup>3</sup> Down through the eighteenth century trial courts had no power to grant new trials, and the verdict was not reviewable upon the facts by any higher tribunal. To avoid error or miscarriage of justice, the courts were accustomed to suspend sentence for various reasons.<sup>4</sup>

<sup>1</sup> *Ex parte* United States, Petitioner, U. S. Sup. Ct., Oct. Term, 1915, No. 11 original. For a fuller statement, see RECENT CASES, p. 396.

<sup>2</sup> See 25 HARV. L. REV. 739.

<sup>3</sup> *United States v. Reid*, 12 How. 361; *United States v. Nye*, 4 Fed. 888. See 2 FOSTER, FEDERAL PRACTICE, 1615. The same construction has been applied in state courts. *State v. Harmon*, 31 Ohio St. 250, 258; *Callanan v. Judd*, 23 Wis. 343, 349.

<sup>4</sup> 2 HALE, PLEAS OF THE CROWN, c. 58, p. 412; 2 HAWKINS, PLEAS OF THE CROWN, c. 51 § 8; BLACKSTONE, COMMENTARIES, Book IV, c. 31, pp. 394-95; 1 CHITTY, CRIMINAL LAW, 2 ed., 758.



The extent of this practice is highly conjectural, because of a dearth of contemporaneous authorities. Blackstone says<sup>5</sup> that reprieves were granted *ex arbitrio*<sup>6</sup> *judicis*, either before or after judgment, for various reasons, as where the judge was not satisfied with the verdict, or considered the evidence suspicious. Often where the reprieve was granted because of extenuating circumstances, to enable a pardon to be sought or bestowed, the court refused to proceed further in the future, even though no pardon had been sought or granted. In 1809 (which is so proximate to the adoption of our Constitution as to be fairly indicative of the then-existing practice), Lord Ellenborough, a preëminent criminal jurist, released a convicted prisoner upon condition that he come up again for sentence when the court should desire it.<sup>7</sup> As the courts did not do this by virtue of any statute, their power must have been established by long-continued practice. But even though the power, as exercised in the principle case, was not so exercised by the courts at common law, this is not conclusive of the power of the courts to-day. The power to suspend sentence was established there; due allowance must be made for the development of its practice and its adaptation to changing attitudes and conditions.<sup>8</sup> Thus the federal trial courts, and those of many states, exercise, in the absence of any statutes, the power to grant new trials in criminal cases;<sup>9</sup> yet such power, except as to misdemeanors, has never been recognized in England.<sup>10</sup> Nowhere in our law has there been a more radical change of attitude than that of criminal legislation to offenders,<sup>11</sup> as is manifested by probation and juvenile statutes in many States.<sup>12</sup> It was in accord with this changing attitude that Justice Miller and other justices of the Supreme Court, while sitting on circuit, suspended sentence in many cases, a practice which has long been prevalent in many

<sup>5</sup> See note 4, *supra*.

<sup>6</sup> This word is used in its original Latin sense, meaning "discretion" or "judgment."

<sup>7</sup> *Rex v. Draper*, 30 How. St. Trials 959, 1130. The power of the court seems not to have been questioned. This practice has continued in England. ARCHBOLD, CRIMINAL PLEADING AND EVIDENCE, 23 ed., 242. In 1887 the First Offenders Act, 50 & 51 VICT., c. 25, was passed, providing that the courts might release first offenders on their recognizance during good behavior. But this act was viewed as not conferring on the court any powers which it did not already possess. STEPHEN, CRIMINAL LAW, 5 ed., 17, n.; ARCHBOLD, 244. The Probation of Offenders Act, 7 EDW. VII, c. 17 a, which is much broader, was passed in 1907.

<sup>8</sup> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." McKenna, J., in *Weems v. United States*, 217 U. S. 349, 373. "But the provisions of the Constitution are not mathematical formulas having their existence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Holmes, J., in *Gompers v. United States*, 233 U. S. 604, 610.

<sup>9</sup> *United States v. Keen*, 1 McLean 429; *United States v. Conner*, 3 McLean 573; *Commonwealth v. Green*, 17 Mass. 515; *State v. Prescott*, 7 N. H. 287. See 1 BISHOP, NEW CRIMINAL LAW, 8 ed., § 1003, pp. 603-04.

<sup>10</sup> ARCHBOLD, 291. The Criminal Appeal Act, 7 EDW. VII, c. 23, in 1907, denied to the trial court the power to grant new trials in any criminal case.

<sup>11</sup> See SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT; HENDERSON, PREVENTIVE AGENCIES AND METHODS.

<sup>12</sup> See HART, JUVENILE COURT LAWS IN THE UNITED STATES. The Children's Act, 8 EDW. VII, c. 67, was passed in 1908. See HALL, THE CHILDREN'S ACT.

federal courts.<sup>13</sup> It would seem that this is a reasonable exercise of judicial power to attain a "lawful end."

The doctrine of separation of powers is said to be a further objection to the exercise by the judiciary of a suspensive power which it is thought trespasses on the pardoning power intrusted by the Constitution to the executive. A pardon reaches the punishment prescribed for the offense, and, perhaps, the guilt of the offender. Under a suspension of sentence both the conviction and the civil disabilities remain, and the prisoner may suffer eventually the prescribed punishment. Only in a narrow sense can the powers be said to be identical.<sup>14</sup> But to say that therefore the exercise of this power by the judiciary is unconstitutional is to adopt a strict, scholastic, and impractical view of the Constitution.<sup>15</sup> If the right to suspend sentence is part of the judicial power of courts, it is not probable that the framers of the Constitution intended that it be taken away by the grant of an analogous power to the executive, when the two powers existed side by side at common law.

As the right to suspend sentence is not so necessary a part of the judicial power of courts as to render their jurisdiction ineffective otherwise, it would be subject to the control of Congress.<sup>16</sup> In the principal case the statute<sup>17</sup> under which the prisoner was convicted provided for imprisonment for a minimum term of five years. By fair construction this enactment was not intended to affect the power to suspend sentence, as it merely required that the imprisonment, when suffered, should be of certain duration. It is unlikely that, if Congress intended to take away such an important power of the judiciary, it would have left its intent to be gathered by mere inference.<sup>18</sup>

The decision is especially unfortunate in that it denies to the federal judiciary a power which, where exercised, has proved highly salutary in its operation.<sup>19</sup> The trial judge has peculiarly first-hand knowledge of all the facts and extenuating circumstances. Appeals to the executive for clemency are difficult and expensive. Further, the suspension of sentence better protects society, as it reserves a check upon the prisoner, which is an incentive to good behavior in the future. The exercise of this

<sup>13</sup> See the opinion in the principal case. It has been exercised in the Massachusetts district for more than sixty years, and in numerous other circuits for many years. It was stated in the course of the argument that more than two thousand persons, then at large under suspended sentences, would be affected by the decision.

<sup>14</sup> See *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 294-95.

<sup>15</sup> "The attempt to make an exact analytical scheme of the powers of government according to this threefold division has failed. As actually drawn in America, the line is historical only in many cases." Pound, "Justice According to Law," 14 COL. L. REV. 1, 5 *et seq.* See GOODNOW, PRINCIPLES OF ADMINISTRATIVE LAW, 25-26. Thus the granting of amnesty or immunity by Congress has been upheld. *Brown v. Walker*, 161 U. S. 591. The practice, sanctioned by Congress, of granting remissions of pecuniary penalties and forfeitures by officers other than the President has been held constitutional. *The Laura*, 114 U. S. 411. Yet the power of the President to grant amnesty and to remit fines and forfeitures is undoubted. See 2 WILLOUGHBY, CONSTITUTION, §§ 688-89, pp. 1172-73.

<sup>16</sup> See 2 WILLOUGHBY, §§ 746-47, pp. 1267-69.

<sup>17</sup> Sec. 5209 U. S. REV. STAT.

<sup>18</sup> Statutes relating to crime must be interpreted in the light of the common law of crime. *United States v. Carll*, 105 U. S. 611.

<sup>19</sup> See *People ex rel. Forsyth v. Court of Sessions*, *supra*, 296; *State v. Crook*, 115 N. C. 760, 763, 20 S. E. 513, 514.



power, while discretionary, would not be arbitrary; where ordered unjustly or unreasonably, the suspension could be set aside.

While the language of the opinion of the Supreme Court denies the right of the courts to exercise the power to suspend either the imposition or the execution of a sentence, the scope of the decision is limited to the power to suspend the execution of an imposed sentence. It is possible to draw a distinction on the ground that the latter so closely resembles a pardon as to render its exercise by the courts unconstitutional, and yet the power to suspend the imposition of sentence be sustained. While the recognition of such a distinction by the Supreme Court would be fortunate, in that it would save to the courts much of this desirable power, yet on principle it would seem that the validity of the practice, in whichever form, must depend ultimately upon the same considerations.

It is hardly to be expected that the matter will be left as it is at present. The court intimates that the legislative power of Congress is adequate to meet the demands of the situation. It is submitted that the establishment of a board of probation, while helpful, would at most provide an expensive, cumbersome, and inadequate mechanism to meet the demands of the individual case.<sup>20</sup> Hence it is desirable that the legislation take the form of vesting in the courts themselves the power to suspend sentence indefinitely.<sup>21</sup>

PRACTICAL METHODS OF APPROACHING THE CONSTRUCTION OF WILLS. — Two distinctly different methods of approaching the construction of testamentary dispositions have become current.<sup>1</sup> The first, in vogue in most American jurisdictions, is the expression of a violent reaction against the over-technical and highly refined rules of construction so nicely employed by the common-law judges, the application of which often resulted in dispositions quite contrary alike to any intention the testator might have had, and to general notions of fairness, as was the case with the rule that "dying without issue" meant an indefinite failure of issue.<sup>2</sup> So the judges went to the other extreme, declaring that the testator's intention should control each case, and "that the mode of dealing with one man's blunder is no guide as to the mode of dealing with another man's blunder."<sup>3</sup> No doubt all this is true, if we know what the testator intended. But the courts have been influenced in no small degree by taking a fic-

<sup>20</sup> This is true because of the wide territory over which such a board would have to operate.

<sup>21</sup> The Act of July 25, 1910, 36 STAT. AT L. 864, established a probation system in the District of Columbia providing, *inter alia*, for the suspension of sentence by the courts.

<sup>1</sup> To what sources outside the four corners of the will the court may go for facts and circumstances, and what standard of interpretation it will apply, belongs to the science as distinguished from the practical art of construction. The science of construction determines what materials the court may use; the art of construction is the practical method the court employs in using these materials. It is of the former that Wigmore (EVIDENCE, Vol. IV), Thayer (PRELIM. TREAT. EVID.), and Hawkins (JURIDICAL SOC. PAPERS, II, 298) treat. The late Professor Gray, on the other hand, in THE NATURE AND SOURCES OF THE LAW, § 700 *ff.*, deals with the latter. See also, Holmes, "The Theory of Interpretation," 12 HARV. L. REV. 417; JARMAN, WILLS, Sweet's 6 ed., 503; *Boyes v. Cook*, 14 Ch. Div. 53 (1880).

<sup>2</sup> See GRAY, NATURE AND SOURCES OF THE LAW, § 701.

<sup>3</sup> *Ibid.*

tion as a fact. For in the vast majority of cases presenting problems of construction, the testator's mind, so far as we can judge from his words, has never contemplated a situation such as has arisen. "When the judges say they are interpreting the intention of a testator, what they are doing, ninety-nine times out of a hundred, is deciding what shall be done with his property on contingencies which he did not have in contemplation."<sup>4</sup> The facts from *Doe v. Eyre*<sup>5</sup> may be taken as an illustration. There a testatrix, having the power of appointment in fee among a class, appointed to her son in fee, but if he should not be living at his father's death, then over to one not in the class. The son predeceased his father, but, of course, the gift over was ineffective. Upon this contingency, which the testatrix never contemplated, are we to say she "intended" the divesting clause to include the vesting of the gift over, or not? Of course, no one can know what the testatrix intended. But courts can determine, in the light of what they now know which she never knew, what they would have intended had they been the testatrix. And this determination can be assigned to the testatrix, under the guise of *her* intention, and the problem is solved, at least for one case. But just what that result would be defies prediction. One court might feel that the son should keep the fee, and declare that the testatrix so "intended"; another might see a wife as the son's sole heir-at-law, and be certain that the testatrix surely intended to keep the property within the family. Which would be taken depends entirely upon the personal equation of the court trying the cause. As each and every question is necessarily uncertain until adjudicated, attorneys are at a loss to advise a client as to what his rights might be. As the late Professor Gray said, "There are jurisdictions where no counsel dares to advise on what is to be done with property that is bequeathed to 'heirs.'"<sup>6</sup> A striking example of this uncertainty is afforded in a series of Illinois decisions. In February, 1912, that court held contingent a certain remainder,<sup>7</sup> and in October, 1914, held vested a remainder to all intents and purposes the same as that in the previous case.<sup>8</sup> And again the court held contingent a certain remainder,<sup>9</sup> and within two months thereafter held vested a remainder in all essential respects the same as the first one.<sup>10</sup> Why the difference was made was not disclosed. The whole method seems to degenerate into a preliminary determination by the court of the result they would personally like to reach, and then reaching it by blandly declaring that the testator so willed.

In England the reaction against super-refined rules took on a different aspect. Objectionable technicalities and refinements have been eliminated, but the mode of dealing with one man's blunder has ever been a guide as to the mode of dealing with another's man blunder. Of course, where the testator has expressed an intention, it must be given effect.<sup>11</sup>

<sup>4</sup> GRAY, NATURE AND SOURCES OF THE LAW, § 702.

<sup>5</sup> 5 C. B. 713.

<sup>6</sup> GRAY, NATURE AND SOURCES OF THE LAW, § 704.

<sup>7</sup> *People v. Byrd*, 253 Ill. 223, 97 N. E. 293.

<sup>8</sup> *People v. Carpenter*, 264 Ill. 400, 407, 106 N. E. 302.

<sup>9</sup> *Hill v. Hill*, 264 Ill. 219, 106 N. E. 262.

<sup>10</sup> *Lachenmyer v. Gehlbach*, 266 Ill. 11, 107 N. E. 202.

<sup>11</sup> Gray, J., in *Robinson v. Martin*, 200 N. Y. 159, 166, 93 N. E. 488, 490: "There is no need to have resort to any rules of construction; for the rule of intention overrides



It is in that class of cases where he has not expressed an intention that the two methods part company. This school recognizes first of all that there is no expressed intention to carry out; that we must face the problem of what to do with a man's property where he has left no directions. Conceivably the court should attempt to find out what the testator intended but forgot or failed to express, or what he never intended at all but would have intended had he known what the courts now know. If human intelligence could determine these facts, it would be ideal. But such is impossible.<sup>12</sup> For cases in which the testator has not consciously provided, it is well to have fixed rules, as there are for descent in cases of intestacy; the two situations are closely analogous. But here are words which cover the case. Although not written in contemplation of the present contingency,<sup>13</sup> these words form the only certain and definite basis from which to determine the disposition of the property. So unless it appears from circumstances outside the will to which the court may properly look,<sup>14</sup> or from disclosures on the face of the will itself,<sup>15</sup> or from some incongruity of result that would follow,<sup>16</sup> that the

all such. It is only where the will fails to express, or to disclose, an intention that we must resort to the rules that the decisions have established."

<sup>12</sup> "It is true that the testator is a despot . . . over his property, but he is required by statute to express his commands in writing, and that means that his words must be sufficient for the purpose when taken in the sense in which they have been used by the normal speaker of English under the circumstances." Holmes, "The Theory of Legal Interpretation," 12 HARV. L. REV. 417, 420.

<sup>13</sup> The same is true of the situation where the testator did contemplate the contingency, but failed for some reason to express to us his intention in case it occurred. It is often quite impossible to tell which of the two situations we are facing.

<sup>14</sup> Thus if a testator left his "go-cart" to his son, the family "go-cart" would pass unless the son showed that the father habitually spoke of the Packard as the "go-cart," in which event the automobile would pass. We are not seeking here the testator's intention as such, but the way in which he employed the English language. It would be useless to urge that he wrote "go-cart" when he really meant to write "Packard."

<sup>15</sup> The facts in *Harman v. Dickenson*, 1 B. C. C. 91, illustrate a situation where a secondary meaning will be taken in preference to the primary meaning from facts gathered from the fact of the will itself. The testator left property in trust for two daughters, A. and B., for life, and if either died with issue, that issue to take the parent's share in fee; but if both died without issue, then over, provided that if one die without issue, the whole to go in fee to the "survivor." A. died first, leaving issue; then B. died without issue. If we take the ordinary meaning of "survivor" we find that the testator has provided for three out of four possible contingencies — the fourth being the one which has happened. But if we construe "survivor" as meaning "other," the testator has provided for every contingency. As an original question, this step seems open to the grave objection that "other" is not even a remote secondary meaning for "survivor." But this decision has established such a meaning. And since it does give a definite rule, and one not out of harmony with our notions of fairness, it is preferable to any system leaving the question open to the caprice of each court that may be called upon to construe such language. But where a word legitimately has two meanings, the application of the principle of this case is unquestionably proper.

<sup>16</sup> In *Scott v. Bargeman*, 2 P. Wms. 68, the testator left an estate for life to his widow, "and after her death in trust that J. S. shall divide £900 equally among three daughters at their respective ages of twenty-one or marriage, provided that if all three die before their legacies become payable," then over. Two of them died unmarried and under twenty-one. The surviving daughter, now over twenty-one, claimed the entire fund. The court held her entitled thereto. The daughters took contingent interests only. If we accept the primary meaning of the language, if one die, her share at once vests in the executor as intestate personalty; so when the second dies. But upon the death of the third, unmarried and under age, the whole then jumps and vests in the donee of the gift over. Such a result the law declares "incongruous." So cross-

testator was using the words in a sense other than that ordinarily ascribed thereto by dictionaries and decisions, that primary meaning will be taken and the property disposed of in strict accordance therewith.<sup>17</sup>

Contrast the results obtained from the application of the two methods. We saw in the *Eyre* case, *supra*, the uncertainty following an attempt to apply the first method. If we employ the second, we first inquire the primary meaning of the divesting clause: "If the son should not be living at the death of her husband," then over to his uncle. While it may be argued that the validity of the gift over is an integral part of the divesting clause, the better view seems that it is not. There is no reason why we should not apply this primary meaning and allow the property to pass as intestate. This the court decided in *Doe v. Eyre*, and the definite principle there established was followed in *Robinson v. Wood*.<sup>18</sup> English lawyers know exactly how their courts will deal with such a situation and upon what considerations analogous cases will be decided.

The facts in *Harrison v. Foreman*<sup>19</sup> also afford good material for comparison. After a life estate to the wife, an absolute interest was given, share and share alike, to the children, Peter and Susan; but in case of the death of either during the mother's life, the whole estate to go to the survivor, with ultimate remainders over. Both Peter and Susan died before their mother. Obviously the testator had not considered such a contingency. Applying the first method, it would be very easy to feel the testator would have liked to have the gift over take effect if both children died during their mother's life, especially if the gift over happened to be to the testator's brother and the son's sole heir was his wife. It would be just as easy to feel that he must have intended his children to take, especially if they had children surviving them or the gift over was to a distant relative or stranger. But just which one a court would take is mere conjecture. Applying the English method, we find that the divesting clause, in its primary meaning, calls for the death of *one* child in the mother's lifetime. There is no reason to depart from this meaning. Since the contingency did not happen because *both* died before their mother, the divesting clause was inoperative and the heirs of Peter and Susan were held entitled to a fee as tenants in common.

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remainders are implied to prevent this. Again this has the virtue of being an established rule.

<sup>17</sup> In *O. v. D.*, [1916] 1 I. R. 364, the testator left property to his "children." An illegitimate daughter claimed under this provision. Ross, J., in holding that she was entitled, declared that in order to find the testator so intended "we are driven to speculate and conjecture, and that is forbidden"; the primary meaning, *i.e.*, "legitimate children," must be taken in the absence of special considerations. These he found from the context of the will and the circumstances surrounding the testator. See *Robinson v. Wood*, 27 L. J. Ch. 726; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388. Lord Redesdale said, in *Jesson v. Wright*, 2 Bligh 1, 56, 57, "The rule is that technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise." So Mr. Justice Holmes says in "The Theory of Legal Interpretation," *supra*, "A word generally has several meanings even in the dictionary. You are to consider the sentence in which it stands to decide which of those meanings it bears in the particular case. . . . So when you let whatever galvanic current that may come from the rest of the instrument run through the particular sentence you are still doing the same thing."

<sup>18</sup> 27 L. J. Ch. 726.

<sup>19</sup> 5 Vesey, 207.



Whichever way the court might decide under the first method, its decision would be of no use outside the particular case. The same uncertainty would attend the next appearance of substantially similar facts. But in England this point is settled for good by this decision. The importance of practical difference between these two situations can hardly be exaggerated.

Two recent decisions give promise that the Supreme Court of Illinois has adopted the second method. In *O'Hare v. Johnston*<sup>20</sup> the testator left stocks to trustees to pay one half the income to his son and one half to his daughter for a period of thirty years, and then to distribute the fund equally between them; provided that if either child died within the thirty years without issue, the income from the whole and the principal thereof at the end of the term be paid to the survivor; and further that if either child died leaving issue, the income and principal, at the end of said period, "hereby given to its or their parents," be paid to that issue. At his death, neither child had issue. Both died within the thirty years, the son without issue, but the daughter leaving a daughter surviving her. If the granddaughter's interest vested on her mother's death, it was valid; but if contingent upon the child's surviving the thirty-year period, it was too remote. Obviously the testator intended her to take the property; but we have no expression from him as to when such interest was to vest. Probably he had never considered it. From one angle of approach, the case is easy. The testator intended the child to take; it is possible to construe the limitation to avoid the rule against perpetuities; therefore her interest is vested upon her mother's death. This is improper; here we are dealing with a rule which defeats intention. Any such attitude as that suggested would leave the application of the rule against perpetuities, wherever a possible construction would permit, to the individual prejudice of the court. The court here did not proceed along such methods, but set about to determine the effect of the language used in the light of the judicial caution and experience of previous decisions. The court declares "that the principles of former decisions should be kept in mind, for while the testator's intention is implicitly obeyed . . . yet the courts in construing that language resort to certain established rules by which particular words and expressions, standing alone, have obtained a definite meaning."<sup>21</sup> And this is what the court did. A primary meaning was being sought, where no meaning appeared clear. Analogous cases and various cautions were weighed in making the final decision, that the remainder vested on the mother's death. Although the court reverted to the familiar talk about each case being decided as distinct from all others,<sup>22</sup> there is at least a suspicion that this was resorted to in order to avoid the enforcement of several doubtful decisions previously handed down in Illinois which the court did not care to follow. Whatever the language, the method is distinctly different from that formerly used in Illinois.

The case of *Abrahams v. Saunders*<sup>23</sup> is an excellent illustration of the application of the English method. The testator devised realty to his

<sup>20</sup> 273 Ill. 458, 113 N. E. 127.

<sup>21</sup> Quoting from 2 JARMAN, WILLS, Bigelow's 6 ed., \*1651.

<sup>22</sup> Quoting from *Gulliver v. Poyntz*, 3 Wils. 141, 143.

<sup>23</sup> 113 N. E. 737.

widow for life, with remainder to his son in fee, provided that "in the event he should die without definite issue and before this will takes effect," the gift to go over. The son survived the testator but died without issue in his mother's lifetime. The *quantum* of his estate was in issue. The testator, very probably, was unconscious of any contingency which would make the ultimate disposition of his property depend upon the construction of this ambiguous phrase. The primary meaning of "before this will takes effect" is, of course, "before the testator dies." But a secondary meaning, "before the devisee takes possession," is possible. This the court adopted upon three considerations: the same words were used in another connection in such a context as to indicate that the testator employed them in this secondary meaning; in another place in the will he had specifically provided concerning his wife's death before his own in commonplace language, indicating that had he meant his son's death before his own as the contingency, he would have employed such ordinary language, and not technical language, to express it; and the further notion that the testator is presumed to prefer to have the property remain in his family. The other construction would have allowed his wife to have taken. This last reason may be legitimately used in close cases; but it should be used only as a determining rule, analogous to rules of intestacy, and not as a giving effect to the testator's intention. It has been much abused, so that it has come in some instances to militate against a son's widow taking if some construction is possible which will bar her.

It is sincerely to be hoped that the Supreme Court of Illinois will follow the lead it has established in these two cases. Under any scheme, of course, each case must be decided substantially apart from all others; but the bar is given something with which to work far more tangible than a guess as to what the Supreme Court might feel was the fair thing to do as Christian gentlemen. They know that the language used will be given its ordinary and primary meaning unless there are good reasons for accepting a secondary meaning. And they know what facts and circumstances will be weighed by the court to determine which meaning shall prevail. The ultimate decision is a matter of the court's judgment; but it may be known beforehand what considerations will be weighed on either side of the scale.

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STATUTORY AUTHORIZATION AND THE LAW OF NUISANCE. — The North Melbourne Tramways Company was authorized by legislative act and municipal regulations made thereunder to operate electric street cars, and was doing so, using the ordinary trolley pole and wire system for distributing current to its cars. One of the safeguards of its system was a ground wire running from an overhead and supposedly uncharged wire to a rail-end. This ground wire was uninsulated and was carried down inside a metal post. An accident to the system charged the overhead wire and so the ground wire and the post. The short circuit arranged by the contact with the rail-end was ineffective because a place in the ground wire was corroded. The plaintiff touched the post and suffered severe burns. When he sued, the jury found that there had been no negligence in the conduct of the defendant's enterprise. Judgment



went for the defendant. The High Court of Australia allowed an appeal and ordered a new trial. *Fullarton v. North Meldourne Electric Tramways & Lighting Co. Ltd.*, [1916] Vict. L. R. 231.

The court decides the case by saying that an electrified post standing in the public highway is a nuisance, for whose misdeeds its owners will be liable unless they are protected by the authority under which they operate.<sup>1</sup> This brings up at once the question of the extent of the immunity resulting from a legislative grant of power. On this question rules are as numerous as cases. The truth is that cases are unique; that each case depends on the precise statute under authority of which the defendant operated. A statute may in effect enact absolute liability for accidents, or certain kinds of accidents;<sup>2</sup> it is presumed it may enact complete immunity from liability.<sup>3</sup> Often it is provided that there shall be liability for "nuisances" committed.<sup>4</sup> Often there is no provision about civil liability. Then it is sometimes said that what the legislature has authorized is privileged, and that no action can lie for any of its consequences.<sup>5</sup> Also it is sometimes said that no action but the state's is barred, that the legislature has not meant to touch tort rights at all.<sup>6</sup> Necessarily, however, those tort rights that depend on the fact that the plaintiff has been injured in consequence of the defendant's doing a forbidden (penal) act<sup>7</sup> cease when the act ceases to be forbidden; one cannot recover as for "special injury from a public nuisance" when there is no public nuisance. The legislative grant always has this much effect: it takes away the prior prohibition and raises the thing permitted to the plane of a thing that never was prohibited. On that plane the thing is subject to all the rules of law excepting only that one rule by which it was forbidden.<sup>8</sup> If because of some one of those other rules the defendant would be liable, *prima facie* he is still so. It then becomes important to determine whether any further immunity was meant to be conferred. The answer to this question is said to depend on whether the power conferred covers specifically what has here been done,<sup>9</sup> on its permissive or mandatory character,<sup>10</sup> on whether it was given for a private or a public

<sup>1</sup> [1916] Vict. L. R. 231, 246, 255.

<sup>2</sup> *Hipkins v. Birmingham & Staffordshire Gas Light Co.*, 5 H. & N. 74, 6 H. & N. 250.

<sup>3</sup> See *Hammersmith & City Ry. Co. v. Brand*, L. R. 4 H. L. 171, 196; *POLLOCK, TORTS*, 10 ed., 136-38. This statement must of course in this country be limited by the Fifth and Fourteenth Amendments. See *infra*, note 15.

<sup>4</sup> *Midwood & Co. Ltd. v. Manchester Corporation*, [1905] 2 K. B. 597; *Charing Cross, etc. Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442, [1914] 3 K. B. 772.

<sup>5</sup> See *Vaughn v. Taff Vale Ry. Co.*, 5 H. & N. 679, 685; *Hammersmith & City Ry. Co. v. Brand*, L. R. 4 H. L. 171, 196.

<sup>6</sup> See *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 332.

<sup>7</sup> See E. R. Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317, 326-28.

<sup>8</sup> The way that this is commonly expressed is by the statement that the legislature shall be deemed to have intended that the authority granted should be exercised only in conformity with the private rights of parties. See *Metropolitan Asylum District v. Hill*, 6 A. C. 193, 201, 208; *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 331; *SALMOND, TORTS*, 3 ed., 221.

<sup>9</sup> *Metropolitan Asylum District v. Hill*, 6 A. C. 193; *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18.

<sup>10</sup> See Lord Watson, in *Metropolitan Asylum District v. Hill*, 6 A. C. 193, 212; *SALMOND, TORTS*, 3 ed., 220.

purpose,<sup>11</sup> and finally on inference from the whole language and circumstances of the statute.<sup>12</sup> The language of the principal case, that only acts "necessary, not for their mere occasions but in order that the statutory power might live as an effective authority"<sup>13</sup> are privileged, does not add much to prior statements.<sup>14</sup>

In the United States courts are aided toward finding liability by the Fourteenth Amendment and similar provisions in the constitutions of the states. When the conduct of the defendant's operations, though permitted by authority, is resulting in so serious an injury to the plaintiff's enjoyment of his property that a "taking" is occurring, the defendant must pay for the property so taken.<sup>15</sup> So we have "informal eminent domain proceedings" and the various procedures that in the several jurisdictions vindicate the plaintiff's right.<sup>16</sup>

In the case at bar there clearly was no taking of liberty or property,<sup>17</sup> even if the case had arisen in this country. And liability upon any other of the ordinary rules of law is far from clear. The injury resulted from acts in the course of a permitted business done without negligence and without intentional reference to the plaintiff or any of his property, nor

<sup>11</sup> See *Sinnickson v. Johnson*, 17 N. J. L. 129, 146, 150-53.

<sup>12</sup> Compare the decisions of the two courts in *Truman v. London, Brighton, & South Coast Ry. Co.*, 29 Ch. D. 89, and 11 A. C. 45.

Mr. Salmond calls on us to distinguish between "absolute" authority, that is, authority to do the act "notwithstanding . . . that it necessarily causes a nuisance," and conditional authority, that is, authority to do the act "provided it can be done without causing a nuisance." SALMOND, TORTS, 3 ed., § 69. The distinction is sound and necessary, but except in cases where the authority is mandatory or the condition is express, the statement of it gets us little beyond the statement of the primary problem. See however, *Bowen, L. J.*, in *Truman v. London, Brighton, & South Coast Ry. Co.*, 29 Ch. D. 89, 108.

<sup>13</sup> [1916] Vict. L. R. 231, 251. The bearing of this upon the facts is this: cars could have been run with the ground wire in the post made safe by insulation. Consequently for using it uninsulated and for injuries resulting through such use no immunity was granted.

<sup>14</sup> That in *Metropolitan Asylum District v. Hill*, 6 A. C. 193, for instance.

A pretty question in this connection not raised often, but suggested by a recent English case, is whether a change in circumstances following a statute can revoke or limit an immunity once given. *Hewlett v. Great Central Ry. Co.*, 114 L. T. R. 713. In that case posts standing in the street, and constituting an obstruction of the highway, were authorized as they then stood by Act of Parliament. Then ensued Zeppelin raids and ordinances reducing lights in London. The plaintiff was hurt by collision with one of the posts. The jury were allowed to say that it was negligent for the defendant to maintain the posts after the lighting ordinances without painting them white. Cf. *The Queen v. Bradford Navigation Co.*, 6 B. & S. 631. Clearly such a change in circumstances affects the decision of our primary question, that is, whether on ordinary rules of law, excluding the rule that posts in a highway are a public nuisance, the defendant would be liable. It would seem, however, that if the legislature has really meant to grant immunity, and if changes in conditions make the grant unwise, the proper remedy is an appeal to the legislature to revoke it. Cf. *Louisville Bridge Co. v. United States*, U. S. Sup. Ct., Oct. Term, 1916, No. 540.

<sup>15</sup> *Eaton v. Boston, Concord, & Montreal R.*, 51 N. H. 504. See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 62-68.

<sup>16</sup> See 2 LEWIS, EMINENT DOMAIN, 3 ed., ch. 27.

<sup>17</sup> A catastrophic and unintended injury can hardly be a "taking"; that word seems necessarily to call for an intentional reference to the plaintiff or his property, which may of course exist in a continuance of operations after it is known that they will hurt the plaintiff as well as in starting them with that knowledge beforehand. Mr. Lewis says that there never is a taking unless there is an injury for which the plaintiff could sue at common law. 1 LEWIS, EMINENT DOMAIN, 3 ed., 57.



to the obstruction in the highway that resulted. Liability is found by calling the electrified post in the highway a public nuisance.<sup>18</sup> The use of that language of course proves very little. Doubtless the post was a nuisance, in the sense that it might be abated and that the defendant was under an obligation to take it down or get the current out of it as soon as possible.<sup>19</sup> But the only purpose of saying "public nuisance" in the law of torts (except in connection with the rule that one who suffers from such a nuisance in common with the rest of the community can *not* recover), is to indicate that the plaintiff has been injured by the defendant's doing of a forbidden thing, for which, therefore, he is liable.<sup>20</sup> Here the defendant has done nothing not permitted. Doubtless if it fails after a reasonable chance to remove or de-electrify the post, it has been derelict, and if then children touch it and are hurt it will be liable. But as we have the case there is nothing but a catastrophic injury happening unexpectedly and without fault from a permitted act. Such injuries have indeed from time to time been termed nuisances, public or private, and liability imposed upon that ground.<sup>21</sup> But the fact that the interest that has been by chance

<sup>18</sup> See note 1.

<sup>19</sup> *Northern Pacific Ry. Co. v. United States*, 104 Fed. 691. In this case the weight of the defendant railway's roadbed squeezed out a lower viscous stratum which no one knew existed, and so created a reef to the injury of navigation in the Red River of the North. The defendant was ordered to move its railroad or to keep the channel clear.

<sup>20</sup> See note 7.

<sup>21</sup> *Midwood & Co. Ltd. v. Manchester Corporation*, [1905] 2 K. B. 597. In this case an accidental escape of electricity from the defendant's wires volatilized some of the bitumen in which the mains were laid. The gas so generated leaked into the plaintiff's house, took fire, and exploded. The defendant's ordinance provided that it should be liable for nuisances. Collins, M. R., said, p. 605, "If that was not a nuisance, I do not know what would be one." See also *Charing Cross, etc. Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442, [1914] 3 K. B. 772. Mr. Salmond thinks that the term nuisance should be applied to all escapes of injurious substances. SALMOND, TORTS, 3 ed., 191. But his further analysis is interesting. "In the case of continuing nuisances it is no defence that all possible care and skill are being used to prevent the operation complained of from amounting to a nuisance. . . . How far damage done accidentally, in the course of an operation which is not thus known to be a necessary source of danger, is any ground of liability in the absence of negligence is a question that will be considered later." SALMOND, TORTS, 3 ed., 199, 200. The later consideration is given in connection with discussion of the case of *Fletcher v. Rylands*, as to which Mr. Salmond's opinion is well known. SALMOND, TORTS, 3 ed., § 62. Professor Bohlen thinks that liability for the escape of injurious substances should be the same whether the escape is gradual or sudden. Bohlen, "The Rule in *Rylands v. Fletcher*," 59 U. PA. L. REV. 298, 312 *et seq.* He cites in support the case of *Bell v. Twentyman*, 1 Q. B. [1 A. & E. (N. S.)] 766, where the defendant, on whose property an obstruction in a watercourse arose without his fault, was held liable for damages done the plaintiff before he knew of the obstruction. Lord Denman said, p. 774, "If the plea had stated that he cleansed and opened the watercourse as soon after the injury as it was possible for him to do it, that would have made no difference." It must be admitted that the decision, and certainly the *dictum* of Lord Denman, is in direct conflict with what we have been urging. Against it must be put all the decisions in the country refusing to follow *Fletcher v. Rylands*, and all the cases before and after *Fletcher v. Rylands* holding that when a milldam breaks suddenly and without fault there is no liability. Inhabitants of *Shrewsbury v. Smith*, 12 Cush. (Mass.) 177; *Livingston v. Adams*, 8 Cow. (N. Y.) 175; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225. See especially *City Water Power Co. v. City of Fergus Falls*, 113 Minn. 33, 128 N. W. 817, a case in a jurisdiction normally loyal to *Fletcher v. Rylands*; and compare *Pixley v. Clark*, 35 N. Y. 520, in which seepage into the plaintiff's property occurred continually, and where it was properly held that a nuisance existed. For a clear statement of the distinction be-

endangered is common to many members of the community cannot change the ordinary principles of liability for fault.<sup>22</sup> The case is therefore one that can rest only upon *Fletcher v. Rylands*.<sup>23</sup> This then is one more situation where an acceptance of that case permits us to arrive at a decision different from the one that would have been arrived at in its absence.<sup>24</sup>

THE TANK CAR CASE. — In 1887, the date of the passage of the Interstate Commerce Act,<sup>1</sup> the purpose of government regulation was the prevention of the exorbitant and discriminatory rates and practices then on the rampage.<sup>2</sup> And the amendatory Hepburn Act of 1906<sup>3</sup> pretended to do no more than make the original act a more efficient instrument of that purpose. But later, with the increase in commerce and trade, arose a demand for more adequate service. Recently this demand has become more and more insistent. Embargoes by the railroads and complaints by the shippers are making manifest the next point of contact between the railroads and the law. It is more and more clear that the limit of production is fixed by the transportation facilities.<sup>4</sup> Furthermore, it may fairly

tween catastrophic and continuous escapes of substances, and of the reasons therefor see Jeremiah Smith, "Tort and Absolute Liability," *supra*, p. 324.

<sup>22</sup> The fact that a public interest is invaded by the condition of premises for which the defendant is responsible certainly throws on him a positive obligation to put them into shape, in spite of the fact that the condition arises from some force outside of his control, while it is rather clear that he has no such duty if all that is threatened is a private injury. Compare *Y. B. 32 Assis. pl. 10*; *VINER, ABR. tit. Nuisance, A*; *King v. Wharton* 12 Mod. 510; *Proprietors of Margate Pier & Harbor v. Margate*, 20 L. T. (N. S.) 564; *Attorney-General v. Heatley*, [1897] 1 Ch. 560; and *Northern Pacific Ry. Co. v. United States*, 104 Fed. 691, with *Sparke v. Osborne*, 7 Comm. L. R. 51, and *Reed v. Smith*, 27 West. L. R. (Can.) 190. See, however, *Smith v. Giddy*, [1904] 2 K. B. 448; *Roberts v. Harrison*, 101 Ga. 773, 28 S. E. 995; 27 HARV. L. REV. 769. Such a distinction can be understood. But no case has been found which says that when defendant has done nothing and omitted nothing he is any more liable for accidents connected with his property when the interest interfered with is common to many persons than when it is not so. *Barker v. Herbert*, [1911] 2 K. B. 633, and *Inhabitants of Shrewsbury v. Smith*, 12 Cush. (Mass.) 177, seem to hold that there is no such distinction.

<sup>23</sup> The court understood this perfectly. In the course of the argument Gavan Duffy, J., inquired, "Is the meaning of the statute that the promoters may run a tramway at their own risk, or that they may run it provided they use reasonable care?" The answer was, "In general the promoters are free from liability if their works are in good order. . . . In the case of damage caused by the escape of electricity their liability goes farther and is absolute." [1916] Vict. L. R. 231, 240. The use of the language of nuisance in connection with this kind of a case is perhaps, in a British jurisdiction, justified by the cases of *Midwood & Co. Ltd. v. Manchester Corporation*, and *Charing Cross, etc. Supply Co. v. London Hydraulic Power Co.*, *supra*, note 21.

<sup>24</sup> See E. R. Thayer, "Liability without Fault," 29 HARV. L. REV. 801, 802-13. It was apparently at one time thought in English courts that legislative authorization, whatever its effect on liability on other grounds, necessarily negated liability under *Fletcher v. Rylands*. See *Green v. Chelsea Waterworks Co.*, 10 T. L. R. 259. This opinion can hardly now be held.

<sup>1</sup> 24 STAT. AT L. 379.

<sup>2</sup> See *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 233; *New York, New Haven, etc. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391. See also S. O. Dunn, "The Interstate Commerce Commission," 63 ANNALS AM. ACAD. OF SOC. AND POL. SCI. 155, 159.

<sup>3</sup> 34 STAT. AT L. 584.

<sup>4</sup> See an address by J. J. Hill on the "Need of Greater Railway Facilities," pub-



be said that the original purpose of regulation has been practically achieved,<sup>5</sup> and the annual crop of rebates and discriminatory practices may be likened to the natural weed-growth of a competency system. The "danger-point" is shifting from these sources to the need of adequate service.<sup>6</sup> Consequently, the only public body devoted to railway supervision, the Interstate Commerce Commission, is turning into new fields of activity. This attempt has come to a head recently in the need for tank cars to carry oil in place of the barrel on a flat car. Hitherto the Commission has denied itself the power to require any particular form of service from the railroads.<sup>7</sup> Indeed, even in the more humanitarian field of safety devices, the Commission seems to have admitted its helplessness by asking for legislation.<sup>8</sup> But now the Commission has issued an order requiring the Pennsylvania Railroad to "furnish . . . tank cars in sufficient numbers to transport . . . normal shipments."<sup>9</sup> The Commission found that 91 per cent of the refined oil in the United States was transported in tank cars; that east of the Mississippi railroads own only about 3 per cent of these, the rest being privately owned; that the only other method of transporting oil, *i. e.*, in barrels on flat cars, was 3½ cents per gallon more expensive; and that the railroads and not the shippers should supply this facility.<sup>10</sup> It based its power mainly on section one of the Act: "and it shall be the duty of every carrier . . . to provide and furnish such transportation upon request."<sup>11</sup> An injunction was granted to the railroad by a federal court,<sup>12</sup> and this has just been affirmed unanimously by the Supreme Court.<sup>13</sup> The reasoning of the court was briefly: The Act had as its object the prevention of unreasonable and discriminatory rates and practices; the alleged power rests solely upon an implication from certain phrases that are more naturally explicable in a way more in consonance with the purpose of the Act; such a broad power cannot be permitted to rest upon such an implication; both Congress and the Commission have heretofore acted as if there was no such power. The demonstration is convincing, though with the Newlands Committee sitting to propose new legislation it is not probable that the

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lished in the RAILWAY LIBRARY for 1912 on page 56. And the remarks of Mr. Thom before the Newlands Committee, now sitting, to be found on pp. 59-60 of the published hearings.

<sup>5</sup> See an address by C. A. Prouty, ex-Commissioner of Interstate Commerce, "Adequate Service and Facilities Obligatory," published in the RAILWAY LIBRARY for 1912, pp. 45, 47. See the article on the "Railways in the United States" by C. Colson, reprinted in the RAILWAY LIBRARY for 1912, pp. 20, 27.

<sup>6</sup> See C. A. Prouty, *supra*, p. 48.

<sup>7</sup> *Scofield v. Lake Shore, etc. Ry. Co.*, 2 Int. Com. Rep. 90, 116; *Re Transportation of Fruit*, 10 Int. Com. Rep. 360, 373.

<sup>8</sup> See the TWENTY-SEVENTH ANNUAL REPORT OF THE COMMISSION, 82.

<sup>9</sup> *Pennsylvania Paraffine Works v. Pennsylvania R. Co.*, 34 Int. Com. Rep. 179.

<sup>10</sup> For the economic situation, see pp. 180-84 of the decision.

<sup>11</sup> There were two dissents. The year before, in *Vulcan Coal & Mining Co. v. Illinois Central R. Co.*, 33 Int. Com. Rep. 52, the Commission had required a railroad to supply an adequate number of coal cars. The only distinction between the two cases was that the former case dealt with adequacy in quantity while the latter dealt with adequacy in quality.

<sup>12</sup> *Pennsylvania R. Co. v. United States*, 227 Fed. 911. One of the three judges dissented.

<sup>13</sup> *United States v. Pennsylvania R. Co.*, U. S. Sup. Ct., Oct. Term, 1916, Nos. 340 & 341.

decision will become a leading case. But the whole course of the question through the Commission and the courts presents a very suggestive illustration of the effect of economic needs on the one hand, and future legislation on the other, upon judicial construction. In the early years of the Commission's existence, with its original purpose in mind, it vigorously repudiated this power,<sup>14</sup> and from time to time it affirmed this position.<sup>15</sup> In 1909, about the time when the service was beginning to appear inadequate, the Commission expressly reserved its opinion upon the existence of the power.<sup>16</sup> And recently in two successive decisions it claims the power outright, first with three dissents,<sup>17</sup> next with only two.<sup>18</sup> But now arises the possibility of new legislation that will make liberal construction unnecessary. A federal court reverses these decisions, but there is one dissent.<sup>19</sup> And then the Supreme Court affirms this action unanimously.<sup>20</sup> The parallel is purely chronological, be it understood, but in so far, of interest.<sup>21</sup>

So the decision is not only good law, but an admirable expository argument for a much-needed clause in such new legislation as Congress may presently pass upon the advice of the Newlands Committee now sitting. For since adequate service is the watchword of the new era, just as rate regulation was of the old, Congress should use its undoubted power<sup>22</sup> to require it both in quantity and quality and should give the Interstate Commerce Commission, or whatever body may succeed it, the power to compel it.

But we must not let an imperative conception of law run away with us; a command and penalty are not omnipotent. A quantitative addition to facilities may be gained by increased efficiency,<sup>23</sup> but a qualitative improvement like tank cars necessarily costs money. In this case the money must be borrowed, and so takes the form of credit. And credit, so long as we retain private ownership, depends upon the private investor.<sup>24</sup> The private ownership of our railroads, however overlaid with governmental regulation, is still very substantially private in its reliance upon the private investor for capital. Therefore it behooves us to inquire carefully into the complaints of the railroads as to the

<sup>14</sup> *Scotfield v. Lake Shore, etc. Ry. Co.*, *supra*.

<sup>15</sup> *Rice v. Cincinnati, etc. R. Co.*, 5 Int. Com. Rep. 193, 212; *Independent Refiner's Ass'n. v. Western New York, etc. R. Co.*, 5 Int. Com. Rep. 415, 433; *Truck Farmers' Ass'n. v. Northeastern R. Co.*, 6 Int. Com. Rep. 295, 316; *Re Transportation of Fruit*, 10 Int. Com. Rep. 360, 373. An anomalous decision in which the power seems to have been actually exercised in effect, although no mention of it was made, must be mentioned. *Preston v. Delaware, etc. R. Co.*, 12 Int. Com. Rep. 115. See 1 *DRINKER, THE INTERSTATE COMMERCE ACT*, § 268.

<sup>16</sup> *Mountain Ice Co. v. Delaware, etc. R. Co.*, 15 Int. Com. Rep. 305, 322.

<sup>17</sup> *Vulcan Coal & Mining Co. v. Illinois Central R. Co.*, *supra*.

<sup>18</sup> *Pennsylvania Paraffine Works v. Pennsylvania R. Co.*, *supra*.

<sup>19</sup> *Pennsylvania R. Co. v. United States*, *supra*.

<sup>20</sup> *United States v. Pennsylvania R. Co.*, *supra*.

<sup>21</sup> See J. C. GRAY, *NATURE AND SOURCES OF THE LAW*, §§ 385-86.

<sup>22</sup> Not only would a requirement of service seem a constitutional "regulation," but part of the common law duty of a common carrier is to keep its service abreast of the times. See 1 *WYMAN, PUBLIC SERVICE CORPORATIONS*, §§ 795-96.

<sup>23</sup> See the efforts of the Commission toward a better distribution of freight to prevent car shortage. *THIRTIETH ANNUAL REPORT*, 67-74.

<sup>24</sup> See W. Z. RIPLEY, *RAILROADS: FINANCE AND ORGANIZATION*, Preface, vi, vii.



difficulty of raising money and to investigate the reasons for those difficulties.<sup>25</sup>

CONGRESSIONAL POWER TO PUNISH FOR CONTEMPT. — It has been generally conceded that Congress has the power to punish certain contempts, but the courts have never finally determined the limitations on this power. A recent case has raised the question as to whether it extends to examinations preliminary to impeachment proceedings. The good faith of a committee of the House, deliberating on the propriety of preferring articles of impeachment against a United States District Attorney, was bitterly impugned by the accused in an open letter. The House found him guilty of contempt, and issued a warrant for his arrest; in pursuance thereof he was thrown into confinement. He applied for a writ of *habeas corpus*, but the court returned him to custody.<sup>1</sup>

Parliament has always had the general power to punish contempts;<sup>2</sup> this seems to be one of the judicial characteristics that have survived from the days when that body was clearly a court.<sup>3</sup> Other English legislative bodies, however, have never exercised such broad authority.<sup>4</sup> And it is certain that Congress has no such general prerogative;<sup>5</sup> those who seek to trace this right from analogies to Parliament as it existed at the adoption of the Constitution fail to recognize the fact that Congress was never a judicial body and that the judicial origin of Parliament is the basis of this power. English analogies lead nowhere.<sup>6</sup>

Whatever ability to punish contempts Congress may have must come from constitutional implications.<sup>7</sup> The Constitution requires that Congress legislate, and impliedly, it must be granted the power to secure itself against disorders or intimidation in its presence.<sup>8</sup> Just as any other

<sup>25</sup> See, for instance, the argument of Mr. Alfred P. Thom before the Newlands Committee, now sitting, to consider future legislation. HEARINGS BEFORE THE JOINT COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, parts I-VII.

<sup>1</sup> United States *ex rel.* Marshall v. Gordon, 235 Fed. 422 (Dist. Ct., S. D., N. Y.).

<sup>2</sup> Brass Crosby's Case, 3 Wils. 188, 198.

<sup>3</sup> "... the competence of the House of Commons to commit for a contempt and breach of privilege cannot be questioned." *Burdett v. Abbot*, 14 East 1, 149, *per* Lord Ellenborough, C. J.

<sup>4</sup> It is perfectly clear that Parliament originally was, and to some extent still is, a court. *Cf.* COKE, FOURTH INSTITUTE, 23. "All courts, by which I mean to include the two houses of parliament and the courts of Westminster-Hall. . . ." Brass Crosby's Case, *supra*, at p. 204, *per* Blackstone, J.

<sup>5</sup> *Kielly v. Carson*, 4 Moo. P. C. 63, 88, 92.

<sup>6</sup> *Kilbourn v. Thompson*, 103 U. S. 168, 197.

<sup>7</sup> See *Kilbourn v. Thompson*, 103 U. S. 168, 189.

<sup>8</sup> "Such [powers] as are not conferred by that instrument (the Constitution), either expressly or by fair implication from what is granted, are 'reserved to the States respectively, or to the people.' . . . There is no express power in that instrument conferred on either House of Congress to punish for contempts." *Kilbourn v. Thompson*, 103 U. S. 168, 182, *per* Mr. Justice Miller.

<sup>9</sup> *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 228. It is clear that *Kilbourn v. Thompson*, *supra*, does not overrule *Anderson v. Dunn* on this point, which is the true basis of the decision; the later case takes exception to *dicta* that are much more broad in their scope. See 1 STORY, CONSTITUTION, 5 ed., § 845 *et seq.*; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 191; CUSHING, LEGISLATIVE ASSEMBLIES, 2 ed., § 654. *Cf.* *Burnham v. Morissey*, 80 Mass. 226, 239, where it is said that the power to imprison for contempt is limited to cases where the power is necessarily implied from those constitutional functions and duties, to the proper performance of which it is essential.

legislative body, it can maintain order in its chambers and can resist interruptions; such power is necessary to the very existence of the body, and without it constitutional functions could not be efficiently carried out. The circumstances of the principal case present a different and almost clearer argument for the power. A committee of the House considering an impeachment is like a Grand Jury hearing evidence which may lead to the return of an indictment<sup>9</sup> — it is a judicial body and it is one provided for by the Constitution. It must surely have the power to call witnesses, and the power is of little avail if these witnesses may contemptuously refuse to respond, or may be influenced and intimidated by outside contempts of the body before whom they are testifying.<sup>10</sup> If the House is to sit in a judicial capacity, it must have the protection that a court has.

But conceding the power of this committee to punish contempts, we are confronted with the further question of whether the publication of this letter was a contempt. The federal courts may punish all contempts in their presence or so near thereto as to obstruct the administration of justice.<sup>11</sup> This has been construed to refer to acts remote from the court, but directly tending to interfere with the court in the exercise of its proper functions.<sup>12</sup> The letter in the present case obviously influenced, in one way or another, the members of the committee sitting as judges, and so opened their minds to a non-judicial bias. Furthermore, it must have tended to destroy public confidence in the House, and so to render any decision it might reach more obnoxious to public opinion, a result which, of course, would block the smooth administration of justice. A contempt certainly was committed and the House had jurisdiction to punish it.<sup>13</sup>

<sup>9</sup> See CUSHING, *LEGISLATIVE ASSEMBLIES*, 2 ed., § 641; cited in ORDONAU, *CONSTITUTIONAL LEGISLATION*, 367.

<sup>10</sup> "Where the question of . . . impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel attendance of witnesses, and their answer to proper questions, in the same manner and by use of the same means that courts of justice can in like cases." *Kilbourn v. Thompson*, *supra*, at p. 190.

In discharging its functions the House may delegate the duty of investigation to committees, and contempt of the committee is contempt of the House. See COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., 193.

<sup>11</sup> See U. S. REV. STAT., § 725.

<sup>12</sup> *United States v. Toledo Newspaper Co.*, 220 Fed. 458 (affirmed by C. C. A., December, 1916, but not yet reported). " . . . federal authorities are one in applying the principle that the criterion whether a given act is so near the presence of the court as to obstruct the administration of justice is not in the physical propinquity of the occurrence to the court, but abides in the degree of approximation the act attains in affecting the immediate duty before the court; that there may be invidious acts or misbehaviors occurring remote from the physical presence of a sitting court, in place or time or both, yet so direct in their tendency to affect the administration of the court's duties in a pending cause as to be an obstruction thereof, and, consequently, within the statute. It is the quality of the obstruction to the administration of justice that measures the propinquity of the act to the court." *United States v. Toledo Newspaper Co.*, *supra*, at p. 487, *per* Killets, J.

<sup>13</sup> In a proper case, the process of Congress is probably effective throughout the United States.

"And, as to the distance to which the process might reach, it is very clear that there exists no reason for confining its operation to the limits of the District of Columbia; after passing those limits we know no bounds that can be prescribed to its range but those of the United States. . . . Such are the limits of the legislative powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with



Accordingly, the propriety of its action will not be reviewed, any more than would the commitment for contempt by any other court of general jurisdiction under similar circumstances.<sup>14</sup>

Very probably too, when conducting an inquiry preliminary to legislation or to any other act within their constitutional powers, Congress may punish the refusal of a witness to answer relevant questions.<sup>15</sup> The Constitution intends that the functions of Congress be intelligently carried out, and, accordingly, information must be obtained before all the facts necessary to the determination of the propriety of an act can be before them. To gain such knowledge, third parties must, at times, be questioned, and if they cannot be compelled to answer, the ability to legislate efficiently is tremendously diminished; oftentimes it would be impossible to get vital information. The power to legislate does, then, by necessary implication include the power to examine witnesses and to compel them to respond by contempt proceedings. Congressional power to punish contempt must at least go so far.

VALIDITY OF A STATUTE AS A QUESTION FOR AN ADMINISTRATIVE COMMISSION. — The point that a public service commission is not competent to consider the constitutionality of a statute which it has been directed to enforce has been the occasion for a virtual unanimity of opinion on the part of these administrative bodies and courts far and wide.<sup>1</sup> The question, however, has in each instance been disposed of in summary fashion, although the answer seems by no means correspondingly obvious.

bribery and corruption, or attempt, by letter to induce the commission of either, as the inhabitant of any other section of the Union." *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 234, *per* Mr. Justice Johnson.

It is to be further noted that in the case under discussion the accused came of his own free will before the committee investigating the alleged contempt, though the warrant of arrest was probably served in New York.

<sup>14</sup> " . . . authorities . . . show conclusively that the senate of the United States has power to punish for contempts of its authority in cases of which it has jurisdiction; that every court, including the senate and house of representatives, is the sole judge of its own contempts; and that in case of the commitment for contempt in such a case, no other court can have the right to inquire into the correctness or propriety of the commitment; or to discharge the prisoner on *habeas corpus*; or that the warrant of commitment need not set forth the particular facts which constitute the alleged contempt." *Ex parte Nugent*, 18 Fed. Cas. 471, 481, *per* Chief Judge Cranch. See CUSHING, *LEGISLATIVE ASSEMBLIES*, 2 ed., § 649.

*Cf.* *Burdett v. Abbot*, 14 East 1, 149, and *Case of Sheriff of Middlesex*, 11 A. & E. 273, 289, where it is stated that if the warrant states that the prisoner was committed for something other than a contempt or which could not be a contempt, then the court will act as justice requires. A general warrant committing for contempt is however held non-reviewable.

<sup>15</sup> See *In re Chapman*, 166 U. S. 661, 671. See COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., 193.

<sup>1</sup> *Director of Posts v. Inchausti & Co.*, P. U. R. 1916 E, 849; *Re Marin Municipal Water Dist.*, P. U. R. 1915 C, 433; *Scobey v. Great Northern R. Co.*, P. U. R. 1915 A, 950; *Re Cochise County*, P. U. R. 1915 D, 220; *Re Marysville Light & Water Co.*, P. U. R. 1915 D, 374; *State ex rel. Missouri Southern R. Co. v. Public Service Comm.*, 259 Mo. 704, 727, 168 S.W. 1156. In *Knott v. Southwestern Tel. & Tel. Co.*, P. U. R. 1915 E, 963, 985, the Commission at one point expressly denies its power to decide a question of the constitutionality of a statute, proceeding later, however, to consider such a question.

At the outset it is to be noticed that the practice of the judiciary to declare statutes unconstitutional is not the necessary concomitant of a written constitution,<sup>2</sup> but certainly it is much too late to question the settled existence of this power in our American courts.<sup>3</sup> Its tremendous importance and the danger of injudicious exercise, however, have found recognition in the chain of safeguards with which the courts have surrounded it. For example, there is the well-settled principle that a constitutional point, though squarely raised, will not be determined if the case can be disposed of on another ground;<sup>4</sup> the rule that a statute is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt;<sup>5</sup> and finally the rule that no one is permitted to attack a statute who is not directly affected by its operation.<sup>6</sup>

This last-named rule has had its effect upon the relation of executive officials to statutes the validity of which is in question. In general, it may be said that it is the duty of a ministerial officer to assume that the legislature has not exceeded its authority and act accordingly, since in a *mandamus* proceeding he will not, by the weight of authority, be permitted to defend on the ground of the unconstitutionality of the statute, his interest being conceived of as too remote.<sup>7</sup> To allow every petty official to set himself up as a judge would obviously be a serious menace to any orderly scheme of government.<sup>8</sup> On the other hand, one is confronted with the oath to support the Constitution required of public officers. But since the Constitution needs for its support the expeditious enforcement of the laws quite as much as the non-enforcement of what are not laws, query whether in the long run it will not be better served by unhesitating obedience to the legislature rather than recalcitrant tactics on the part of officials. The answer depends to some extent

<sup>2</sup> See "The Origin and Scope of the American Doctrine of Constitutional Law" by the late James B. Thayer, in 7 HARV. L. REV. 129, 130. See also 9 HARV. L. REV. 277.

<sup>3</sup> The leading case is *Marbury v. Madison*, 1 Cranch (U. S.) 137.

<sup>4</sup> *Ex parte Randolph*, 2 Brock. (U. S.) 447.

<sup>5</sup> *Comm. v. Smith*, 4 Bin. (Pa.) 117; *So. Morgantown v. Morgantown*, 49 W. Va. 729, 40 S. E. 15.

<sup>6</sup> *Williamstown v. Carlton*, 51 Me. 449; *Supervisors v. Stanley*, 105 U. S. 305; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Comm. v. Wright*, 79 Ky. 22.

<sup>7</sup> *Ames v. People*, 26 Colo. 83, 56 Pac. 656; *State ex rel. Cruce v. Cease*, 28 Okla. 271, 114 Pac. 251; *Thoreson v. State Board of Examiners*, 19 Utah 18, 57 Pac. 175; s. c. 21 Utah 187, 60 Pac. 982; *Franklin County Comm'rs v. State ex rel. Patton*, 24 Fla. 55, 3 So. 47; *Comm. v. James*, 135 Pa. 480, 19 Atl. 950; *Smyth v. Titcomb*, 31 Me. 272; *People ex rel. Atty. Gen. v. Salomon*, 54 Ill. 39; *State ex rel. New Orleans Canal, etc. Co. v. Heard*, 47 La. Ann. 1679, 18 So. 746. The leading case *contra* is *Van Horn v. State ex rel. Abbott*, 46 Neb. 62, 64 N. W. 365.

An exception, however, is generally made where the officer defending will incur liability by acting under the void statute, as in the case of an auditor who is compelled to pay out money. *Denman v. Broderick*, 111 Cal. 96, 43 Pac. 516. But see *Smyth v. Titcomb*, 31 Me. 272, 286. The acts of a commission, however, would not, it is submitted, be likely to be of this character.

But even a state auditor or similar officer would have no appeal to the federal courts, although it is the federal Constitution which the statute in question is claimed to contravene. See *Braxton County Court v. West Virginia*, 208 U. S. 192, discussed in 21 HARV. L. REV. 438. See also *Smith v. Indiana*, 191 U. S. 138.

<sup>8</sup> See *People ex rel. Atty. Gen. v. Salomon*, 54 Ill. 39, 46.



at least on the servant's chances of arriving at a correct conclusion on the question of constitutionality.<sup>9</sup>

In addition to courts and executive officials, there is another type of governmental agency to which conceivably a question of constitutionality might be presented — namely, an inferior legislative body as, for example, a municipal corporation.<sup>10</sup> The course of action which such an organ should follow seems clear. The judicial and executive departments enjoy the distinction of being coördinate with the legislature; whereas this body is plainly subordinate, a creature of the legislature purely and simply. The legislature's mandate should be its gospel.<sup>11</sup>

Having examined the relation of the executive, judicial, and legislative branches of the government toward questions of the validity of statutes, the writer's task now becomes a mere matter of indexing a commission in our tripartite scheme of government — does a commission function as a legislature, an executive, or a court? The line of demarcation between the first two cannot be drawn with chiseled nicety; one must be content with perceiving that a commission more nearly resembles an executive body. But for the purposes of our immediate problem it is unnecessary to pursue the inquiry thus far; we may stop when we have negatived the likelihood of a commission's being a judicial body. Some of the more important reasons may here be noticed. The personnel of a commission seems almost conclusive against its judicial character, composed entirely as it usually may be of individuals untrained in the law.<sup>12</sup> From this fact one may argue directly, that is, aside from where a commission stands in the division of powers, against the propriety of its sitting on questions of constitutionality. A commission frequently appears itself as a plaintiff, or defendant — rather a strange rôle for a court.<sup>13</sup> Furthermore its hearings are not conducted according to the technical rules of evidence.<sup>14</sup> Both on principle and by the great preponderance of authority<sup>15</sup> a commission is not to be classified as a court, and since of the three so-called coördinate departments of government courts alone are entitled to declare statutes unconstitutional, it follows that commissions do not possess this power.

<sup>9</sup> An examination of the decisions handed down by the Supreme Court of the United States between the dates October 13, 1915, and June 12, 1916, in cases involving the validity of statutes, disclosed the fact that in fifty out of fifty-nine instances the statute was held to be constitutional.

<sup>10</sup> The notion that a legislature can under no circumstances delegate its powers has been abandoned. See GOODNOW, *PRINCIPLES OF ADMINISTRATIVE LAW*, 41. See also 21 HARV. L. REV. 205.

<sup>11</sup> A state legislature would seem to occupy a similar position toward the state constitution where doubts as to its conformity to the federal Constitution are raised.

<sup>12</sup> The Interstate Commerce Act does not require the appointment of lawyers to the Commission. The Commission is at present composed of four lawyers and three non-lawyers.

<sup>13</sup> See *Peavey v. Union Pacific R. Co.*, 176 Fed. 409.

<sup>14</sup> See 29 HARV. L. REV. 208.

<sup>15</sup> *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 336; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567; *Interstate Commerce Comm. v. Cincinnati, U. O. & T. P. R. Co.*, 64 Fed. 981; *Southern R. Co. v. Railroad Comm.*, 172 Ind. 113, 87 N. E. 966; *State ex rel. Taylor v. Missouri Pacific R. Co.*, 76 Kan. 467, 92 Pac. 606. WYMAN, *PUBLIC SERVICE CORPORATIONS*, 1232, and 25 HARV. L. REV. 704. Cf. *People ex rel. Railroad v. Willcox*, 194 N. Y. 383, 87 N. E. 517.

## RECENT CASES

**ADMIRALTY — EFFECT OF PAYMENT IN FULL BY AN ENEMY UNDERWRITER ON A PRIOR SEIZURE OF NEUTRAL GOODS.** — Goods belonging to a neutral, but insured by German underwriters, were seized by Great Britain. The underwriters paid the owners in full as for a constructive total loss, and now claim the goods or proceeds in the name of the neutral shipper. *Held*, that the proceeds be condemned as enemy property. *The Palm Branch*, [1916] P. 230.

The original seizure was unjustifiable, for the goods were owned by a neutral. Yet the inevitable result of such seizure was the change to ownership by the belligerent underwriters. For the capture of goods insured against war risks is a *prima facie* constructive total loss giving the owner the right to abandon. See *Peele v. Merchants Insurance Co.*, 3 Mason (U. S. C. C.) 27, 52, 65. See 6 EDW. 7, c. 41, § 60, sub-sec. 2 (Marine Insurance Act.) And the underwriter is liable whether the capture is lawful or unlawful. *Goss v. Withers*, 2 Burr. 683, 695. An abandonment by the owner has two results: the insurer is entitled to take over the interest of the assured in whatever may remain of the property, and the insurer is subrogated to all the rights and remedies of the assured as from the time of the casualty causing the loss. See *Stewart v. Greenock Ins. Co.*, 2 H. L. Cas. 159. See 6 EDW. 7, c. 41, § 79. Neither of these effects would seem to validate the original seizure. Subrogation in the present case should give the underwriters a perfect claim, although the court might well refuse to entertain their suit, *pendente bello*, because of their enemy citizenship. Cf. 28 HARV. L. REV. 312. And the underwriters' assumption of the shipper's title *because* of the capture could not retroactively justify the capture. Nor could a new seizure of goods or proceeds after the goods had been landed and sold be condoned in the face of the generally understood principle of international law that enemy goods in a belligerent country will not be confiscated. WESTLAKE, INTERNATIONAL LAW, Part II, 42. According to the rule in the present case, it would result that enemy-insured goods are as liable to confiscation as enemy-owned goods.

**AGENCY — RESPONSIBILITY OF EMPLOYER FOR ASSAULT BY EMPLOYEE — RELATIONAL DUTY.** — An employee of a corporation which held itself out to diagnose, treat and furnish appliances for defective feet and limbs, feloniously assaulted the plaintiff during the course of a private examination made after the corporation had agreed to take the plaintiff's case. The plaintiff sues the corporation. *Held*, that she may recover. *Stone v. Eisen Co.*, 219 N. Y. 205.

The theory of the plaintiff's complaint is tort. The court, however, granted a recovery on the basis of a breach of an implied term in the contract that the plaintiff shall be treated courteously. Undoubtedly, it is in accordance with the purposes of code procedure to allow a recovery if warranted on any theory of the facts. *Bruheim v. Stratton*, 145 Wis. 271; *Cockrell v. Henderson*, 81 Kan. 335, 105 Pac. 443; *Connor v. Philo*, 117 App. Div. 349, 102 N. Y. Supp. 427. But see *Barnes v. Quigley*, 59 N. Y. 265. But as a matter of substantive law the implication of such a term in the contract is pure fiction. The true basis of the decision must be found elsewhere. As the court seems to have recognized, it cannot be founded on pure agency doctrines. For acts which constitute an assault are, as a rule, outside the scope of a servant's employment and do not bind the master. *Hardeman v. Williams*, 150 Ala. 415, 43 So. 726. MECHEM, AGENCY, 2 ed., § 1977. But railroads, and according to some cases, innkeepers, themselves without fault, are held responsible for assaults by employees on passengers and guests. *Craker v. Chicago, etc. R.*, 36 Wis. 657; *Stewart v. Brooklyn, etc. R.*, 90 N. Y. 588; *Chicago, etc. R. v. Flexman*, 103 Ill. 546; *Goddard v. Grand Trunk Ry.*, 57 Me. 202; *Stanley v. Bircher's*



*Ex'rs*, 78 Mo. 245. See also *New Orleans, etc. R. v. Jopes*, 142 U. S. 18, 27. The employer's duty which is violated in these cases is one based on the existing relationship. *Delaware, etc. R. v. Trautwein*, 52 N. J. L. 169, 19 Atl. 178; *Chicago, etc. R. v. Flexman, supra*. See also *Gillespie v. Brooklyn Hts. R.*, 178 N. Y. 347, 352, 70 N. E. 857, 859; 28 HARV. L. REV. 620. The justification for imposing such an enlarged responsibility is found in the large degree to which the public in such situations surrender the care of their persons during periods of particular danger. *Hayne v. Union St. Ry.*, 189 Mass. 551. See also *Clancy v. Barker*, 71 Neb. 83, 92, 98 N. W. 440. The true basis of the decision in the principal case must be along the lines of the doctrine just laid down. If so, it is an extension into what the court recognizes as private business of a relational responsibility hitherto confined to public service enterprises. But see *Dickson v. Waldron*, 135 Ind. 507, 35 N. E. 1. If it is recognized that the true test for such extension is the degree of danger and bodily surrender in each situation, there is no reason why this should not be done. It becomes then a question of fact and policy rather than of law. Thus, see *Clancy v. Barker*, 71 Neb. 83, 101, 98 N. W. 440; *Clancy v. Barker*, 131 Fed. 161, 165, 166, 172; *Rahmel v. Lehdorff*, 142 Cal. 681, 76 Pac. 659.

CONFLICT OF LAWS — EFFECT AND PERFORMANCE OF CONTRACTS — APPLICATION OF FRENCH MORATORIUM TO A CONTRACT TO BE PERFORMED IN ANOTHER COUNTRY. — A bill of exchange was drawn and accepted in France, payable in New York. The holder sues on it in New York, after it is due according to its terms, but before it is due under the French moratorium. *Held*, that the bill is not due. *Taylor v. Kouchakji*, 56 N. Y. L. J. 813.

The authorities on what law governs the validity of a contract are in great confusion. Probably the most prevalent rule makes it depend on the intention of the parties. *Hamlyn & Co. v. Talisker Distillery*, [1894] A. C. 202. According to another line of cases the validity is governed by the law of the place of performance. *Douglass v. Paine*, 141 Mich. 485, 104 N. W. 781. Still a third rule makes it governed by the law of the place where the contract is made. *Carnegie v. Morrison*, 2 Met. (Mass.) 381. Theory as well as convenience would seem to support this last rule. See Joseph H. Beale, "What Law Governs the Validity of a Contract?" 23 HARV. L. REV. 1. For the same reasons, matters relating to performance should be governed by the law of the place of performance. *Abt v. American Trust Savings Bank*, 159 Ill. 467, 42 N. E. 856. *Contra*, *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589. So the sufficiency of the presentation and notice of dishonor of a negotiable instrument is to be determined by the law of the place where it is payable. *Hirschfeld v. Smith*, L. R. 1 C. P. 340; *Pierce v. Indseth*, 106 U. S. 546. *Contra*, *Amsinck v. Rogers*, 189 N. Y. 252, 82 N. E. 134. A moratorium does not affect the validity of any obligation. It simply says that the right to have payment on a certain date according to contract is a right to have payment only at a later date, according to law. It should therefore affect only such obligations as are to be performed in the jurisdiction which issues the moratorium. *Roquette v. Overman*, L. R. 10 Q. B. 525. If a moratorium is regarded merely as affecting the remedy, *i. e.*, if the time of payment, both by contract and law, is the date agreed upon, but action for a breach is delayed, the principal case is the more clearly wrong, as such a question must surely be determined by the law of the forum. *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 339. It seems pretty clear, however, that a moratorium affects the right of payment and not merely the remedy for a breach of such right.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — NON-RESIDENT HUSBAND BRINGING ACTION IN STATE ALLEGED TO BE SEPARATE RESIDENCE OF WIFE. — In an action for divorce brought by the husband the jurisdiction of

the court was grounded on the alleged residence of the wife, and the residence of the husband was not pleaded. A demurrer based on lack of jurisdiction of the cause of action was sustained below. *Held*, that the judgment be affirmed. *Aspinwall v. Aspinwall*, 160 Pac. 253 (Nev.).

In England a wife is generally denied the possibility of a separate domicil. *Yelverton v. Yelverton*, 1 Sw. & Tr. 574. There is, however, a tendency away from the strict rule. See *Niboyet v. Niboyet*, 4 P. D. 1; *Swathatos v. Swathatos*, [1913] P. D. 46. In America a separate domicil for purposes of divorce is readily given to the wife. *Ditson v. Ditson*, 4 R. I. 87; *Cheever v. Wilson*, 9 Wall. (U. S.) 108. A few cases have permitted a separate domicil of a wife for purposes other than divorce. *Shute v. Sargent*, 67 N. H. 305; *Matter of Florance*, 61 N. Y. Sup. Ct. Rep. 328; *Gordon v. Yost*, 140 Fed. 79; *McKnight v. Dudley*, 148 Fed. 204. However, cases giving the wife a separate domicil seem to require that she leave her husband for good cause. See *Suter v. Suter*, 72 Miss. 345, 349, 16 So. 673, 674; *Kendrick v. Kendrick*, 188 Mass. 550, 555, 75 N. E. 151, 152. Applying this test to the principal case makes it appear that the husband must prove his own misconduct in order to make possible the separate domicil of the wife. This in turn defeats his action for divorce. It may perhaps be said that the wife's domicil when she sues for divorce need not depend upon having left her husband for good cause. See *Williamson v. Osenton*, 232 U. S. 619, 625. Such a rule would be advantageous, for in its absence a divorce decree may be overthrown on collateral attack on the ground of lack of jurisdiction, whenever a court takes a different view of the merits. But a domicil good for one purpose only is difficult to conceive and would seem to be nothing more than a privilege granted the wife on account of the necessity of the situation. Whether full faith and credit would be due a decision based on a jurisdiction of privilege only, is rather doubtful. But clearly, even under this view, the husband should not be allowed to make use of this privilege. The court seems to rely somewhat on a statute as requiring residence on the part of the moving party, but it is not clear that this is the meaning of the statute. See REVISED LAWS OF NEVADA, 1912, § 5838. Also *cf.* the principal case with *Smith v. Smith*, 15 D. C. 255.

**CONFLICT OF LAWS — RIGHT TO RECOVER FOR MENTAL ANGUISH DUE TO NEGLIGENT NON-DELIVERY OF INTERSTATE TELEGRAM — APPLICATION OF INTERSTATE COMMERCE ACT.** — Due to the negligence of the defendant telegraph company, a telegram sent by the plaintiff's husband from New Mexico was not delivered at its destination in Texas. The plaintiff, joining her husband, brought suit in Texas to recover for the mental anguish she suffered therefrom. *Held*, that she cannot recover. *Western Union Telegraph Co. v. Smith*, 188 S. W. 702 (Tex. Civ. App., 1916).

The plaintiff, as beneficiary of the telegram, notice of which was given the company by its context, is a proper party to maintain, independently, an action thereon for negligent non-delivery. *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Western Union Tel. Co. v. Morrisson*, 33 S. W. 1025 (Tex. Civ. App., 1896). The court in the principal case accepted the proposition as proven, that the law of New Mexico does not allow recovery for mental anguish. But recovery for such injury is allowed in Texas. *Stuart v. Western Union Tel. Co.*, 66 Texas 580, 18 S. W. 351. There are at least three distinct views as to which state's law should govern. Many jurisdictions, conceiving the action to be *ex contractu*, hold with the principal case that the law of the place where the contract was made must govern. *Johnson v. Western Union Tel. Co.*, 144 N. C. 410, 57 S. E. 122; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904. Others hold that the law of the place of performance governs. See MINOR, CONFLICT OF LAWS, §§ 153, 160. Of the states taking this view, at least one regards the performance as being entirely within the state



where the telegram is to be delivered. *Western Union Tel. Co. v. Lacer*, 122 Ky. 839, 93 S. W. 34. Cf. *Dike v. Erie Railway Co.*, 45 N. Y. 113. The others consider the performance as partly in one state and partly in the other, and apply the law of the state in which the breach occurred. *Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248; *Howard v. Western Union Tel. Co.*, 119 Ky. 625, 84 S. W. 764, 86 S. W. 982. Several other jurisdictions apparently consider the action as *ex delicto* in nature, and hold that the law of the place where the breach occurred determines the right. *Gentle v. Western Union Tel. Co.*, 82 Ark. 96, 100 S. W. 742; *Fail v. Western Union Tel. Co.*, 80 S. C. 207, 60 S. E. 697; *Gray v. Western Union Tel. Co.*, 108 Tenn. 36, 64 S. W. 1036. But properly it should make no difference whether the cause be regarded as in tort or contract. The legal duty of the telegraph company, to perform, was created in New Mexico. But the violation of that duty took place in Texas. The law of Texas, therefore, is the only law that can determine the existence and limitation of any legal right arising out of the breach of duty. Therefore whether such breach creates a right to damages for mental anguish is dependent on Texas law. See *Barter v. Wheeler*, 49 N. H. 9; *Curtis v. Delaware, etc. Ry. Co.*, 74 N. Y. 116; *Baetjer v. La Compagnie*, 59 Fed. 789; MINOR, CONFLICT OF LAWS, §§ 153, 160. The case further suggests that neither the law of Texas nor New Mexico is applicable, because of the interstate nature of the telegram. It is clear that prior to the decision in *Western Union Tel. Co. v. Brown*, 234 U. S. 542, the imposition of liability for mental anguish, though not the common-law rule, was held a legitimate exercise of local administration, and not a burden on interstate commerce. *Ivy v. Western Union Tel. Co.*, 165 Fed. 371. See *Western Union Tel. Co. v. James*, 166 U. S. 650; *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406. In a *dictum* in the *Brown* case, however, Mr. Justice Holmes declared that a South Carolina statute imposing liability for mental anguish arising from a negligent non-delivery in the District of Columbia was unconstitutional as an attempt to regulate interstate commerce. Upon the authority of this *dictum* alone, several state courts of last resort have held that recovery for mental anguish is precluded as a burden on interstate commerce. *Western Union Tel. Co. v. Johnson*, 115 Ark. 564, 171 S. W. 859; *Western Union Tel. Co. v. Bank of Spencer*, 156 Pac. 1175 (Okla.); *Western Union Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91. This interpretation seems unjustified. Of course, one state cannot dictate to another state what its law shall be regarding interstate commerce or anything else. This, it is submitted, is as far as the *dictum* goes. See *Bailey v. Western Union Tel. Co.*, 184 S. W. 519, 520 (Tex. Civ. App.). But it is further suggested that Congress has, by the Interstate Commerce Act as amended in 1910 to include within its scope interstate telegraph companies, entered and covered this field, making all state laws relating thereto in any manner inapplicable. It appears, however, that Congress merely declared that telegraph companies shall be considered as common carriers, and required them to charge reasonable rates, permitting certain classifications of messages as a basis. 1913 U. S. COMP. STAT., § 8563. The Interstate Commerce Commission has issued an order defining what companies shall be under the Act, and detailing the nature of improper charges. But this is all. The present action is not founded upon a violation of duty imposed by the Act, but upon common-law breach of contract; and until Congress has manifested a clear purpose to supersede the common law of a state, it remains in force. *Missouri, etc. Ry. Co. v. Harris*, 234 U. S. 412; *Reid v. Colorado*, 187 U. S. 137. The mere fact that Congress has enacted some legislation concerning interstate telegrams does not signify the necessary purpose to monopolize the whole field. *Atlantic, etc. Ry. Co. v. Georgia*, 234 U. S. 280; *Smith v. Alabama*, 124 U. S. 465; *Bailey v. Western Union Tel. Co.*, *supra*. Cf. *Louisville, etc. R. Co. v. Ohio, etc. Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 66.

**CONFLICT OF LAWS — RIGHTS AND OBLIGATIONS OF FOREIGN CORPORATIONS — APPOINTMENT OF RECEIVER FOR LOCAL PROPERTY OF FOREIGN CORPORATION.** — A New York corporation was doing business in Connecticut. A Connecticut court appointed a receiver for the assets located in that state. The plaintiff, a receiver appointed in New York, seeks to recover the assets, claiming that the Connecticut appointment was invalid. *Held*, that the plaintiff may not recover. *Lowe v. R. P. K. Pressed Metal Co.*, 99 Atl. 1 (Conn.).

It is elementary that no court has jurisdiction to dissolve a foreign corporation. *Merrick v. Van Santvoord*, 34 N. Y. 208. But the appointment of a receiver does not dissolve a corporation. Indeed, in the absence of a statute, a court of equity, which is the court that appoints receivers, cannot dissolve even a domestic corporation. *Elizabeth Gas Light Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. 844. Therefore in view of the plenary jurisdiction which a state has over all property in it, it seems clear that a receiver may be appointed to take charge of those assets of a foreign corporation which are within the state. *Holbrook v. Ford*, 153 Ill. 633, 643, 39 N. E. 1091, 1094; *Shinney v. North American, etc. Co.*, 97 Fed. 9. *Cf. In re Commercial Bank*, 33 Ch. D. 174. One state court holds the contrary; but the decision is based on a local statute. *Stafford v. American Mills Co.*, 13 R. I. 310. Moreover, even in that state it has been held that an ancillary receiver may be appointed. *Evans v. Pease*, 21 R. I. 187, 42 Atl. 506. Such an appointment raises practically the same question as to the jurisdiction of the appointing court; for an ancillary receiver is as much an officer of the court as an original one. *Sands v. Greeley*, 88 Fed. 130. The result of the principal case, therefore, seems clearly in accord with authority.

**CONFLICT OF LAWS — WHETHER A SHAREHOLDER IN A CORPORATION IS BOUND BY THE LAWS OF THE STATE OF INCORPORATION OR OF THE STATE IN WHICH BUSINESS IS CONDUCTED.** — An Arizona corporation was formed under the laws of that state exempting stockholders from individual liability for corporate debts. The charter provided that business might be transacted in any other state or territory as the Board of Directors might direct. A suit is brought against the holder of some of the stock on a debt incurred in the prosecution of the corporate business in the state of California. The creditor relies on the provisions of the California Constitution and Code that every shareholder in a corporation is individually liable for such proportions of its debts, incurred while he was a shareholder, as the amount of his stock bears to the subscribed capital stock of the corporation. CONST., Art. 12, § 3; CIV. CODE, § 322. The same liability attaches whether the corporation is foreign or domestic. CONST., Art. 12, § 15; CIV. CODE, § 322. *Held*, that the shareholder is liable. *Provident Gold Mining Co. v. Haynes*, 159 Pac. 155 (Cal.).

When an individual becomes a member of a corporation he manifestly contemplates that the corporation will conduct its affairs according to the laws of the power giving corporate existence. Hence he must, of necessity, consent to be bound by those laws. Therefore, as a general proposition, the law of the jurisdiction granting the charter regulates the liability of a shareholder. *Flash v. Conn*, 109 U. S. 371; *Bernheimer v. Converse*, 206 U. S. 516, 529; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207; BEALE, FOREIGN CORPORATIONS, § 445. For the same reason, if the corporation is specifically authorized to act in given jurisdictions, the shareholder binds himself according to their laws. *Thomas v. Mathieson*, 232 U. S. 221; *Pinney v. Nelson*, 183 U. S. 144, 151. But an English case has decided that assent, sufficient to bind the stockholder by the laws of the foreign jurisdiction, is given only when such jurisdiction is specifically designated, and that a general assent, to be particularized by the directors as in the principal case, is not capable of such effect. *Risdon Iron & Locomotive Works v. Furness*, [1905] 1 K. B. 304, affirmed [1906] 1 K. B. 49. Similarly cases hold that a married woman's liability on a



negotiable instrument is determined by the law of the jurisdiction in which it is negotiated only if special reference is made to the place of negotiation. *Hauck v. Sharpe*, 83 Mo. App. 385; *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672. Whether this distinction is justified, namely, that a general assent to the laws of whatever jurisdictions others may determine is no assent to the jurisdictions finally settled upon, would seem to be a question of fact incapable of productive argument. It is probable that the stockholder was a resident of California. If so, it is obvious that the only limitation to the effectiveness of California's laws over him would be the federal and its own constitutions, and the case would be clear. *MINOR, CONFLICT OF LAWS*, § 2, III. But the court's opinion neither proceeded upon this ground nor stated the facts necessary for it.

**CONSTITUTIONAL LAW — PERSONAL RIGHTS — IMPRISONMENT FOR DEBT — VALIDITY OF ORDINANCE MAKING DEBT A CRIME.** — A city ordinance made it a misdemeanor to refuse to pay taxicab hire. The defendant was charged with a violation of the ordinance. He sets up the prohibition in the state constitution against imprisonment for debt. *Held*, that the ordinance was unconstitutional. *Kansas City v. Pengilly*, 189 S. W. 380 (Mo.).

Failure to pay the fine for a misdemeanor results in imprisonment under the law of Missouri. But while the imprisonment is directly predicated on the misdemeanor and the fine, this is but an indirect method of imprisonment for debt. See *Lamar v. State*, 120 Ga. 312, 47 S. E. 958; *Ex parte Milecke*, 52 Wash. 312, 100 Pac. 743, 744. *Cf. United States v. Reynolds*, 235 U. S. 133. It is true that not all debts are within the meaning of the constitution. Thus, taxes are not included. *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053. Nor are judgment debts in tort actions. *Ex parte Berry*, 85 S. C. 243, 67 S. E. 225. *Contra, Bronson v. Syverson*, 88 Wash. 264, 152 Pac. 1039. But debts arising out of contract must clearly fall within the immunity. And so the principal case is supported by the weight of authority. *Ex parte Crane*, 26 Cal. App. 22, 145 Pac. 733; *State v. Paint Rock Coal & Coke Co.*, 92 Tenn. 83, 20 S. W. 499. *Contra, Bray v. State*, 140 Ala. 172, 37 So. 250. Undoubtedly the purpose of the statute was to prevent fraud, but its language was by no means so limited. It is of course obvious that the state may punish fraud even though arising out of contract. *Ex parte Milecke, supra*; *State v. Yardley*, 95 Tenn. 548, 32 S. W. 481. But see *Carr v. State*, 106 Ala. 35, 17 So. 350. For fraud is a distinct injury to the state. The present universality of the crime of obtaining goods or money under false pretenses makes the step easy. But one state has likewise allowed imprisonment, in spite of a constitutional provision, for failure to pay a debt when the ability to pay existed. *Ex parte Clark*, 20 N. J. L. 648. It seems extremely doubtful whether stubbornness in refusing to pay a debt can possibly be classed as an injury to the state distinct from the failure in general of paying one's debts. It may be that the statute in question can be supported on the grounds of police power. An Alabama case, dealing with licensed vehicles, has so held. *Bray v. State, supra*. Whether such holding is correct must depend on the view of the court of the necessity for the public welfare of the statute in question. *Cf. State v. Missouri Pacific R. Co.*, 242 Mo. 356, 147 S. W. 118.

**CONSTITUTIONAL LAW — POWER OF ADMINISTRATIVE COMMISSION TO DECLARE A STATUTE UNCONSTITUTIONAL.** — A statute passed by the Philippine legislature required certain steamship lines to carry mail free of charge. A complaint was filed with the Philippine Public Utility Commission setting forth the defendant's refusal to comply. The defense was the unconstitutionality of the statute. *Held*, that the Commission had no power to consider the question of the constitutionality of the statute. *Director of Posts v. Inchausti & Co.*, P. U. R. 1916 E, 849.

For a discussion of the principles involved, see NOTES, p. 386.

**CONSTITUTIONAL LAW — SEPARATION OF POWERS — POWER OF THE HOUSE OF REPRESENTATIVES TO PUNISH FOR CONTEMPT.** — Charges of misconduct, preferred against a United States District Attorney, had been referred by the House to the Committee on the Judiciary. That body proceeded to examine into the truth of the charges. During the pendency of the examination, the accused published in the newspapers a signed letter severely criticising the committee's actions and impugning the honesty of their motives. Upon a vote of the House, the Speaker caused his arrest for contempt, whereupon the District Attorney applied for a writ of *habeas corpus*. *Held*, that he be remanded to custody. *U. S. ex rel. Marshall v. Gordon*, 235 Fed. 422 (U. S. Dist. Ct., S. D., N. Y.).

For a discussion of this case, see NOTES, p. 384.

**CORPORATIONS — STOCKHOLDERS — INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — PROTECTION FROM CREDITOR BY NO RECOURSE CLAUSE.** — A stockholder in a Missouri corporation paid for his stock with overvalued property. A statute required payment of full value. The corporation being insolvent, one of its bondholders seeks to recover from the stockholder on his statutory liability. The stockholder sets up an agreement incorporated by reference into the bond, providing that the creditor should have no recourse against a stockholder. *Held*, this was a good defense. *Babbitt v. Read*, 236 Fed. 42.

There are three possible theories as to the nature of the statutory liability of a stockholder who has paid for his stock with overvalued property. See 29 HARV. L. REV. 854. Of these the "trust fund" theory is historically the first. It, however, has never been applied so as to impose an actual trust upon the corporation in favor of its creditors. See *Graham v. Railroad Co.*, 102 U. S. 148, 160. *Wabash, etc. Ry. Co. v. Ham*, 114 U. S. 587, 594. In reality, in its application it differs from the second or third theories, according as it is conceived to grant recovery to all creditors or only to those without notice, in nothing but its terminology and the vagueness of the principle applied. Under the second theory the corporation's release of the stockholder from his obligation to pay the full par value of his stock is rendered void by the statute. The creditor's right is then to enforce the stockholder's liability as an equitable asset. By contracting not to hold the stockholder liable, he is simply cutting himself off from reaching certain assets of the corporation. There is no reason of policy for questioning the validity of this limitation. *French v. Teschemaker*, 24 Cal. 518. Thus a creditor's contract to go only against partnership assets, leaving untouched the partners' individual liability, is upheld. See LINDLEY, PARTNERSHIP, 8 ed., 244. The third theory is based upon the so-called "holding out" idea. This seems to be the ground of the Missouri decisions. *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 567, 87 S. W. 933, 939. Under this view a corporation bargaining for the exemption of its stockholders is in the position of one deceiver stipulating for the immunity of a joint tortfeasor. But where, as part of a scheme to defraud, a clause in a contract is inserted to exempt a party from the consequences of his fraud, that waiver, being itself based upon fraud, may be set aside. *Bridger v. Goldsmith*, 143 N. Y. 424, 38 N. E. 458. See 21 HARV. L. REV. 218. Though if the party proposing the exemption, being innocent, wishes merely to protect himself from inadvertent statements or omissions, as where a statute requires him to publish certain facts in a prospectus, such a clause has been upheld. *Macleay v. Tait*, [1906] A. C. 24, 27, 34. In the principal case there was no evidence of an intent fraudulent in fact on the part of the corporation. *Cf. Babbitt v. Read*, 215 Fed. 395, 418. Since, however, under the "holding out" theory the statute declares that the doing of certain prohibited acts shall be equivalent to the making of misrepresentations such as ground an action for deceit, it might well be argued that by analogy the



exemption clause, when itself part of the scheme to issue fully paid-up stock for overvalued property, should be void. Another difficulty with the defense arises from the fact that, the creditor's right against the stockholder being direct, the stockholder is availing himself as beneficiary of a defense created for him by a contract to which he was a stranger. Neither of these objections to the defense, however, seems insuperable. As a matter of authority the validity of a stockholder's exemption clause has been unanimously sustained, without, however, any attempt to differentiate as to possible bases of the liability. *Brown v. Eastern Slate Co.*, 134 Mass. 590; *Basshor & Co. v. Forbes*, 36 Md. 154; *Bush v. Robinson*, 95 Ky. 492, 26 S. W. 178; *Grady v. Graham*, 64 Wash. 436, 116 Pac. 1098. But cf. *Kreisser v. Ashtabula Gas Light Co.*, 24 Ohio Cir. Ct. R. 313.

CRIMINAL LAW — SUSPENSION OF SENTENCE. — A prisoner was convicted in a District Court of the United States for embezzlement in violation of section 5209 REVISED STATUTES, and sentenced to imprisonment for five years, the minimum provided for by the statute. The judge, then, over the objection of the United States District Attorney, ordered the suspension of execution of the sentence, during the good behavior of the prisoner, and extended the term of the court for five years. The United States seeks from the Supreme Court a writ of *mandamus*, directing the judge to vacate the order. *Held*, that *mandamus* should issue. *Ex parte United States, Petitioner*, U. S. Sup. Ct., Oct. Term, 1915, No. 11 original.

For a discussion of this case, see NOTES, p. 369.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY IN GENERAL — ADDITIONAL LIABILITY FOR INJURY CAUSING DEATH. — Section 1 of the Federal Employers' Liability Act provides that where the employee of an interstate carrier is negligently killed, his representative may recover for the benefit of the next of kin. U. S. COMP. STAT. 1913, § 8657. Section 9 provides that where an employee is injured, his right of action shall survive to his representative for the benefit of the next of kin. U. S. COMP. STAT., § 8665. An employee of an interstate carrier was injured, and, after having lived ten minutes in an unconscious condition, died from the injury. His representative seeks to recover under both statutes. *Held*, that he may recover only under the death statute. *Great Northern Ry. Co. v. Capital Trust Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 107.

Many states have statutes similar to those in the principal case. See TIFANY, DEATH BY WRONGFUL ACT, 2 ed., § 26. Most courts hold that there may be a recovery under the survival statutes, even if death results from the injury. *Missouri, etc. Ry. Co. v. Bennett*, 5 Kan. App. 231; *Brown v. Chicago, etc. Ry. Co.*, 102 Wis. 137, 77 N. W. 748. *Contra, Merrihew v. Chicago, etc. Ry. Co.*, 92 Ill. App. 346; *Lubrano v. Atlantic Mills*, 19 R. I. 129, 32 Atl. 205. And a majority of the states allow recovery under the death acts, although death is not immediate. *Brown v. Buffalo, etc. R. Co.*, 22 N. Y. 191. See *Roach v. Imperial Mining Co.*, 7 Fed. 698, 704. *Contra, Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660; *Dolson v. Lake Shore, etc. Ry. Co.*, 128 Mich. 444, 87 N. W. 629. It would follow that the facts may be such as to satisfy both statutes. The theories of the two actions are entirely different. See 15 HARV. L. REV. 854. Consequently most jurisdictions permit a recovery under both, where the facts permit it. *Leggott v. Great Northern Ry. Co.*, 1 Q. B. D. 599; *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 83 N. E. 601. See *Stewart v. United Electric Light & Power Co.*, 104 Md. 332, 344, 65 Atl. 49, 54; *Murphy v. St. Louis, etc. R. Co.*, 92 Ark. 159, 163, 122 S. W. 636, 638. *Contra, Sweetland v. Chicago, etc. R. Co.*, 117 Mich. 329, 75 N. W. 1066. It would seem to be immaterial that the same person may receive the benefit of both actions. But, where the death

from an injury is instantaneous, no action for the injury survives. *Illinois, etc. R. Co. v. Pendergrass*, 69 Miss. 425, 12 So. 954; *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960. See *Hansford v. Payne*, 11 Bush (Ky.) 380, 385. But cf. *Murphy v. New York, etc. R. Co.*, 30 Conn. 184; *Worden v. Humeston, etc. R. Co.*, 72 Iowa 201, 33 N. W. 629. Nor is there a survival, if there was conscious suffering which was substantially contemporaneous with death. *The Corsair*, 145 U. S. 335, 348. It is said that the deceased never suffered damage substantial enough to give him a cause of action which could survive. It would seem to follow, as the principal case holds, that no action survives in cases where the decedent lived for a time, but was never conscious. See *St. Louis, etc. Ry. v. Craft*, 237 U. S. 648, 655. But the weight of authority takes a contrary view. *Bancroft v. Boston, etc. R. Co.*, 93 Mass. 34; *Olivier v. Houghton, etc. Ry.*, 134 Mich. 367, 96 N. W. 434.

**EQUITY — JURISDICTION — POLITICAL RIGHTS; INJUNCTION TO PROTECT.** — One Gilmore, a Democrat, is candidate for Railroad Commissioner. The State Democratic Committee is about to nominate one Hurdleston for the office. TEXAS REV. STAT. 1911, § 3173, forbids the state committee of a party to nominate candidates. TEXAS REV. STAT. 1911, § 3143, authorizes a *mandamus* to enforce the prior statute; and TEXAS REV. CR. STAT. 1911, § 226, makes its violation criminal. Gilmore seeks to enjoin the committee from making the nomination. *Held*, that an injunction will issue. *Gilmore v. Waples*, 188 S. W. 1037.

Although all political rights are considered legal rights, yet between purely political rights and civil rights the courts draw a distinction. The overwhelming weight of judicial authority is to the effect that courts of equity will not protect those political rights which do not involve civil rights. *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683; *Kearns v. Howley*, 188 Pa. 116, 41 Atl. 273; *Green v. Mills*, 69 Fed. 852; *State v. Aloe*, 152 Mo. 466, 54 S. W. 494; *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681. See 5 POM. EQ., 3 ed., §§ 331, 332; KERR, INJUNCTION, 4 ed., 8. Most of these cases proceed on the ground that there has been no tort at law, a position perhaps open to some doubt. See Pound, "Equitable Relief against Injuries to Personality," 29 HARV. L. REV. 640, 681; 30 HARV. L. REV. 172, 174. However that may be, it must be clear that the use of an equitable remedy in a case like the present, where the appeal is from a party body and the injunction runs to them, involves practical difficulties very serious in character. Policy leaves the redress of this class of wrongs to the voters. See *Winnett v. Adams*, 71 Neb. 817, 825, 99 N. W. 681, 684. The statutory remedy by *mandamus*, too, seems as sufficient as it is convenient. And if it was a sound principle of equity before the statute passed that political rights would not be protected, it must be so still, for most political rights are "legal" rights whether or not they are recognized by statute. The distinction is between political and civil, not political and legal, rights.

**EVIDENCE — HEARSAY — EVIDENCE OF INTERPRETATION OF OPPONENT'S DECLARATIONS.** — In an action for personal injuries, the defendant set up a release by the plaintiff. The plaintiff, a Pole, seeks to show that he signed this without knowledge of its nature. It was proved that the defendant's agent, when securing the plaintiff's signature, had used a bystander as an interpreter. The defendant offers the testimony of the agent as to what, during the interview, the interpreter had told him that the plaintiff said. *Held*, that this is admissible. *Groc v. Delaware & Hudson Co.*, 161 N. Y. Supp. 117.

In conformity to the rule against hearsay, a participant in a conversation carried on through an interpreter may not generally testify to the interpretation of what was said by the other speaker. *State v. Noyes*, 36 Conn. 80. But it is well settled that such evidence may be introduced by one party to the suit



when the person interpreted is an opposing party. Since the latter has availed himself of this method of communication, the interpreter is regarded as an agent and his statements are received as admissions. *Miller v. Lathrop*, 50 Minn. 91, 52 N. W. 274. See 1 WIGMORE, EVIDENCE, § 668. Accordingly anyone who has heard a conversation through an interpreter between a third person and one party to a suit may, as a witness of the other party, testify to the whole conversation, although he understands only the language of the third person. *Commonwealth v. Vose*, 157 Mass. 393, 32 N. E. 355; *Meacham v. State*, 45 Fla. 71, 33 So. 983. This view that the interpretation is an admission of the interpreted party would of course not render admissible evidence of the interpretation of a third person's statements or of the statements of the party offering the evidence. Nor would it admit evidence of the interpretation of the opposing party where there was no actual agency. Yet a fictitious sort of agency has been raised to admit this evidence where the facts do not establish an actual agency. *People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112. It might be better to make a frank exception to the hearsay rule on the grounds of practical convenience and admit evidence of the interpretation of a statement, wherever evidence of the statement itself is admissible.

**INJUNCTIONS — ACTS RESTRAINED — SUITS AGAINST VENDEES OF A PATENT INFRINGER.** — The plaintiff is an established manufacturer of wireless apparatus, and the defendant a competitor just starting in the business. The plaintiff brings suit against defendant for infringement of patents, seeking an accounting of profits and assessing of damages. The plaintiff then starts three other similar suits against defendant's vendees. The defendant files a petition alleging that the plaintiff is about to bring many more such suits in widely scattered places, and that unless relief be granted the defendant's business will be ruined. The defendant prays for a temporary injunction against pending and future suits involving vendees until the "parent" suit against defendant is settled. *Held*, that the bringing of future suits will be enjoined upon the filing of a bond by the defendant to secure payment to the plaintiff in case the latter succeeds in the "parent" suit. *Marconi Wireless Tel. Co. v. Kilbourne & Clark Mfg. Co.*, 235 Fed. 719.

If suits were maliciously brought to ruin the defendant's business, without belief in the validity of the patent or the fact of infringement, there would be an abuse of a legal right and an injunction should follow. See *Emack v. Kane*, 34 Fed. 46. But even if the suits were brought in good faith the plaintiff should be enjoined. It is true that where a patentee is suing joint tortfeasors in separate suits for infringement, one defendant cannot stay the prosecution of the other suits without showing injury to himself. See *Sherman, Clay & Co. v. Searchlight Horn Co.*, 225 Fed. 497. Though in certain cases all defendants by acting together might secure a settlement of the issue in one suit through a bill of peace. See *Foxwell v. Webster*, 4 De G., J. & S. 77. But when, as in the principal case, one defendant is a seller and the other defendants are his customers, the seller is under a moral duty to defend his customers' suits, and is injured directly in his business. Wherefore equity will enjoin this multiplicity of suits. *Commercial Acetylene Co. v. Avery, etc. Co.*, 159 Fed. 935; *Stebler v. Riverside, etc. Ass'n*, 214 Fed. 550. The balance of convenience for the issuance of such injunction is clear. The injury is certainly irreparable. Further, there is a public interest against allowing the courts to be filled with useless suits. See *Ide v. Ball Engine Co.*, 31 Fed. 901, 904. And the defendant cannot be said to have brought the injury upon himself by delaying the "parent" suit. *Cf. Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767. Nor is the plaintiff deprived of any substantial right. For a decree for profits and damages against defendant, when satisfied, will give the vendees all rights as to the machines involved in the decree. *Stebler v. Riverside, etc. Ass'n*, 214 Fed. 550.

While if the case against the defendant fails, the plaintiff cannot sue the defendant's vendees. *Kessler v. Eldred*, 206 U. S. 285. Though equity will therefore enjoin future suits, yet, on grounds of comity, the court is reluctant to interfere with suits already pending. *Kelley v. Ypsilanti, etc. Co.*, 44 Fed. 19.

INSURANCE — CONSTRUCTION OF PARTICULAR WORDS AND PHRASES IN STANDARD FORMS — "SOLE AND UNCONDITIONAL OWNERSHIP." — The insured, a boat-builder, agreed to build a boat, the buyer to advance sums of money as the work progressed. In the event of the completion of the boat being prevented, "all materials bought for the boat" were "to belong" to the buyer and he was to "own an interest in the boat shop" amounting to the excess of moneys paid over the cost of the materials. While the boat was in process of construction, the builder insured the property under a standard policy which was to be void if the insured's interest was other than "sole and unconditional ownership." The boat, when nearly completed, was destroyed by fire. *Held*, that the insured can recover on the policy. *Lloyd v. North British & Mercantile Ins. Co.*, 161 N. Y. Supp. 271 (App. Div.).

An insurance policy with the standard clause of "unconditional ownership" is void if the legal title, or even the equitable ownership, of the property is not in the insured when the policy is executed. *Skinner, etc. Co. v. Houghton*, 92 Md. 68, 48 Atl. 85; *Hamilton v. Dwelling House Ins. Co.*, 98 Mich. 535, 57 N. W. 735; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668. Now according to the English decisions, under a contract like that in the principal case, the legal title to the boat passes to the buyer while it is being built, *pari passu*, with the payment of installments. *Clarke v. Spence*, 4 A. & E. 448; *Wood v. Bell*, 5 E. & B. 772. But see *Reid v. Macbeth*, [1904] A. C. 223. But the American cases, following the more logical view, have uniformly held that under such a contract legal title passes only upon the appropriation of the completed boat to the buyer. *Clarkson v. Stevens*, 106 U. S. 505; *Wright v. Tellow*, 99 Mass. 397; *Andrews v. Durant*, 11 N. Y. 35. See WILLISTON, SALES, § 275. The question then arises whether the clause in the contract, that title to the materials shall pass to the buyer if the completion of the boat is prevented, can divest the owner of "unconditional ownership." That it is possible to create by an *inter vivos* transaction a future estate in a chattel personal, if such is the intention of the parties, would seem to be established. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 854. *A fortiori*, an executory estate by way of a conditional limitation must be possible. Yet such is a property interest and in conflict to "unconditional ownership." But that effect is not conceivable in the principal case, for undoubtedly at the time of the making of the contract the title to the chattels in question was not yet in the grantor. Obviously no equitable title could pass, when the grantor did become the owner, on a principle somewhat akin to *Holroyd v. Marshall*, for the condition precedent to the vendee getting a right was not fulfilled until the goods were destroyed. In any case it is probable that equity looking at the substance of the agreement would decide that as, after all, the vendee was only seeking security for his advances, any right he might acquire in the property would be in the nature of a lien, in spite of the contrary terminology of the contract. Cf. *Hurley v. Atchison, etc. Ry. Co.*, 213 U. S. 126; *Cooper v. Brock*, 41 Mich. 488, 2 N. W. 660; *Albert v. Van Frank*, 87 Mo. App. 511. But it is well settled that a mere lien or incumbrance on the property is not violative of the "unconditional owner" clause in an insurance policy. *Dolliver v. St. Joseph, etc. Ins. Co.*, 128 Mass. 315; *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418. See 1 MAY, INSURANCE, 4 ed., § 287.

INTERSTATE COMMERCE — POWER OF THE COMMISSION TO REQUIRE TANK CARS. — The Interstate Commerce Commission ordered the Pennsylvania Railroad to furnish tank cars in sufficient numbers to transport a complainant's



shipments of oil. The railroad brought suit to enjoin this order and a federal court issued the writ. *Held*, that the order was *ultra vires*, and the injunction was properly issued. *United States v. Pennsylvania R. Co.*, U. S. Sup. Ct., Oct. Term, 1916, Nos. 340 and 341.

For a discussion of this case, see NOTES, p. 381.

INTERSTATE COMMERCE — RECOVERY IN STATE COURT FOR INDIRECT DAMAGE TO BUSINESS DUE TO ILLEGAL OVERCHARGE — FEDERAL REMEDY EXCLUSIVE. — The defendant railroad, in interstate business, collected from the plaintiff a charge in excess of that provided for by the Interstate Commerce Commission. As reparation therefore, the commission had ordered the railroad to pay the plaintiff \$6198, which was done. The present action is brought in a Kentucky court under the common law to recover for additional damage done the plaintiff's business as a result of the overcharge. *Held*, that the plaintiff cannot recover. *Louisville, etc. R. Co. v. Ohio Valley Tie Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 66.

It is axiomatic that where Congress, under the power reserved to it in the federal Constitution, legislates in regulation of interstate commerce, the laws of the several states covering the same field, whether formally abrogated or not, cease to have any force. See *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 210; *Missouri, etc. Ry. Co. v. Haber*, 169 U. S. 613, 626; *Reid v. Colorado*, 187 U. S. 137, 146. The sole question presented by the principal case is whether or not Congress has by the Interstate Commerce Act taken over the entire field of relief for violations of that Act, or has provided merely for the refunding of the overcharge and certain penalties, leaving to the several states the matter of redress for general damage resulting to the plaintiff's business. The Supreme Court of Kentucky took the latter view. *Louisville, etc. R. Co. v. Ohio Valley Tie Co.*, 161 Ky. 212, 170 S. W. 633. By § 8 of the Act it is provided that in case of a violation of its provisions "such common carrier shall be liable . . . for the full amount of damages sustained in consequence of any such violation." And § 9 provides that the remedy is to be sought before the Commission or a federal court. So it has been held that the Commission has jurisdiction to give whatever damage the plaintiff has actually suffered. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 202, 203; *Meeker v. Lehigh Valley Coal Mining Co.*, 236 U. S. 412, 429. And the Act, and not the common law, determines the extent of the damages. *Pennsylvania R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456, 472. And § 16 further provides that in case an order by the Commission to pay money remains unpaid, suit thereon may be brought in a state court, inferentially declaring that suit would not lie where the order had been performed. These sections seem to indicate a clear purpose by Congress to commit to the Commission and federal courts the entire field of redress for violations of the Act.

JUDGMENTS — *RES JUDICATA* — CRIMINAL LAW — FORMER JEOPARDY — JUDGMENT ON PLEADING A BAR TO SECOND PROSECUTION. — A defendant, indicted for conspiracy to violate the Federal Bankruptcy Act, pleaded the special statute of limitations provided in that act. The plea was sustained. A later decision, in other proceedings, took the offense of conspiracy outside the operation of this special bar. A second indictment being brought, the defendant pleaded in bar the earlier judgment in his favor. The lower court sustained this plea. The government thereupon brings a writ of error. *Held*, that the plea was good. *United States v. Oppenheim*, U. S. Sup. Ct., Oct. Term, 1916, No. 412.

Except under statutes, no similar case on a judgment on a plea to the indictment seems to have arisen. It has been held, however, that a new indictment is not barred by a judgment sustaining a demurrer going to the merits

of a previous indictment on the same facts. *People v. Gluckman*, 60 App. Div. 307, 70 N. Y. Supp. 173. Cf. *Commonwealth v. Willcox*, 111 Va. 849, 69 S. E. 1027; *Bowman v. Commonwealth*, 146 Ky. 486, 143 S. W. 47. See 2 VAN FLEET, RES JUDICATA, 1242. These decisions are based on the fact that there had been no former jeopardy, for the defendant had not yet been put on trial upon any issues of fact. Cf. *Taylor v. United States*, 207 U. S. 120; *People v. Stanton*, 84 Misc. 101, 146 N. Y. Supp. 862. In civil actions such a judgment would however operate as *res judicata*. *Gould v. Evansville, etc. R. Co.*, 91 U. S. 526, 534. *Contra, State of Arkansas v. Gill*, 33 Ark. 129, 132. But the application of this doctrine to criminal law is apparently new. Nothing under that name, distinct from former jeopardy, has been hitherto recognized. At most the term has been used to extend the doctrine of former jeopardy to summary proceedings. Cf. *Wemyss v. Hopkins*, L. R. 10 Q. B. 378, 381. But former jeopardy is only a variant of the same fundamental principles of justice and expediency that lie behind *res judicata*. See *Wemyss v. Hopkins*, L. R. 10 Q. B. 378, 381. Yet jeopardy sufficient to create a defense to subsequent action is generally only reached subsequent to judgments on the pleadings. Cf. *Taylor v. United States*, *supra*; *Kepner v. United States*, 195 U. S. 100, 128. As there is no basis for this failure to protect a criminal after a judgment on a demurrer or plea to the indictment, it seems but equitable to apply the doctrine of *res judicata* to fill the gap. The result of the principal case has been reached by statutes in a number of states. Cf. *Ex parte Hayter*, 154 Cal. 243, 116 Pac. 370, with *State v. Fields*, 106 Iowa 406, 76 N. W. 802.

**POWERS — SPECIFIC PERFORMANCE — ENFORCEMENT OF CONTRACT TO EXERCISE GENERAL TESTAMENTARY POWER OF APPOINTMENT.** — The donee of a general power of appointment to be exercised by will contracted to exercise it by an irrevocable will in favor of the promisee. At the same time he signed a will in accordance with the contract. He later made a new will revoking the former and leaving the property to others. Suit is brought after his death. *Held*, that the contract will not be specifically enforced. *Farmers' Loan & Trust Co. v. Mortimer*, 114 N. E. 389 (N. Y.).

Where the owner of property contracts to devise it, specific performance is regularly granted and enforced by imposing a constructive trust on the property in the hands of those to whom it has come at law. *Emery v. Darling*, 50 Ohio St. 160, 33 N. E. 715. A general power of appointment is often considered to approximate absolute ownership. See 24 HARV. L. REV. 654. Thus where the mode of execution is unrestricted, a contract to appoint is in equity deemed equivalent to actual appointment. *Johnson v. Touchet*, 37 L. J. Eq. 25; *In re Jennings*, 8 Ir. Ch. 421. But a distinction should be made when necessary to fulfill the donor's intention. Now the very purpose of making a power exercisable by will only is to provide freedom of appointment until the donee's death. An irrevocable contract destroys this freedom. Specific performance of it should therefore not be allowed to defeat the rights of those claiming under an exercise of the power as contemplated by the donor. Thus in default of appointment, those entitled under the provisions made by the donor should take over those with whom the donee has contracted. See *Reid v. Shergold*, 10 Ves. Jr. 370, 379. So also those prevail who claim under an authorized exercise of the power, although in violation of the contract, and specific performance is not granted. *In re Parkin*, [1892] 3 Ch. 510; *Wilks v. Burns*, 60 Md. 64. Cf. *Reid v. Boushall*, 107 N. C. 345, 12 S. E. 324. In the case of a special testamentary power it has been held that not even may damages be recovered at law, the contract being considered illegal and void. *In re Bradshaw*, [1902] 1 Ch. 436. See *Palmer v. Locke*, 15 Ch. D. 294, 300. This result may be supported on the ground that the power was created primarily for the benefit of a class, to which the donee owes a fiduciary duty, in the nature of a trust, to do nothing in vio-



lation of the creator's intention. But where the power is general, there is no reason, as regards the donee alone, why he should not be liable on his promise. Damages may therefore be recovered against his estate. *In re Parkin, supra*.

QUASI-CONTRACTS — RIGHTS ARISING FROM MISTAKE OF FACT — RECOVERY FOR BENEFITS CONFERRED UNDER A CONTRACT WITH AN UNAUTHORIZED AGENT. — Plaintiff agreed with the defendant's general manager to make certain improvements on defendant's land in return for a twenty-year lease of the land. The manager had no authority to make such a contract. After the plaintiff had been working on the improvements for about five months, evidently with the defendant's knowledge, defendant offered to give plaintiff a lease for ten years, but no longer. Plaintiff quit work, and sues for the value of the improvements already made. *Held*, that the plaintiff recover. *Underhill v. Rutland R. Co.*, 98 Atl. 1017 (Vt.).

At one time liability in quasi-contract was thought to be based on a form of implied contract. See WOODWARD, QUASI-CONTRACTS, § 4. If this were true, it is obvious that no recovery could be had for services rendered under a void contract, for the contract itself must rebut any inconsistent implication. See dissenting opinion of Ingraham, J., in *Lyon v. West Side Transfer Co.*, 132 App. Div. 777, 117 N. Y. Supp. 648. It is a survival of this idea of implied contract which causes some courts to hold that the defendant must knowingly receive the benefits in order to be liable in quasi-contract. *Spooner v. Thompson*, 48 Vt. 259; *Kelley v. Lindsey*, 7 Gray (Mass.) 287. *Cf. Otis v. Inhabitants of Stockton*, 76 Me. 506. But if the benefits of a contract made by an unauthorized agent were knowingly received, it would usually amount to a ratification of the agent's contract. See MECHEM, AGENCY, 2 ed., §§ 434, 436, n. 16. The true basis of liability in quasi-contract is that the defendant has received a benefit from the plaintiff which it would be inequitable for him to keep; it does not rest on any real contractual obligation whatever. KEENER, QUASI-CONTRACTS, 19. One who receives the fruits of a contract made by an unauthorized agent should therefore be liable irrespective of his knowledge of the transaction, if actually benefited thereby, and it is usually so held. *Reid v. Rigby*, [1894] 2 Q. B. 40; *Leonard v. Burlington, etc. Ass'n*, 55 Iowa 594, 8 N. W. 463. *Cf. Van Deusen v. Blum*, 18 Pick. (Mass.) 229. But *cf. Bond v. Attkin*, 6 Watts & S. (Pa.) 165. In the principal case there was considerable evidence that the defendant knowingly received the benefits of its agent's contract, so that it might well have been held to have ratified it. *Cf. Clark v. Hyatt*, 118 N. Y. 563, 23 N. E. 891. But if such is not the case, the recovery in quasi-contract is clearly justified. *Hawkins v. Lange*, 22 Minn. 557; *Werre v. Northwest Thresher Co.*, 27 S. D. 486, 131 N. W. 721; *Henrietta National Bank v. Barrett*, 25 S. W. 456 (Tex.).

SALES — TIME OF PASSING OF TITLE — MISTAKE AS TO WHOM GOODS ARE INTENDED FOR. — Seller was owner of 1000 bushels of oats lying in a ship in the harbor. He sold 500 bushels to the plaintiff and 500 to the defendant. Both the plaintiff and the defendant hired the same lighterman, X., to bring their grain to shore. X. got 500 bushels in one of his boats, which he took for the defendant; but the seller intended this grain for the plaintiff, and made out his papers accordingly, one of which, in the nature of a consignment, was delivered to X. but X. did not open it. This load was delivered to the defendant and appropriated by him. X. got the remaining 500 bushels in another boat and the converse mistake occurred. This boat was sunk. The plaintiff sues for the first load of grain. It was found as a fact that neither the seller nor X. was negligent in making the mistake. *Held*, that title to the first load passed to plaintiff. *Denny v. Skelton*, 115 L. T. R. 305.

According to the English law, where the goods are part of an undivided mass

and the sale is of a specific quantity, and not of a fractional part of the mass, no title to an undivided share of the whole passes. *Austen v. Craven*, 4 Taunt. 644. As then title did not pass at the time of sale, and among the acts still to be done was delivery to the buyer's agent, title did not pass before such delivery. SALE OF GOODS ACT, 1893, § 18 (5). See WILLISTON, SALES, § 276. Did the delivery to X., then, pass title to the defendant? In saying that title passes according to the intent of the parties, it must be remembered that it is the expressed intent which counts, and if the only interpretation of the seller's actions must be to pass title to the defendant, title would so pass regardless of his secret intent. *Wigton v. Bowley*, 130 Mass. 252. Cf. *Bragdon v. Metropolitan Ry.*, 2 A. C. 666. But in the principal case the expressed intent of the seller was ambiguous. It was capable of being understood by X. in two ways without any negligence on his part. Under these circumstances the seller should be allowed to show the mistake, and no title would pass to the defendant. *Campbell v. Mersey Docks*, 14 C. B. R. (N. S.) 412. Cf. *Raffles v. Wichelhaus*, 2 H. & C. 906. This would be equally true whether X. was regarded as defendant's personal agent or merely as an agent for transportation. Did the title pass to the plaintiff? If X. was considered as the defendant's personal agent, there would be no implied authority in the seller to appropriate by delivery for the buyer, but consent by the plaintiff's agent to the appropriation at the time of delivery would be necessary. If X. was regarded merely as an agent for transportation, there is some force in the court's argument that the seller has without negligence made an appropriation according to the terms of the contract, to which the buyer must be taken to assent. But it is a question whether the appropriation was a proper one, since X. was not bound as between X. and the seller to deliver to the proper party, and no cause of action would accrue to the plaintiff against X. in case of misdelivery. It might well have been held that the case fell within the rule of misdirected articles. *American Jewelry Co. v. Witherington*, 81 Ark. 134; *Woodruff v. Noyes*, 15 Conn. 335; *Tinn v. Clark*, 94 Mass. 522. But even if the title remained in the seller at the time of delivery, the case may perhaps be supported on the ground that the acts of the seller amounted to an offer to pass the title, which was accepted by the plaintiff by electing to treat the goods as his. See WALD'S POLLOCK ON CONTRACTS, 3 ed., 12.

TENANCY IN COMMON — CONVEYANCE BY METES AND BOUNDS — PARTITION. — A tenant in common of a ninety-nine acre tract conveyed by metes and bounds twenty-seven acres thereof to the defendant in this partition suit. The defendant thereupon improved the parcel. The plaintiff, a co-tenant on the ninety-nine acre tract, now seeks partition of the twenty-seven acres. Held, that the ninety-nine acres exclusive of improvements will be valued and if the twenty-seven acres do not exceed the grantor's share they will be allotted the defendant. *Highland Park Mfg. Co. v. Steele*, 235 Fed. 465.

A conveyance by metes and bounds of a parcel of a larger tract, by one of several tenants-in-common of the larger tract, cannot give good title to that parcel, for the grantor does not own it. *Duncan v. Sylvester*, 24 Me. 482. Nor can the deed operate to convey the grantor's undivided interest in the entire tract, for it does not purport to. *Soutter v. Porter*, 27 Me. 405. The grantee in such a case cannot even obtain the tenancy in common of the grantor as to the part specified, for courts refuse to allow such a conveyance on account of the difficulty, if not impossibility, of partitioning the whole tract under such circumstances. See *Bogges v. Meredith*, 16 W. Va. 1, 28. But cf. *Mora v. Murphy*, 83 Cal. 12, 23 Pac. 63. But, if the conveyed parcel should on partition of the whole tract fall to the grantor, it will by estoppel pass to his grantee. See *Soutter v. Porter*, *supra*, p. 417. Moreover, lands improved by a co-tenant will on partition be awarded him if his co-tenants will not be prejudiced. *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151. It seems therefore that the court should re-



gard the grantee's equity and on partition should allot the parcel to the grantor, or as a short cut directly to the grantee. *McNeil v. McDougall*, 28 N. S. 296. But in the principal case there is a further difficulty. Partition is asked of the parcel alone. It is well settled that partition of a part of a larger tract held in common will not be granted. It would seem that the plaintiff's bill should on this ground have been dismissed. *Barnes v. Lynch*, 151 Mass. 510, 24 N. E. 783; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356. Moreover, the defendant's cross bill for a partition of the whole is ineffectual, for while he may, as shown, obtain rights on partition, before that he has no rights against the grantor's cotenants and therefore cannot demand partition. *Soutter v. Porter*, *supra*. The court evidently considered that it had power to make partition of the whole so as to determine equitably the interests of all parties, because the jurisdiction of equity had been invoked in the matter. But a court of equity cannot give relief beyond the scope of the pleadings. *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603.

**TORTS — DEFENSES — STATUTORY AUTHORITY.** — A metal post owned by the defendant street car company, which was operating under legislative franchise, became electrified without its fault. The plaintiff touched it and was burned. *Held*, that the plaintiff may recover. *Fullarton v. North Melbourne Electric Tramways & Lighting Co. Ltd.*, [1916], Vict. L. R. 231.

For a discussion of this case, see NOTES, p. 377.

**WATERS AND WATERCOURSES — FLOOD WATERS — ACCELERATING FLOW BY ARTIFICIAL DEPRESSIONS.** — The Colorado River at the time of the formation of the Salton Sea was doing unprecedented damage by inundating large portions of the country and was threatening the defendant's valuable irrigation system. The river had permanently left its old channel and was making rather successful efforts to cut a new one. The defendants caused the rock which was retarding the cutting of this new channel to be blasted and the result was a rapid flow of the water from off the submerged territory, and a resulting erosion and gulying of the plaintiff's land which had been submerged. *Held*, that the plaintiff cannot recover. *Jones v. The California Development Co.*, 52 Cal. Dec. 473.

Under the "common enemy" rule, often miscalled the common law rule, surface waters may be fought off by landowners in any way they see fit regardless of consequences. *Gannon v. Hargadon*, 92 Mass. 106; *Bowlsby v. Speer*, 31 N. J. L. 351; *Cairo & Vincennes R. Co. v. Stevens*, 73 Ind. 278. See 14 HARV. L. REV. 390. But California has adopted the so-called "civil law rule" of surface waters. *Ogburn v. Connor*, 46 Cal. 346. Under this rule the natural course of drainage cannot be interfered with, and a right is recognized to have surface water pass in its natural channels. See DOMAT, CIVIL LAW, Cushing's ed., § 1583. But even under the civil law rule, a landowner may reasonably improve natural drainage and hasten the flow of water from his lands, over the lands of a lower proprietor without liability for resulting damage. *Pohlman v. Chicago, etc. R. Co.*, 131 Ia. 89, 107 N. W. 1025; *Sowers v. Schiff*, 15 La. Ann. 300; *Guesnard v. Bird*, 33 La. Ann. 796. Thus the principal case can be supported by regarding the waters of the vagrant river as surface waters and the method of drainage a reasonable one. If, however, the waters be considered as flood waters, the ordinary rule does not apply, and the owners of land along the river have a right to construct levees or embankments for the protection of their lands from the ravages of the flood. *Cubbins v. Mississippi River Commission*, 241 U. S. 351. And this is true although the effect thereof may be to prevent the free discharge of such flood waters as may tend to increase the flow of water upon lands not similarly protected. *Lamb v. Reclamation Dist.*, 73 Cal. 125, 14 Pac. 625; *McDaniel v. Cummings*, 83 Cal.

515, 23 Pac. 795. Nor should the rule be affected by the fact that the channel is deepened, as here, by being depressed below the surface instead of by elevating the banks by the erection of levees. The court in the principal case, however, has apparently reached its conclusion, not by placing the case within the technical confines of any of these rules, but by generally determining the rights of the parties by the reasonableness of their actions. See 2 FARNHAM, LAW OF WATERS, § 889.

## BOOK REVIEWS

**CRIMINALITY AND ECONOMIC CONDITIONS.** By William Adrian Bonger. Translated by Henry P. Horton. Boston: Little, Brown & Company. 1916. pp. xxxi, 706.

Seven years ago the American Institute of Criminal Law arranged, as a part of its educational work, to secure the translation of some of the more important foreign treatises on criminology. Dr. Bonger's work appears as the eighth number of this Modern Criminal Science Series.

William A. Bonger is a prominent Dutch publicist who has given special attention to the problems of crime. He is the author of "Religion and Crime" and numerous articles in Dutch and German periodicals on crime and its treatment. The Socialist point of view is very apparent in Dr. Bonger's writings, and it is doubtless the desire to bring before American readers the views of criminality held by this important school of European thought that has led to the selection for translation of "Criminality and Economic Conditions."

In style of presentation Dr. Bonger is somewhat academic. Almost half of the work is devoted to a critical exposition of the literature dealing with the relations of criminality and economic conditions. Space is even taken for the presentation of the views of men like Thomas More and Rousseau who wrote before the birth of modern criminal science. More recent writers are grouped under the titles Statisticians, Italian School, Bio-Socialists, Spiritualists, and others. The views of each are suggested by extracts and interpretations. Where Dr. Bonger differs in opinion he states his criticisms forcibly. Of one author he says that a complete criticism would require "a whole book, — so great is the number of his errors and omissions."

In summing up this review of the literature the author finds that a very small proportion of the writers deny the existence of a relation between criminality and economic conditions — the great majority are of the opinion that economic conditions occupy a more or less important position, but that other factors are also at work — while a small number are of the opinion that the influence of economic factors is sovereign. Of the third group Dr. Bonger says, "I have been able to find no inaccuracies in the foundations of their theses."

Part Two of "Criminality and Economic Conditions" contains the author's own discussion of the problem of crime. In the opening chapter one finds a brief but effective statement of the orthodox Socialist view of the present economic system. From the essential injustice of the system flow the outstanding evils of society. Prostitution is "the consequence of existing social conditions, which, in their turn, spring from the economic system of our time." "Alcoholism has its deeper causes in the material, intellectual and moral poverty created by the economic system now in force." Militarism is "a consequence of capitalism."



With regard to crime, the subject under consideration, the discussion is detailed and evidence is presented in abundance. While some crimes are more immediately economic the author finds all traceable to economic causes. Even in the crimes of degenerates the social and economic causes of degeneracy are the ultimate factors.

Upon the evidence reviewed the author claims that we have a right to say that "the part played by economic conditions in criminality is preponderating, even decisive." This conclusion he considers to be the most optimistic of criminological theories, for since crime is the consequence of economic and social conditions, we can combat it by changing these conditions, and humanity may look forward to the possibility of "some day delivering itself from one of its most terrible scourges."

In the opinion of the reviewer Dr. Bonger's work as translated is a valuable addition to our American literature on criminology. It is a partisan statement, but is a much-needed corrective to the numerous individualistic interpretations of crime recently published. It may be that lawyers especially need to consider these Socialist views of crime.

G. P. WYCKOFF.

WOMAN'S SUFFRAGE BY CONSTITUTIONAL AMENDMENT. By Henry St. George Tucker. New Haven: Yale University Press. London: Humphrey Milford. Oxford University Press. 1916. pp. x, 204.

The present volume is an elaboration of the Storrs lectures, recently delivered by the author at the Yale Law School. Mr. Tucker attacks the proposed constitutional amendment, providing that no state shall restrict suffrage because of sex, on the ground that it violates the fundamental principles of the Constitution by destroying local self-government in a most important respect, and that such a "break in the Constitutional wall" would be almost certainly enlarged in the future (p. 150). To sustain his indictment of the proposed amendment, he quotes at length from the debates of the Constitutional Convention, and cites the Tenth Amendment as a specific establishment of state control of suffrage. The only limits upon such control have been in the Fifteenth Amendment. It, with the two other *post bellum* amendments, made changes in the Constitution as organic as the suggested Eighteenth Amendment would make, Mr. Tucker admits; but omitting from consideration their doubtful wisdom, they were the direct products of the Civil War, and hence no precedents for the suffrage amendment.

Mr. Tucker's argument, it will be seen, is directed primarily to the psychological effect of adoption of the suffrage amendment; that it is constitutionally impolitic *per se* is of lesser importance. But, for the state-rights idea to be destroyed, it must first have a present existence and potency. The assumption of such a potency is the fundamental fallacy in Mr. Tucker's argument. That the preservation of the sovereignty of the state once dominated constitutional thought, is true; that it so dominates now is obviously not. The Civil War and the subsequent amendments have combined with changes in the nature of the country, to make precarious even the continued existence of the state-rights conception. Economic pressure has increased the tendency to centralize at the expense of state powers.<sup>1</sup> The sovereignty of the state, in a true sense, has already passed away; and to a new generation of lawyers there may seem nothing strange even in the abolition of the historical states as the units of local government, and the substitution for them of economic units in harmony with

<sup>1</sup> Cf. Former Atty.-Gen. George W. Wickersham, "Confused Sovereignty," 11 ILL. L. REV. 225, with "The Failure of the States," 9 NEW REPUBLIC 170, and Harold J. Laski, "Sovereignty and Centralization," 9 NEW REPUBLIC 176.

efficient administration. The state-rights idea is to-day without power. It has now passed where no future amendment to the Constitution can ever injure it. The suffrage amendment cannot change constitutional thought, for constitutional thought has already changed beyond it.

But Mr. Tucker's book illustrates not only the persistence of old habits of thought, but also the strength of the allegiance which that brilliant, flawless conception, state sovereignty, attracted. Here we have the able successor of Calhoun, the worthy descendant of Randolph and of earlier Tuckers. The book is the last gallant lance in behalf of state rights. It marks the end of an era.

RAEBURN GREEN.

**EQUITY AND ITS REMEDIES.** By Charles Neal Barney. Boston: G. A. Jackson. 1915. pp. xxxiii, 352.

This volume attempts to give in a small compass a simple, yet comprehensive, survey in outline form of the principles of equity jurisdiction. There is no attempt to discuss or analyze these rules, so that the book is of little value to the student. However, the full citation of Massachusetts cases, conveniently arranged under appropriate headings, makes the book valuable to Massachusetts practitioners as a "first-aid" manual of reference. Aside from the chapter on Reparation and Prevention of Torts, which contains some new matter not readily found elsewhere, the work can hardly be termed a permanent contribution to the literature of this branch of the law.

**THE WAR AND HUMANITY.** By James M. Beck. New York and London: G. P. Putnam's Sons. 1916. pp. xi, 322.

**THE DEPORTATION OF WOMEN AND GIRLS FROM LILLE.** Translated textually from the Note addressed by the French Government to the Governments of Neutral Powers on the conduct of the German Authorities towards the population of the French Departments in the occupation of the enemy. New York: George H. Doran Company. pp. 81.

**A TREATISE ON THE AMERICAN AND ENGLISH WORKMEN'S COMPENSATION LAWS.** By Arthur B. Honnold. Two Volumes. Kansas City: Vernon Law Book Company. 1917.

**THE PROSECUTION OF JESUS: ITS DATE, HISTORY AND LEGALITY.** By Richard Wellington Husband. Princeton: Princeton University Press. 1916. pp. vii, 302.

**A TREATISE ON THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES, INCLUDING ELECTRIC LAW.** By S. Walter Jones. Second Edition. Kansas City: Vernon Law Book Company. 1916. pp. xxiv, 1065.

**THE ROCKEFELLER FOUNDATION: ANNUAL REPORT.** 1915. New York: The Rockefeller Foundation.

**OPHTHALMIC JURISPRUDENCE.** By Thomas Hall Shastid. Chicago. 1916. pp. vi, 147.

**A TREATISE ON FEDERAL IMPEACHMENTS.** By Alex. Simpson, Jr. The Law Association of Philadelphia. 1916. pp. 230.



INTERNATIONAL CASES, ARBITRATIONS AND INCIDENTS ILLUSTRATIVE OF INTERNATIONAL LAW AS PRACTISED BY INDEPENDENT STATES. By Ellery C. Stowell and Henry F. Munro. Volume Two. Boston: Houghton Mifflin Company. pp. xvii, 662.

BELGIUM'S CASE: A JUDICIAL ENQUIRY. By Ch. De Visscher. Translated from the French by E. F. Jourdain. London: Hodder & Stoughton. 1916. pp. xxiv, 164.

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## TORT AND ABSOLUTE LIABILITY — SUGGESTED CHANGES IN CLASSIFICATION

### III

THE field for a doctrine depending on the extra-hazardous character of the undertaking "is narrow at the best; the line between the danger which calls for care and the 'extra' hazard is hard enough to draw."<sup>1</sup>

"While it is difficult to frame an affirmative definition of extra hazard, it is safe to assert (negatively) that certain circumstances do *not* constitute a test of extra hazard. The test of extra hazard is not merely that there is a possibility of serious harm resulting. That is true of all occupations. Nor merely that there is a probability of harm resulting from an occupation, unless it is conducted with reasonable care. That, again, is true of occupations in general."<sup>2</sup>

There are, as yet, no unanimously approved rules or criteria whereby to determine whether a particular user or act falls under this head of acting at peril. The highest English court some fifty years ago, in *Rylands v. Fletcher*,<sup>3</sup> undertook to lay down the so-called Blackburn Rule.

Before stating this rule, or considering its correctness, it should be said that, according to the weight of modern authority, it was unnecessary in that case to decide whether the defendants could

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<sup>1</sup> Professor E. R. Thayer, 29 HARV. L. REV. 811.

<sup>2</sup> 27 HARV. L. REV. 349, n. 15, giving further instances which do *not* constitute tests.

<sup>3</sup> L. R. 3 H. L. 339, 339-40 (1868).



be held liable irrespective of negligence. It would seem that the same result (judgment for plaintiff) could have been reached on the ground that the defendants were legally chargeable with negligence. True, the defendants personally were guiltless of negligence. But the engineer and contractors employed by them were negligent; and for the negligence of these persons the defendants were responsible. The duty resting upon the defendants in that case could not be discharged by delegating it to an independent contractor. (As to this last proposition there is some conflict, but the weight of modern authority is strongly in favor of it.) The view that *Rylands v. Fletcher* could have been decided on the ground of negligence is supported by Bishop, Street, Bohlen, and Pollock.<sup>4</sup>

In *Rylands v. Fletcher*, the following formula, enunciated by Blackburn, J., in the Exchequer Chamber in 1866, was approved by the House of Lords in 1868:

"We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape."<sup>5</sup>

Although the learned judge puts the qualification "*primâ facie*" before "answerable," yet the context, and indeed the entire opinion, shows that he did not think that the so-called *primâ facie* liability could be rebutted by proving that the defendant used all possible care. It is quite apparent that he thought of only two possible methods whereby defendants could escape liability, *viz.*, "by showing that the escape was owing to the plaintiff's default," "or perhaps that escape was the consequence of vis major or the act of God."

Nothing can be more general or sweeping than the word "anything" standing alone. Here it is qualified or limited only by the words "likely to do mischief if it escapes." Notice what this rule does *not* contain. The application of the rule is not restricted to

<sup>4</sup> BISHOP, NON-CONTRACT LAW, § 839; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 62, 63; Professor Bohlen, 59 U. PA. L. REV. 299, n. 2; Pollock's Editorial Preface to 143 REVISED REPORTS v, vi. Pollock adds: "Moreover the case was of the class where '*res ipsa loquitur*.'"

<sup>5</sup> Blackburn, J., L. R. 1 Exch. 265, 279 (1866), approved in L. R. 3 H. L. 330, 339-40 (1868).

anything "likely to escape," or to anything "having a tendency to escape of itself," or to "a substance likely to escape despite the utmost care to confine it." Nor is absolute liability limited to "unusual and extraordinary uses which are fraught with exceptional peril to others." It is not required that the thing brought upon the land should be some article which owners are not accustomed to bring on their land. The rule makes no exception as to things reasonably necessary to the ordinary beneficial use and enjoyment of the land.<sup>6</sup>

It should, perhaps, be mentioned here that Lord Cairns, while indorsing Blackburn, gave also a test of his own, which is briefly referred to in the note below.<sup>7</sup>

The Blackburn Rule has not met with universal and cordial approval by English lawyers.

In the Preface to the fourth edition of Salmond on Torts (dated November, 1915), the learned author, speaking of cases of absolute liability for accidental harm, says:

"... The scope and limits of these exceptional rules still remain covered with doubt and darkness. This is more especially so with the

<sup>6</sup> Some jurists, who have undertaken to state the principle upon which cases like *Rylands v. Fletcher* rest, have put the requirements much higher than in the Blackburn test. Thus, Knowlton, J., in *Ainsworth v. Lakin*, 180 Mass. 397, 399 (1902), uses the expressions "things which have a tendency to escape, and do great damage"; "unusual and extraordinary uses of property"; "unwarrantable and extremely dangerous uses of property." So Dr. Kenny, in the headnote prefixed to *Rylands v. Fletcher*, in his *CASES ON TORTS*, p. 600, asserts that the landowner is liable for the escape of "any extraordinary source of danger which he has brought upon his land."

In *Rickards v. Lothian*, [1913] A. C. 263, 280, Lord Moulton, in deciding "that the present case does not come within the principle laid down in *Fletcher v. Rylands*," says: "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

<sup>7</sup> *Rylands v. Fletcher*, L. R. 3 H. L. 330, 339 (1868). It has sometimes been understood that the Cairns test was intended as a substitute for the Blackburn test, but Professor Bohlen thinks that Lord Cairns then intended to lay down a rule "as to how far acts, *primâ facie* actionable, may be justified because done by the defendant in the course of his use of his land for his own purpose." See 59 U. PA. L. REV. 302-04. The Cairns test is that of natural or non-natural use of his land by the defendant. Lord Cairns appears to describe a non-natural use as a use "for the purpose of introducing into the close that which in its natural condition was not in or upon it." Taking the term "non-natural user" as interpreted by Lord Cairns, the test has been subjected to very destructive criticism. The criticisms of Doe, J., in 53 N. H. 442, 448 (1873), have never been satisfactorily answered. See also SALMOND, TORTS, 4 ed., 225, 229, n. 15, and Mr. Gest, 33 AM. L. REG. (N. S.) 101-04.



rule established by the decision of the House of Lords in *Rylands v. Fletcher* in 1866 (1868?). No decision in the law of torts has done more to prevent the establishment of a simple and uniform system of civil responsibility, and its true meaning and limitations remain to this day the subject of dispute and uncertainty."

Sir Frederick Pollock has frankly said that he does not "like" *Rylands v. Fletcher*,<sup>8</sup> and that the rule in that case "seems needlessly harsh."<sup>9</sup> In his draft of an Indian Civil Wrongs Bill, section 68, he proposes a provision, that a person keeping dangerous things is bound to take all reasonably practicable care to prevent harm, and is liable as for negligence to make compensation for harm, unless he proves that all reasonable practicable care and caution were in fact used. In his work on Torts,<sup>10</sup> he says:

"... one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk, ... and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge."

He also regrets that he cannot concur in certain views of Mr. Salmond, which would prevent the application of *Rylands v. Fletcher* to any case except that of actual negligence.<sup>11</sup>

"The extent of the exceptions made in later decisions shows" that the rule in *Rylands v. Fletcher* "is accepted with reluctance."<sup>12</sup>

In later cases "there has been a manifest inclination to discover something in the facts that took the case out of the rule."<sup>13</sup>

<sup>8</sup> 25 L. QUART. REV. 321.

<sup>9</sup> POLLOCK, TORTS, 6 ed., 623, n. (s.).

<sup>10</sup> 10 ed., p. 511.

<sup>11</sup> See POLLOCK, TORTS, 10 ed., 511 n. (m.), and Editorial Preface to 143 REVISED REPORTS v, vi.

<sup>12</sup> POLLOCK, TORTS, 10 ed., 671, n. (s.). It has been decided that the rule in *Rylands v. Fletcher* does not apply to damage of which the immediate cause is the act of God (or *vis major*). *Nichols v. Marsland*, L. R. 10 Exch. 255 (1875); 2 Exch. Div. 1 (1876). It has also been held not to apply "where the immediate cause of damage is the act of a stranger." *Box v. Jubb*, 4 Exch. Div. 76 (1879).

In 8 HARV. L. REV. 389, Professor Wigmore says: "This sub-principle of 'acting at peril,' it must be added, has certain general limitations; and a special group of cases attempt to determine how far extraordinary catastrophes or the acts of third persons relieve from responsibility one who would ordinarily be 'acting at peril.'" Compare POLLOCK, TORTS, 6 ed., 475-76.

<sup>13</sup> See POLLOCK, TORTS, 9 ed., 661, notes, and 503, n. (m.); POLLOCK, LAW OF FRAUD IN BRITISH INDIA, 53-54; E. R. Thayer, 5 HARV. L. REV. 186, n. 1; Lord Moulton, in *Rickards v. Lothian*, [1913] A. C. 263, 280-81. For a similar tendency in an American

The Blackburn test is rejected by what we consider the decided weight of American authority.<sup>14</sup>

This doctrine imposing, in exceptional cases, absolute liability for non-culpable accident — this holding that a man, in certain cases, acts at his peril — is regarded unfavorably by some of the best modern text-writers.<sup>15</sup>

"Had the law been content to adopt the uniform principle that liability for accidental harm depended in all cases on the existence of negligence on the part of the defendant or his servants, most of the serious difficulties and complexities which now exist would have been eliminated. Unfortunately, however, for the simplicity and intelligibility of our legal system, it has been found necessary to recognize a number of cases of absolute liability, that is to say, liability for accidental harm independent of any negligence on the part of the defendant or his servants, and the scope and limits of these exceptional rules still remain largely covered with doubt and darkness."<sup>16</sup>

Some jurists would require only due care under the circumstances, a standard which would, of course, require care proportioned to the apparent risk, and thus would often, in fact, require great care. And while thus making negligence the basis of liability, they might impose upon the defendant the burden of proving care, as is done by Sir Frederick Pollock in his "Draft of a Civil Wrongs Bill Prepared for the Government of India."<sup>17</sup>

This doctrine that a man, in certain cases, acts at peril and is absolutely liable for non-culpable accidents is, as we have already said, a survival from the early days when *all* acts were held to be done at the peril of the doer. When the courts, in more recent times, were gradually coming to adopt the doctrine that fault is

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state, where the earlier decisions were understood as having adopted the rule in *Rylands v. Fletcher*, compare *City Water Power Co. v. City of Fergus Falls*, 113 Minn. 33, 128 N. W. 817 (1910), with *Cahill v. Eastman*, 18 Minn. 324 (1872), and *Wiltse v. City of Red Wing*, 99 Minn. 255, 109 N. W. 114 (1906).

<sup>14</sup> For very explicit decisions, see *Losee v. Buchanan*, 51 N. Y. 476 (1873); *Brown v. Collins*, 53 N. H. 442 (1873); *Marshall v. Wellwood*, 38 N. J. L. 339 (1876). See also *BURDICK, TORTS*, 2 ed., 447; Professor E. R. Thayer, 29 HARV. L. REV. 814. Williams, J., in *Gulf, Colorado & Santa Fe Ry. Co. v. Oakes*, 94 Tex. 155, 158, 159, 58 S. W. 999 (1900).

<sup>15</sup> See *POLLOCK, TORTS*, 10 ed., 505, 511, 671, n. (s.); 1 *STREET, FOUNDATIONS OF LEGAL LIABILITY*, 84, 85. Compare *BISHOP, NON-CONTRACT LAW*, §§ 1225, 1230; and 2 *COOLEY, TORTS*, 3 ed., 696-97, 706-08.

<sup>16</sup> *SALMOND, TORTS*, 4 ed., Preface, v.

<sup>17</sup> Article 68 (s.). See *POLLOCK, TORTS*, 10 ed., 477-78.



generally a requisite element of liability in tort, the law on the subject of liability for negligence was not so fully developed as it is now. If the wide scope and far-reaching effect of the law of negligence had then been fully appreciated, it is quite probable that the courts would not have thought it necessary to retain any part of the old law of absolute liability for application in certain exceptional instances.

There was "a time when the common law had no doctrine of negligence." It has been said that, in the earlier stages of the law, "there is no conception of negligence as a ground of legal liability."

In Holdsworth's "History of English Law"<sup>18</sup> the author speaks of "the manner in which the modern doctrines of negligence have been imposed upon a set of primitive conceptions which did not know such doctrines." Mr. Street says that the law of negligence "is mainly of very modern growth." "No such title is found in the year books, nor in any of the digests prior to Comyns (1762-67)."<sup>19</sup> Sir Frederick Pollock says: "The law of negligence, with the refined discussion of the test and measure of liability which it has introduced, is wholly modern; . . ."<sup>20</sup> Professor E. R. Thayer says "that law" (the law of negligence) "is very modern — so modern that even the great judges who sat in *Rylands v. Fletcher* can have had but an imperfect sense of its reach and power."<sup>21</sup> ". . . the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it."<sup>22</sup>

At the present time it is generally unnecessary, in order to do justice to a plaintiff, to adopt the doctrine of acting at peril.<sup>23</sup>

<sup>18</sup> Vol. 3, p. 306.

<sup>19</sup> 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 182.

<sup>20</sup> 27 ENCYCL. BRIT., 11 ed., 66.

<sup>21</sup> 29 HARV. L. REV. 805.

<sup>22</sup> *Ibid.*, 814. The development of the law of negligence was retarded by a tendency to hold a defendant liable on the ground of wrong intent, where the real fault was negligence. In such cases the intent was "presumed" by fiction of law. See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 75, 78.

<sup>23</sup> In some American cases the courts, while deciding in favor of the plaintiff, have cited and seemingly approved the Blackburn Rule in *Rylands v. Fletcher*. But in the great majority of these cases the facts did not call for an application of that rule, the defendant being liable on other grounds, frequently on the ground of his negligence. See Professor Bohlen, 59 U. PA. L. REV. 433-37.

We have already seen that by the weight of modern authority the decision for plaintiff in the case of *Rylands v. Fletcher* itself might have been based on negligence.

Professor E. R. Thayer says:

"... the law has at its hand in the modern law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet."<sup>24</sup>

If the case is a meritorious one and proper emphasis is laid on the test of

"due care *according to the circumstances*," then "the theory of negligence" will generally be "sufficient to carry the case to the jury." "How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. . . ." <sup>25</sup>  
 "... one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk (not merely the diligence of himself and his servants, but the actual use of due care in the matter, whether by servants, contractors, or others), and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge."<sup>26</sup>

One argument for imposing absolute liability on the defendant is the supposed difficulty which the plaintiff lies under if he is obliged to prove defendant's negligence. Professor E. R. Thayer<sup>27</sup> replies:

"The difficulty is met by the doctrine of *res ipsa loquitur*. It is, indeed, the very situation for which that doctrine exists."<sup>28</sup>

If the two rules of law — namely, (1) the doctrine of *Rylands v. Fletcher* as qualified by *Nichols v. Marsland* and *Box v. Jubb*, and (2) the rule prevailing where the *Rylands* test is rejected and the defendant's liability depends on negligence —

"be compared in their practical result, the difference between the two in the actual protection given by the law to the injured person is not very great."<sup>29</sup> "Such an intermediate ground no doubt exists; but it is a little space. How narrow it is can hardly be realized until the full scope of the modern law of negligence is recognized."<sup>30</sup>

<sup>24</sup> 29 HARV. L. REV. 815.

<sup>25</sup> *Ibid.*, 805.

<sup>26</sup> POLLOCK, TORTS, 10 ed., 511.

<sup>27</sup> 29 HARV. L. REV. 806-07.

<sup>28</sup> See his explanation of "the principles to which the phrase points," p. 807.

<sup>29</sup> Professor E. R. Thayer, 29 HARV. L. REV. 808.

<sup>30</sup> *Ibid.*, 804-05.



Professor Salmond, indeed, goes further and practically denies the existence of any "intermediate ground." He maintains<sup>31</sup> that, under the limitation upon *Rylands v. Fletcher*, which is established by *Nichols v. Marsland*, a landowner is exempted from responsibility "when there is no negligence at all upon the part of any one."<sup>32</sup>

What is the present scope, or application, of the common law doctrine imposing absolute liability in exceptional cases of non-culpable accident? What is the tendency of the courts — to extend or to restrict its application?

At the present time, in all countries where the common law prevails, we think it will be found that there are some instances of non-culpable accident where absolute liability will be imposed; some acts or uses which the courts will hold to be extra-hazardous and hence done at the peril of the doer. In many jurisdictions the test of liability will not be so broad as the Blackburn Rule. The line will be drawn in different places, varying with the particular country and with the particular date. Some cases will, at the same time, be held extra-hazardous in one country but not in another country. Thus the keeper of an elephant in England acts at peril; but not so in Burma.<sup>33</sup> And some cases will be held extra-hazardous in a country at an earlier date, but not so held in the same country at a later date.<sup>34</sup>

As to the present tendency of the courts:

On the one hand, there is now a judicial tendency to extend (to recognize more fully) the obligation of using care; to call some conduct negligent which would not have been held so a century ago.

On the other hand, there is a tendency to restrict or deny liability

<sup>31</sup> TORTS, 4 ed., 233.

<sup>32</sup> "Mr. Salmond . . . argues that *Rylands v. Fletcher* does not apply where there has been no negligence on the part of any one. I should be glad to think so if I could." SIR FREDERICK POLLOCK, TORTS, 10 ed., 511, n. (m.).

In the Preface to 143 REVISED REPORTS, Sir Frederick Pollock, after stating the objections to Mr. Salmond's "ingenious thesis" relative to the application of *Rylands v. Fletcher*, says: "For my own part, as I have already said elsewhere, I should like Mr. Salmond to be found in the right. The difficulties, however, are great."

<sup>33</sup> Compare *Filburn v. People's, etc. Co. Ltd.*, 25 Q. B. D. 258 (1890), with *Maung Kyaw Dun v. Ma Kyin, etc.*, 2 Upper Burma Rulings (1897-1901), Civil 570 (1900); S. C. 2 AMES & SMITH, CASES ON TORTS, ed. 1909, 548.

<sup>34</sup> See 27 HARV. L. REV. 352-53, as to use of a steam boiler in New York in 1807 and 1873.

in the absence of negligence or wrongful intention. Professor Wigmore,<sup>35</sup> speaking of the principle enunciated by Blackburn, J., in *Rylands v. Fletcher*, says:

"... the tendency may perhaps be said to be in many States to restrict to as few as possible the classes of situations to be governed by the principle. An example of the latter attitude is found in the masterly opinion of Mr. Justice Doe, in *Brown v. Collins*, 53 N. H. 442."

If there were no modern legislation which might indirectly influence the views of judges, we should be inclined to predict that there would be a gradual diminution in the number of cases where absolute liability is imposed on non-culpable defendants, and it would even be possible that ultimately courts might cease entirely to hold defendants liable in cases of non-culpable accident.

But there is modern legislation, enacted almost wholly within the last twenty-five years, which may indirectly operate to check any further judicial tendency to exonerate in cases of non-culpable accident, and which, conceivably, may even cause courts to reverse the modern common law doctrine — that fault is generally requisite to liability. Much of this legislation is of the class usually described as Workmen's Compensation Acts. These statutes create a duty on the part of employers to compensate workmen in many kinds of industry for accidental damage, irrespective of any fault on the part of their employers or their fellow servants. This legislation singles out workmen employed in an undertaking and constitutes them a specially protected class, while overlooking other persons damaged in the same accident whose claim stands on at least equal ground.<sup>36</sup> The result reached in many cases under this legislation is absolutely incongruous with the result reached under the modern common law as to various persons whose cases are not affected by these statutes. The theory underlying most of the statutes, the basic principle, is in direct conflict with the fundamental doctrine of the modern common law of torts.<sup>37</sup> The statutes show "a distinct revulsion from the conception that fault is essential to liability";

<sup>35</sup> 7 HARV. L. REV. 455, n. 3.

<sup>36</sup> See four examples in 27 HARV. L. REV. 237-38.

<sup>37</sup> See *ibid.*, 245-47. Under these statutes "there is a legal liability without fault, a liability much more extensive than that which grew out of the rule *respondet superior*, qualified as that was by the fellow servant rule and the theory of assumption of risk." Judge Swayze, 25 YALE L. J. 5.



a distinct reversion to the earlier conception, that he who causes harm, however innocent, must make it good.<sup>38</sup>

Here is an incongruity between statute law and modern common law as to a matter where each applies to a large class of cases.

Will this incongruity be permitted to continue permanently?<sup>39</sup> What available methods are there for removing it? Is not one conceivable method this: by decisions of the courts, repudiating the modern common law of torts that fault is generally requisite to liability, and going back to the ancient common law doctrine that an innocent actor must answer for harm caused by his non-culpable conduct? What arguments can be urged to induce courts to make such a change?

These questions have been discussed by the present writer more fully than is possible here in an article on "Sequel to Workmen's Compensation Acts."<sup>40</sup>

What are the objects to be aimed at in arranging and classifying the law?<sup>41</sup>

When is it expedient to make changes in existing classifications or in legal nomenclature?

Some of the best modern writers assert that the object of classification is practical convenience, not logical or scientific order, and that changes from the existing arrangement or nomenclature should be made only for very weighty reasons. "The end sought," it is said, "is a purely practical one"; "not symmetry, *elegantia*, or logical order for its own sake." The existing classification should

<sup>38</sup> The great majority of these statutes do not purport to apply only to extra-hazardous occupations. See 27 HARV. L. REV. 344-45, 348, 363.

<sup>39</sup> "Such inconsistencies must eventually lead to a change that will assimilate the rules of liability in the different cases." Judge Swayze, 25 YALE L. J. 6.

<sup>40</sup> 27 HARV. L. REV. 235, 344. Special reference may be made to pages 250, 251, 363, first sentences on page 367, and last paragraph on page 368.

<sup>41</sup> As to the subject of classification, it has recently been said, "As a matter of fact there is a remarkable poverty in English legal literature of works dealing with the subject at all." Mr. H. J. Randall, 28 L. QUART. REV. 304. "The legal literature of England has many merits, but it is singularly deficient in orderly statements of broad principles." 22 L. QUART. REV. 100. "English law possesses no received and authentic scheme of orderly arrangement. Exponents of this system have commonly shown themselves too little careful of appropriate division and classification, and too tolerant of chaos. Yet we must guard ourselves against the opposite extreme, for theoretical jurists have sometimes fallen into the contrary error of attaching undue importance to the element of form." SALMOND, JURISPRUDENCE, 4 ed., Appendix iv, 481.

not be changed simply "to force a symmetrical grouping."<sup>42</sup> Mr. Salmond says:

"In the classification of legal principles the requirements of practical convenience must prevail over those of abstract theory. The claims of logic must give way in great measure to those of established nomenclature and familiar usage: and the accidents of historical development must often be suffered to withstand the rules of scientific order."<sup>43</sup>

Sir Frederick Pollock says:

"Practical workers want to find things grouped not only, nor chiefly, in a logical order, but more or less nearly as they occur in practice; nor will any real or supposed propriety of logical division reconcile them to being constantly sent from one book to another. Law does not consist of a number of self-contained and mutually exclusive propositions which can be arranged in a rigid framework."<sup>44</sup>

Closely akin to the question of changes in legal classification is the question of changes in legal nomenclature. Sir Henry Maine has said that "legal phraseology is the part of the law which is the last to alter."<sup>45</sup> All changes of phraseology involve temporary confusion. Hence they should not be made "for the mere sake of theoretical or philological accuracy."<sup>46</sup> But on the other hand, it is impossible to ignore "the enormous influence of terminology on thought." "Loose definitions encourage loose conceptions."<sup>47</sup> There are various subjects upon which great confusion exists and will continue to exist, unless and until more exact phrases are substituted for those in popular use. Thus Mr. Bower<sup>48</sup> gives a schedule of sixteen expressions in use in the law of defamation, "which are either meaningless, or incorrect, or misleading, or employed in a number of different senses."

Sometimes it is, upon the whole, expedient that new terms should be substituted for old ones. A compromise is occasionally attempted. The old term is retained, but a new meaning is

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<sup>42</sup> See TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW*, § 582; Professor Wigmore, 8 *HARV. L. REV.* 377.

<sup>43</sup> SALMOND, *JURISPRUDENCE*, 4 ed., 481.

<sup>44</sup> 1 *ENCYCLOPÆDIA OF LAWS OF ENGLAND*, 2 ed., Introduction, 3.

<sup>45</sup> MAINE, *ANCIENT LAW*, 1 Eng. ed., 337-38.

<sup>46</sup> See BOWER, *CODE OF THE LAW OF ACTIONABLE DEFAMATION*, 487.

<sup>47</sup> *Ibid.*, Preface, ix, 487.

<sup>48</sup> Page 489.



affixed to it. But this method is apt to result in great confusion and involves frequent and lengthy explanations.

When changes are made in legal classification or nomenclature there is almost sure to be an uncomfortable transition period. Confusion and increase in litigation are likely to temporarily result "from the dislocation of established associations" and "the introduction of new technical terms." Hence such changes ought not to be made upon slight grounds. But there are cases where there are weighty reasons for the change and where the result in the long run would be highly beneficial. Here the objection of temporary inconvenience should not be allowed decisive force.<sup>49</sup>

What changes from the old forms of classification and nomenclature should now be made as to the general topics we have been discussing? Should any changes at all be made at the present time?

It was said, earlier in this paper, that at the present time certain divisions should be recognized as now existing in the law as held by the courts. And an attempt has here been made, in a very general way, to mark out the boundaries of each division and to enumerate the leading subtopics or cases falling within each. But we have also recognized the possibility, not to say the probability, that the scope of one division (absolute liability) may be materially lessened, it being possible that the cases now classed under absolute liability for accident may be largely, if not wholly, transferred to the division where liability attaches only in case of fault. In such an event, the cases remaining under absolute liability for accident might constitute comparatively insignificant exceptions to the rule that fault is requisite to liability.<sup>50</sup>

<sup>49</sup> Professor Terry, who in such cases is inclined to allow "very little weight" to "objections of novelty and strangeness and temporary inconvenience," adds this limitation: "There may be errors and false classifications which have struck such deep root in our law that it would be better not to attempt to tear them up." TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW*, § 584, p. 613.

<sup>50</sup> We have here been speaking solely of absolute liability in cases of non-culpable *accident*. But this constitutes only one of the three classes of cases, heretofore usually grouped under Tort, where the law has sometimes imposed absolute liability in the absence of fault. The other two classes are: (a) Liability for non-culpable *mistake*; and (b) vicarious liability for the wrongful acts of others. (See *ante*, pp. 325, 326, 327.) Even if the courts should cease to impose absolute liability for non-culpable *accident*, there would still remain the above classes (a) and (b); and in cases of wide extent arising under these classes the courts are likely to continue to impose absolute liability.

If the law is in a transition state as to accident, why not postpone attempts to reclassify or rearrange until the law has become finally settled on a new basis? Why attempt to classify or arrange in accordance with the law as now held by the courts if the existing law is not likely to be permanently adhered to? In view of the possibility of great changes, is it worth while to take time now to consider upon what system the law, as now held by the majority of courts, should be classified?

We think that it *is* desirable; and for at least two reasons:

1. Changes in the present law may be a long time in gaining a firm footing.

2. To delay attempts to classify until the law is finally and forever settled would be to postpone eternally.<sup>51</sup>

Those who regard the distinctions we have attempted to make as being intrinsically correct, and also as being of sufficient importance to justify *some* change from the old forms of classification and nomenclature, may differ as to the extent of the change and as to the method of expressing it.

As to such changes in the classification of topics heretofore usually grouped under Tort, three systems (at least) can be suggested, each differing from the others as well as from the old method.

System 1. Retain Torts as a general title. Include under it all cases heretofore grouped under that general head. But divide these cases into two distinct classes, each of which is to be discussed

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Under the class of non-culpable mistake, we think that the courts will continue to impose absolute liability upon one who intermeddles with tangible objects of property under a *bonâ fide* and non-negligent mistake as to the title. Under the head of vicarious liability, we think that the courts will continue to hold a master absolutely liable for the tortious conduct of his servant while the servant is acting in the course of his employment, although the master was in no fault as to the selection of the servant or as to the orders given to him. It is true that the intrinsic correctness of both the last-mentioned doctrines has been questioned; but without taking time or space to here discuss the matter, we venture the prediction that both doctrines will be adhered to by the courts.

<sup>51</sup> "The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." HOLMES, COMMON LAW, 36.



separately.<sup>52</sup> 1. Where liability is due to fault. 2. Where the court imposes liability notwithstanding the absence of fault.<sup>53</sup>

System 2. Retain Torts as one of the general titles of the law. But include under it only cases where liability is due to fault.

Use Absolute Liability as a distinct title, not as describing a mere division or class under Torts. Under Absolute Liability include (*inter alia*) cases heretofore usually classed under Torts but in which there was no fault.

System 3. Reject altogether the term Tort as a general title in the law.<sup>54</sup>

Substitute the term General Rights, or Actionable Violations of General Right.<sup>55</sup>

The phrase General Rights might be understood as including all rights which inhere in the community generally, whether such rights are available against all the world or only against certain determinate persons.<sup>56</sup>

Divide Actionable Violations of General Rights into two classes:

<sup>52</sup> In the Introduction to HEPBURN, *CASES ON TORTS*, 21, 22, the learned editor divides Torts into two classes:

(1) "Torts through Acts of Absolute Liability."

(2) "Torts through Acts of Conditional Liability."

(1) includes "Trespasses and Absolute Torts other than Trespasses."

(2) includes "Torts through Negligence and Torts through Acts of Intentional Harm."

<sup>53</sup> Under System 1, how should we define Tort—how state the essential requisites to an action of tort?

The definition would have to be in an alternative form, substantially as follows:

There must be the infliction of damage on the plaintiff by reason of the conduct of the defendant.

Either (1) where defendant's conduct is culpable (other than a mere breach of contract),

Or (2) in exceptional cases where, although defendant's conduct is non-culpable, yet there are especial reasons of policy for imposing on defendant absolute liability for the results of his conduct.

We have previously said that, according to the common definition of tort, the "damage" must be of a kind recoverable in a court of common law jurisdiction; and that in some cases the law will allow an action for infringement of right without actual pecuniary loss.

<sup>54</sup> ". . . proscribe, expel, and banish the obnoxious term 'Tort,' as the title of the subject." Preface to 1 WIGMORE, *SELECT CASES ON TORTS*, vii.

<sup>55</sup> "Names enough could be found. Let us agree for the moment on 'General Rights.'" WIGMORE, *ubi supra*.

<sup>56</sup> See *ante*, 252.

1. Where there is fault. 2. Where the court imposes liability notwithstanding the absence of fault.

As to the comparative advantages and disadvantages of the three different systems just suggested.

As to System 1. The two distinct classes are both placed where lawyers are now likely to look for them, *viz.*, under the general head of Torts. Using System 1 does not require so radical or general a rewriting of existing textbooks as might be found desirable under System 2 or 3. It closely resembles, in substance, the classification of Mr. Salmond.<sup>57</sup>

*Per contra:* The term Torts, when used to include Class 2 (under System 1), is a misnomer, and such use requires elaborate explanation. It gives the word Torts a meaning in law different from (indeed exactly contrary to) its meaning in popular speech.

As to System 2. This system corresponds more nearly with facts: it does not use the word Torts in any extraordinary or strained meaning. But it might require a practitioner (when looking up the law of his case) to examine two treatises instead of one as heretofore; or, at least, to look into two different parts of a textbook to find what heretofore was contained in one part. It would render advisable much rewriting and rearrangement of existing textbooks, if, indeed, it did not require the preparation of two separate books where only one was used hitherto.

As to System 3. By discarding altogether the term Torts we get rid of the troublesome question whether that term, if it were retained, should be used as a general title with its former wide scope, or whether it should be used as a limited title describing only a particular class. This system substitutes for Torts the phrase General Rights, which, though not a new term in law, is comparatively new, in this connection, as a leading title. Hence many practitioners might not understand what was here covered by this term, and might not look under this title to find the law of their case. System 3 may be thought more logical and clear-cut than System 1 or 2. But a long time might be required for the profession to get accustomed to the term (as a substitute for Torts), and there might be much confusion *ad interim*.

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<sup>57</sup> TORTS, 1 ed., Ch. I, §§ 2, 3.



What advantage from adopting any one of the three systems, even System 1, the least radical, of the suggested changes?

Even System 1 would

(a) necessitate a more thorough examination of the essence of fault (*i. e.*, in the legal sense);

and (b) a more thorough examination of the reasons, the expediency, of sometimes adopting (imposing in certain cases), the stringent rule of absolute liability.

Neither of these inquiries, neither *a* nor *b*, have yet been subjected to such a searching examination or analysis as their importance demands.

The probable result of close investigation would be: (1) to transfer some cases — some states of fact — from the class of absolute liability to the class of cases where liability must be founded on fault; and (2) to allow immunity in some cases, where liability has heretofore been imposed.

Systems 2 and 3 would have the additional recommendation of using legal terms more nearly in accord with the meaning affixed to those terms in ordinary speech. This is desirable wherever practicable. The old law used tort in a sense quite different from its meaning in ordinary speech on non-legal topics. System 1 still uses the word tort, as a general title, in a manner open to this objection. The subdivision of System 1 into classes removes to some extent, this objection; but that subdivision is, *semble*, inconsistent with the use of tort as a general title under which to include *both* classes.

Which of these three systems are most likely to be adopted by legal writers, who agree that it is desirable to make *some* change from the old classification?

The answer may depend upon the point of view of the individual writer, upon the immediate object which he is attempting to accomplish. The maker of an index-digest or the author of a text-book for handy use by practitioners may be more likely to adopt System 1. The author of a work on jurisprudence, or the framer of a draft of a general code, may be more likely to prefer System 2 or 3 to System 1. If there were no existing system and classification and nomenclature were now to be considered for the first time some jurists might prefer System 3 to System 2.

Teachers of law may not agree among themselves as to what course to adopt.<sup>58</sup>

Those instructors who agree on the principle of a general scheme may differ widely as to how specific subjects should be treated in detail.<sup>59</sup> Most teachers are likely to try experiments with their classes before settling upon a permanent method. One troublesome matter may here be briefly alluded to.

Assume that the instructor will take up one by one the different kinds of specific injuries heretofore grouped under torts and classified in the textbooks according to the sort of particular harm inflicted or the nature of the particular right infringed. Shall he, in dealing with each separate subject and before passing to another distinct subject, discuss both the question (1) when liability is imposed on account of actual fault, and the question (2) when the law imposes absolute liability in the absence of fault? Or shall he first go over the different kinds of specific injuries, considering solely (as to each) the question when liability is imposed on account of actual fault, and then, taking up for the first time the subject of absolute liability, go over again the different kinds of specific injuries and consider (as to each) when the law imposes absolute liability in the absence of fault? Or can some third method be devised which would be preferable to either of the above alternatives?

As heretofore stated, the third class comprising cases of absolute liability is made up mainly of two sets of subjects.

We have been considering only one of these divisions, *viz.*, cases where recovery has heretofore been enforced in an action of tort, but where there is, in fact, no actual fault on the part of the defendant.

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<sup>58</sup> Professor Wigmore, at the end of his essay on "The Tripartite Division of Torts," says: "No opinion is expressed, it should be added, as to whether it is possible or desirable to teach the law of Torts to-day according to the above grouping." 8 HARV. L. REV. 210. And again, at the end of his "General Analysis of Tort Relations," he says: "The writer expresses no opinion as to whether it is possible or desirable to follow the above order of topics in conducting instruction in Torts." 8 HARV. L. REV. 395.

Professor Bohlen, in the Preface to his recently published *CASES ON THE LAW OF TORTS*, gives practical reasons why the editor of such a work should hesitate to reject entirely the popular method of arrangement, or to adopt a "very novel classification." See Preface, iv.

<sup>59</sup> See Judge Holmes, 5 AM. L. REV. 4.



We now advert briefly to the other division, *viz.*, cases where recovery has heretofore been enforced in an action of contract, but where there is in fact no real contract, only a fiction contract invented for the sake of allowing a remedy.

Most of the cases in this division are usually grouped under the head of Quasi-Contract, an infelicitous term. The subtopics usually comprised under this general head are very numerous.

"Some of them have little in common with others," and "in the past, in treatises upon the common law, they have generally been handled under diverse headings." "During the period when the substantive law was controlled by the forms of procedure, they were classified as contractual or delictual in accordance with the form of action maintainable to enforce them."<sup>60</sup>

Upon this subject of Quasi-Contract there are now two elaborate treatises, one by Professor Keener published in 1893, and another by Professor Woodward in 1913. The term, used in its broadest sense, applies "to all non-contractual obligations which are treated, for the purpose of affording a remedy, as if they were contracts."<sup>61</sup> Keener and Woodward agree on the point which especially concerns us here. They both affirm that, in all the cases grouped under this head of Quasi-Contract, there is no genuine agreement or assent; and that the "contract" heretofore alleged in the declaration is a pure fiction.<sup>62</sup>

"The question naturally arises, why a classification productive of so much confusion was ever adopted. The answer to this question is to be sought, not in the substantive law, but in the law of remedies.

"The only forms of action known to the common law were actions of tort and contract. If the wrong complained of would not sustain an action, either in contract or tort, then the plaintiff was without redress, unless the facts would support a bill in equity.

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<sup>60</sup> Professor Corbin, 21 YALE L. J. 536.

<sup>61</sup> See WOODWARD, § 1.

<sup>62</sup> See WOODWARD, § 4; KEENER, 5, 6; MAINE, ANCIENT LAW, 3 Am. ed., 332; AMES, LECTURES ON LEGAL HISTORY, 160; Judge Swayze, 25 YALE L. J. 4. ". . . the implied contract is a mere fiction, devised by the courts of law to enable them to do justice where justice is impossible on the strict conception of contract or tort. . . . we have come to allow a recovery where money ought to be paid *ex aequo et bono* upon the fiction of a contract that never existed." Professor Corbin says the term quasi-contract "suggests a relation and an analogy between contract and quasi-contract. The relation is distant and the analogy slight. The differences are greater than the similarities." 21 YALE L. J. 544.

"Although from time to time the judicial view of substantive rights broadened under the leavening effect of equity and other considerations, the broadening process did not lead to the creation of remedies sounding in neither contract nor tort. The judges attempted, however, by means of fictions, to adapt the old remedies to the new rights, with the result usually following the attempt to put new wine into old bottles. Thus, largely through the action of *assumpsit*, that portion of the law of quasi-contract usually considered under the head of simple contracts, was introduced into our law.

"In the action of *assumpsit*, as the word *assumpsit* implies, whether it be special or *indebitatus assumpsit*, a promise must always be alleged, and at one time it was an allegation which had to be proved. It was only natural, therefore, that the courts, in using a purely contractual remedy to give relief in a class of cases possessing none of the elements of a contract, should have resorted to fictions to justify such a course. This was done in the extension of *assumpsit* to quasi-contract; and the insuperable difficulty of proving a promise where none existed was met by the statement that 'the law implied a promise.' The statement that the *law imposes the obligation* would not have met the difficulties of the situation, since the action of *assumpsit* presupposed the existence of a promise. The fiction of a promise was adopted then in that class of cases solely that the remedy of *assumpsit* might be used to cover a class of cases where, in fact, there was no promise."<sup>63</sup>

"The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension, in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right."<sup>64</sup>

The term Quasi-Contract is unsatisfactory to many jurists. Sir Frederick Pollock and Professor Knowlton prefer "constructive contract." The word "constructive" would more distinctly convey the idea of a fictional contract, invented for the sake of the remedy.<sup>65</sup> Neither designation (quasi-contract or constructive contract) "is as happy as would be one that avoided altogether the use of the word 'contract.'"<sup>66</sup>

<sup>63</sup> KEENER, QUASI-CONTRACT, 14, 15.

<sup>64</sup> *Ibid.*, 160. Compare ANSON, CONTRACTS, 12 ed., 8, 394, 395.

<sup>65</sup> See Sir F. Pollock, 22 L. QUART. REV. 89; 1 ENCYCLOPEDIA OF LAWS OF ENGLAND, 2 ed., Introduction, 11; Professor Knowlton, 9 MICH. L. REV. 671.

<sup>66</sup> WOODWARD, § 4. As to reasons for retaining the term quasi-contract now that it is in such general use, and as to the difficulty of finding a completely satisfactory substitute, see Professor Corbin, 21 YALE L. J. 545, 553.



In reality, these cases of so-called quasi-contract are instances of "absolute" liability imposed by the courts in the absence of either breach of genuine contract or tort in the sense of fault.<sup>67</sup>

The use of the unfortunate expression Quasi-Contract is largely due to two things:

1. The history of remedial law, as summarized *ante* by Keener.
2. The unwillingness of judges to admit that they, by their decisions, make or change rules of substantive law.

As to the advantage of discarding the fiction of a contract:

Lawyers would be forced to think about the validity of results heretofore blindly accepted.<sup>68</sup> Courts would then examine more carefully into alleged reasons of public policy for imposing absolute liability. In some instances the reasons might be found insufficient. And in such instances the courts might refuse to continue to impose liability, unless fault, or breach of genuine contract, could be established, as it sometimes might be.

We have heretofore said that cases falling under the general head of Absolute Liability can be subdivided as follows: Class 1 — Cases where recovery has heretofore been enforced in an action of tort; Class 2 — Cases where recovery has heretofore been enforced in an action of contract.<sup>69</sup> But this division, temporarily adopted for reasons of convenience, is open to the objection that it is based upon procedure — a mode of classification which it is the purpose of this paper to discourage. Now that the general nature of the cases included under Class 2 has been explained, it is possible to substitute a better basis of classification. Such a basis is found in the following statement, given here in the words of a legal friend:

"It may be suggested that cases of absolute liability may be divided into two classes on a basis which is not founded on procedure although

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<sup>67</sup> "Obligation may arise from Quasi-Contract. This is a convenient term for a multifarious class of legal relations which possess this common feature, that without agreement, and without delict or breach of duty on either side, *A* has been compelled to pay or provide something for which *X* ought to have paid or made provision, or *X* has received something which *A* ought to receive. The law in such cases imposes a duty upon *X* to make good to *A* the advantage to which *A* is entitled. . . ." ANSON, CONTRACTS, 12 ed., 8.

<sup>68</sup> "Lawyers and judges fall into habits of mental indolence and take for granted the absolute correctness of legal rules, and apply them mechanically." Judge Swayze, 25 YALE L. J. 14.

<sup>69</sup> See *ante*, 243, 256.

most of the cases in one subdivision would have been enforced at common law by actions of tort, and most of the cases in the other subdivision by actions of assumpsit. The distinction is between (1) cases where the law imposes an obligation upon the defendant to compensate a plaintiff for something which has injured the plaintiff, though there has been no moral fault on the part of the defendant, and (2) cases where the law requires the defendant to restore to the plaintiff a benefit received from him or its value. In one case the plaintiff's injury, in the other the defendant's benefit, is the gist of the action. The latter class of cases will include most, though not all, of the cases generally classified as quasi-contractual."

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## THE EXPANSION OF AMERICAN ADMINISTRATIVE LAW

**B**Y leaps and bounds public sentiment in the present generation has increased in favor of extending governmental control over affairs we once thought sacredly private. There is a desire, even a clamor, for public regulation, state or national, in matters which before the Civil War the nation conceived concerned only the persons directly interested. More accurately stated, we have come to see that in most problems it is not a few people who are interested, but all the people. And all the people must be represented in some way and their interest in the settling of a particular dispute or the solution of a given problem must be considered. So we have seen commissions to regulate railroads and public utilities, commissions to regulate banks, commissions to regulate insurance, commissions to regulate the relations of labor with employers and employment.

Now we have come to a stage where we must not only build anew, but also keep in order the structures existing. Already there has arisen the fear that these public bodies, set to solve given problems, may develop into tyrannous institutions, amenable to no law and subject only to the doubtful safeguards of political action.

There is a body of law, the writer believes, which is well developed and which is capable of dealing with these questions. It is here contended that in American administrative law there are safeguards which answer the nascent popular fear referred to. The object of this argument is to show that administrative law has developed in such a way that commissions, bureaus, and bodies of like type fall into a perfectly organized, perfectly defined place. As we have learned to use these commissions, they have made their own law. Put epigrammatically, it is here contended that administrative law has expanded coincidentally with administrative machinery.

In outlining this conception, it must be said at the threshold

that such law is of general application; it concerns all the governmental machinery. Just as in government we study the functions of each bit of machinery, so in administrative law we should study the law which creates it, which governs its exercise, which limits its function, and which repairs the wrong it does when it goes amiss. In an attempt to formulate some systematic method of approach to these questions the following propositions will serve as the general divisions of the argument:

*First.* That administrative law is the law applicable to the transmission of the will of the state, from its source to the point of its application.

*Second.* That this transmission involves all the so-called "three powers" — legislative, executive, and judicial.

*Third.* That in many instances the differentiation of these three functions is impossible, and instead of using the general governmental machinery we erect a specialized instrument.

*Fourth.* That in such cases the special instrument, in the first instance, excludes the general machinery from its field.

And thereafter the study of administrative law must branch out into specialized investigation of the particular general machinery or special instrument in which the student is interested.

*First.* Administrative law is the law applicable to the transmission of the will of the state, from its source to the point of its application.

We look backward a moment at the definitions of administrative law already formulated.

The word "administrative" will bear some examination. It has been called a synonym of "executive."<sup>1</sup> But its content has changed with the powers of the bodies to which it was applied. The Interstate Commerce Commission, it has been suggested, acts in a legislative, or administrative, capacity, but not judicially.<sup>2</sup> Yet even when this was said, there was an unusually able opinion in which it was stated that this Commission "is an administrative body . . . lawfully created, and lawfully exercising powers which

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<sup>1</sup> *Brazell v. Zeigler*, 26 Okla. 826, 110 Pac. 1052 (1910).

<sup>2</sup> *Missouri, K. & T. R. Co. v. Interstate Commerce Commission*, 164 Fed. 645 (1908).



are quasi-judicial";<sup>3</sup> and instances might be multiplied of similar contradictions. The confusion seems to be upon the subject of administrative power or function. There is little or no dispute either as to what constitutes an administrative body or as to the nature of administrative law. It seems to be assumed that the one is an executive arm of the government creating it and that the other deals with the safeguarding of private rights from such executive, and with the protection of such officials in fulfilling their task.<sup>4</sup> To the first idea we owe a fear, rapidly growing in the public mind and not unknown even to legal thought (as Mr. Dicey's comment<sup>5</sup> upon the *Arlidge* case revealed), that expansion of governmental activity along these lines means bureaucracy; and to the second, that the law may not supply the protection which political activity, as we know from bitter experience, does not afford.

There is a long and fascinating history connected with these conceptions, which is here outlined. Curiously, the relation of it

<sup>3</sup> *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, 64 Fed. 981, 982 (1894).

<sup>4</sup> ERNST FREUND, *CASES ON ADMINISTRATIVE LAW*, Introduction, 3: "The chief concern of administrative law [as contrasted with political science], on the other hand, as of all other branches of civil law, is the protection of private rights, and its subject-matter is therefore the nature and mode of exercise of administrative power and the system of relief against administrative action."

I GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*, 7-8: "Administrative law is that part of the law which governs the relations of the executive and administrative authorities of the government"; which deals with the organization of these administrative bodies and the like, and which supplements thereby constitutional law.

And again, GOODNOW, *PRINCIPLES OF ADMINISTRATIVE LAW IN THE UNITED STATES*, 12: "Further, the adoption of the principle of the separation of powers, which was made theoretically a part of American public law, has done much to make the *executive or administrative authorities, generally*, independent of the legislative authority." (Italics ours.) It will be noted no distinction is made between executive and administrative action. The corollary proposition is stated *ibid.*, at page 15: "Authorities mainly political control administration; and authorities mainly administrative influence politics." The writer believes this theory unduly narrows the field.

<sup>5</sup> A. V. Dicey, "Development of Administrative Law in England," 31 L. QUART. REV. 148, *à propos* of *Local Government Board v. Arlidge*, [1915] A. C. 120, establishing that a department required to exercise judicial functions need not adopt the procedure of courts.

"It may lead to the result," he writes at page 151, "that a government department which is authorized by statute to exercise a judicial or quasi-judicial authority may, or rather must, exercise it in accordance, not with the procedure of the law courts, but with the rules which are found to be fair and convenient in the transaction of the business with which the department is officially concerned."

anticipates in some measure the argument for revising the form which these ideas take. However the theory of division of powers may stand as a philosophical proposition, it is firmly ingrafted into American law, primarily by constitutional provisions, and secondarily and more effectively 'by five generations' habit of legal reasoning. A law which pertained to all officials, of any sort, was feared as containing the possibility of creation of a privileged class. It was believed that the effect of continental administrative law, whose strongest advocate was Napoleon, had been exactly this. It is only within the past few years that M. Léon Duguit, feeling at length the injustice of this assumption, took up his pen to defend the French administrative courts.<sup>6</sup> Transfer of power to bodies which were responsible primarily to the political branch of the government was jealously scanned by the courts. Often it was prevented altogether by a rigid application of the doctrine of division of powers.

Consequently in the early creation of commissions, as their structure was obviously not that of courts (this is a late development, this enactment that commissions shall be "courts of record"), and could not constitutionally be that of legislative bodies, the only possible branch of government to relate them to was the executive. They were therefore regarded as executive arms. Every act attempted by them, every solution of the problems set before them, had to justify itself in the courts as an exercise of executive function. It is elementary law that courts will not attempt to control the coördinate branches of the government save (substantially) where their action results in confiscation or fails to accord with constitutional and statutory requirements. Therefore in self-defense these bodies tried to assimilate their growing power of application of governmental desire to private persons and property, to the executive or political branch of the state.

Then came a second stage, which we shall review more carefully hereafter. It was not possible to assimilate all the new powers to the executive branch. Courts began to talk of "quasi-

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<sup>6</sup> Léon Duguit, "French Administrative Courts," 29 POL. SCI. QUART. 385. "To foreigners, and particularly to Anglo-Saxons, who are inclined to assume that the individual can be protected against the administration only by giving wide competence and strong organization to the ordinary courts of justice, the foregoing statements [i.e., that France has unusually efficient protection against arbitrary administrative action] may seem paradoxical."



judicial" and "quasi-legislative" functions. They began to be astute to escape the fancied limitation of prohibited delegation of power. In a word, they began to break down the dividing walls between the three powers.

We have, in approaching this problem, that best of all testimony, the quiet observation of a stranger to our system. A book which passed almost unnoticed in this field, because it was never translated into English, attacked the British administrative problem from a continental angle. In his "*Englische Verwaltungsrecht*,"<sup>7</sup> Dr. Rudolf Gneist attempted to follow the English administrative system as he conceived it. It began with an expression of will at its source — the king — and the elaborate governmental machinery served to carry that will to its point of application — the people — and there make it effective and operative. He divided this machinery into two classes: Royal Prerogatives, which began and ended with the king's command; and special administrative departments — Privy Council; Treasury; State Secretaries and their subdivided departments; Parliament and subsidiary boards; courts of common law; of Chancery, with more specialized jurisdiction; the Established Church; and the Royal Court. All of these, he contended, were means whereby the royal will was brought through various stages into contact with the people whom it was meant to affect.

Now this opens the entire working of the state to the realm of administrative law. It challenges our whole narrow alignment of administrative problems. It suggests an illustration from practical life. The administrative machinery — the whole government, under this view — is not unlike the machinery which is used in mechanics to transmit power, from its motor source, to the point where it is brought into contact with the raw material requiring its application. In America the motive power is the popular will. The first step in its transmission is its expression in some authoritative way by legislative enactment or (even before the enactment) by political choice of officers, after a campaign in which some idea of the popular will is gathered. Thereafter the normal machinery for transmission is the system of regularly constituted governmental

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<sup>7</sup> DR. RUDOLF GNEIST, *ENGLISCHE VERWALTUNGSRECHT*, 2 vols., Berlin, 1863; second edition, 1867; third, 1871. Though this was widely read in Germany and France, it seems to have escaped the notice of common-law students completely.

agencies—the legislature, to express and make definite and tangible the popular idea; the executive, to express and make definite the enforcement of it and to apply it to the subject calling forth the expression; the judiciary, to limit the executive and to some extent the legislature to the confines of the expressed popular will. This is all administrative work. This is all administrative machinery. For it is submitted there can be no difference between the carrying from expression to action of an ordinary criminal or civil statute, and a similar transmission of a regulative statute with regard to some peculiar problem. The machinery may differ: the former goes through district attorneys' offices and police stations, to municipal courts and common jails; the latter passes from a commission sitting *in banc* to a single examiner, and through him to a chief of an engineering division or the like. We do not doubt that the latter is administrative in function and that the law applicable to it is administrative law. Is there any logical difference between this and the former commoner process?

Indeed, the proposition abroad would be no novelty. In France this is a well-known movement in juristic thought. It was Laferrière who, in his "*Droit Administratif*," summed up this matter:

"To *govern* is to oversee the functioning of the public authorities, to assure the execution of the laws, to carry on relations with foreign powers; to *administer* is to assure the daily application of the laws and to watch over the relations of the citizens with the public authorities and the relations between the different administrative ('executive' would be a better translation) authorities."<sup>8</sup>

There is the distinction. Government has to do with setting the popular will to work; to supply the personal guarantee that the machinery will do its part, to supply even the cogs and belts in the general machinery. Administration is the process of manufacture, if we may call it so. Administrative law is the law which keeps the process in motion in an orderly manner. It is the body of law, then, which governs the transmission of the active power, seeing that it does not waste itself in vain efforts to solve problems,

<sup>8</sup> 4 LAFERRIÈRE, *DROIT ADMINISTRATIF*, 600. I have taken the translation by J. W. Garner in his "Judicial Control of Administrative Acts in France," 9 *AM. POL. SCI. REV.* 653 (1915). I prefer the translation "executive" to "administrative," because the sense of the passage seems to require it. "Administrative" merely reopens the verbal question once more.



seeing that it results in some effective end, seeing that it does not go amiss and commit some grievous wrong.

*Second.* This transmission involves all the so-called "three powers" — legislative, executive, and judicial.

The mind of a common-law lawyer, more especially in America, operates slowly on this sort of concept. What becomes, under it, of our tripartite division? What of our elaborate body of constitutional law?

The answer is, that in matters affecting the particular administrative bodies — commissions, bureaus, and the like — which formed our point of departure, we demand no tripartite division. We exercise all three functions — executive, judicial, legislative — with effectiveness and success. And we find no need of a division in the general rules of law applicable to the various functions, though, indeed, some division of them reappears. In his discussion of commission regulation of public utilities<sup>9</sup> it was Freund who said that the commissions no longer served as mere instruments of a fully expressed legislative will, but took some part in the expression of it. One passage is especially striking:

"The evolution has been rather from generic legislation to administrative power to carry such legislation by specific requirements. . . ."

What is this but the transmission of public will through a commission without the expressed will as a preceding step, that is, the absorption, by an administrative body, of a function essentially legislative? Mr. McCall, in opposing the passage of the Hepburn bills on the floor of the House of Representatives, said they would make the commission "a little Congress and a little Court." The Supreme Court in its most conservative days gave a pronouncement which fairly supported the view, apart from its merits as an objection. In 1891 Texas established a railway commission, with power to make rates, regulate charges and practices, correct tariff abuses, prevent unjust discrimination, and the like.

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<sup>9</sup> Ernst Freund, "Substitution of Rule for Discretion," 9 AM. POL. SCI. REV. 666. "These commissions have indeed been vested with powers of a type hitherto withheld from administrative authorities under our system, powers which are not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute appear merely as general principles."

A man whose name is writ large in the history of governmental railway regulation, John H. Reagan, was a member of that commission. At the suit of one of the carriers involved in an order made by it, enforcement of the orders of this body was enjoined by a federal court; and Reagan, for the commission, prosecuted his appeal. The issue was joined upon delegation of power. Brewer, J., in sustaining the commission, said:

"There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. *Such a commission is merely an administrative body created by the state for carrying into effect the will of the state, as expressed by its legislation.*"<sup>10</sup> (Italics ours.)

Again the concept of transmission of power. And on the next page the court fearlessly asserted that fixing a maximum railway rate was a legislative matter.<sup>11</sup> Yet the power was sustained. In this and other cases,<sup>12</sup> where it was argued that administrative bodies were objectionable as having both judicial and legislative as well as executive powers, they were upheld, although it was conceded that such an absorption of power actually had taken place.

The history of the matter was, that hostility to the new users of old powers — commissions and their like — had changed to a desire to uphold, if possible, the constitution of these new bodies. It was felt that while there may be, generically, three kinds of power, there may be no fundamental need for the separation of them. Men who had studied the question from an old-fashioned point of view approached the question with perhaps the greatest frankness. Mr. Dicey especially recognized that certain sorts of businesses could be handled only through some agency endowed with plenary powers, or, in American constitutional phraseology, that necessity justified limited delegation of legislative and judicial powers to specialized bodies. And behind all this was the unexplained, outstanding phenomenon of the municipal corporation exercising cheerfully all of our three divided powers — a bare, con-

<sup>10</sup> *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 394 (1893).

<sup>11</sup> *Ibid.*, 395-96.

<sup>12</sup> See *The Railroad Commission Cases*, 116 U. S. 307 (1886), and cases there cited. The view is the more striking because it was adopted by a court which, besides being conservative, required above all other things close-knit, logical reasoning.



spicuous, unfaltering exception to the constitutional tripartite division.<sup>13</sup>

So it came about that we found ourselves applying administrative law to bodies which were historically, perhaps, executive, but which were analytically combinations of all three of our governmental functions. From this we must reason backward. If the procedure of the Interstate Commerce Commission in a proceeding to award reparation is an administrative problem — a proposition which is undisputed — why is not the procedure of a police court, or a common-law court, or a court of equity? They are all questions of procedure to secure a stated end. If the method of conducting an immigration hearing is regulated by administrative law — and it doubtless is — why is not the procedure of a Senate committee gathering the ideas for coming legislation a similar administrative question? And so of contempt process, whether it be for refusal to testify before a court or a commission, or of any of five hundred instances.

*Third.* In many instances the differentiation of these three functions — legislative, executive, judicial — is impossible, and instead of using a general governmental machinery, specialized instruments are constructed.

We have now the problem stated. Administrative law is, if the foregoing reasoning is sound, not a supplement to constitutional law.<sup>14</sup> It is a redivision of the various bodies of law which previously have been grouped under the head of constitutional law. That part of constitutional law relative to the functions of governmental bodies would, in its turn, form one part of administrative law as here sketched. Indeed, the difference between Goodnow's suggestion that administrative law supplements constitutional law and a use of "administrative law" as a name for the whole field, is not much more than a readjustment of nomenclature. The fact that the two forms of law are the same, and that the difference between them was the arbitrary one of the extent of a given document on the one side, or of unwritten law upon the other, is not seriously disputed.

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<sup>13</sup> See Stephen A. Foster's discussion of this whole development in "Delegation of Legislative Power to Administrative Officers," in 7 ILL. L. REV. 397 *et seq.*

<sup>14</sup> See *ante*, note 4, last paragraph.

There is, then, this field called administrative law. It concerns the machinery of transmission of governmental will from the point of its origin to the point of its application. In its application to such machinery it cannot be referred to any one division of government; it is applicable alike to courts, legislatures, and executive. This is the range within which we are working.

Having bounded our country, in some sense, the next problem is to explore it. Into what division does this expanded subject of administrative law fall? At what point does the constitutional law relating to government meet the administrative law which we have invertedly developed from the rules applicable to commissions and similar bodies?

The primary distinction is a simple one. Much of the governmental machinery is of general importance; it serves to transmit the will of the state upon the great majority of questions. Most statutes, for example, are enacted by Congress — the general medium for expressing popular will. They are enforced by the executive authorities — the department of justice, the local police, and the like, who normally enforce all laws. They are interpreted by the courts whose regular function is to interpret such laws as Congress may enact. That is the usual, normal course of procedure; it is the general method of administration. But there arise problems which require peculiar and expert handling; a striking example is that of railway regulation. The popular will cannot be expressed by Congress, because the popular will does not discover a method. A result is wanted — better service and rates, freedom from discrimination and tyranny. No general body can reach that result: it takes an expert economist to formulate a rule. Accordingly we construct a *special* administrative body — a commission, like the Interstate Commerce Commission — and charge this body with the duty of investigating the problem and of laying down the rule which will reach the given result. The only expression of the popular will by Congress was the utterance of a desire to have an expert body solve a problem. Then the function of the general body — Congress — stopped, and that of the special body — the commission — began.

There is our first distinction. There are two sorts of administrative body — a general type, whose duty it is to carry on the main business of government, and a special type, whose



duty it is to render expert service in some field calling for that service.

The special body may supplement the general body at any stage of the transmission of power. So it is possible to have a commission establish a rule which thereafter becomes a law like other statutes, and enforced by the general machinery. A few years ago<sup>15</sup> the uniform height of drawbars and hand-holds on freight cars was fixed by the American Railway Association in exactly this manner — an example of a special administrative body whose function was only within the narrow field of getting the popular will into tangible expression. Again, at the very bottom of the judicial administration of our penal law we find juvenile courts, which supplement in a specialized way the general machinery of police courts, in their particular field. The first example is of special administrative action at the very first stages of transmission of popular will; the second, at the very last stage. Instances might be multiplied each showing some different phase of this supplementation of general machinery by specialized instruments.

This brief distinction, moreover, gives us our first principle as to the nature of these special administrative bodies. They are bodies charged with the solution of a problem demanding expert treatment. They have no functions outside the field offered by this problem.

And the last and perhaps most important question here to be considered is the relation of these special administrative bodies — commissions, bureaus, and such bodies — to the tripartite division of powers and functions, to all of which, as we concluded above, administrative law ought to be applied. The writer here contends that a special administrative body — one of those instruments created specially for use in a limited field — may, and often does, exercise all three of the usual trinity of powers. It may, of course, operate upon a problem which requires that only one or two such powers be brought into play; but it may use any two, or all three, in combination.

The statement of the proposition requires that we go a stage

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<sup>15</sup> Act of March 2, 1893 (The Safety Appliance Act), 27 STAT. AT L. 531, § 5. The constitutionality of this was later upheld, over the contention of the railroads that this was a plain instance of delegation of legislative power. *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281 (1908).

further back in the argument. What of the doctrine that powers cannot constitutionally be delegated? What of the rigidity of the division of powers? The answer must be that those doctrines applied, and were intended to apply, only to the great organs of government — the general administrative bodies, as we have here rechristened them. The principle here submitted is, that where efficient solution of the problem requires a separate instrument, this instrument may (as commissions and the like continuously have been) be the recipient of delegated powers, and may use any or all of them together.

We pause once more upon the history of the matter. From a desire to fetter the old commissions there grew up a desire to uphold them if possible. The quick motive was a public clamor that something be accomplished in respect of certain affairs. The complementary idea was a realization that plenary power vested in a single body was the only hopeful way of getting that result. Notably in public utility matters this desire made itself felt. Here there was historical warrant for delegation of power. As long ago as 1691 justices of the peace had been required to fix maximum rates for carriers.<sup>16</sup> In other matters Mr. Dicey has commented<sup>17</sup> on the impossibility of division of function where effective, expert action was required. In many cases the situation which calls this special instrument into being is made up of a group of closely related, highly complex problems; and to limit the commission, or whatever the instrument was called, other than by the nature of these problems was to bind it to uselessness. Occasionally the method of attack could be prescribed; more often not. Usually the only hope is to turn a body of experts loose on the question, instructing them to use their trained best judgment, their undoubted accessibility and consequent simplicity of procedure, and a wide range of powers designated in the statute creating the commission,

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<sup>16</sup> 3 WILLIAM and MARY, c. 12, § 24, par. xxiv (9 STAT. AT L. 154). "And whereas divers waggoners and other carriers, by combinations amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade; be it therefore enacted, by the authority aforesaid, That the justices of the peace of every county . . . shall have power and authority and are hereby enjoined and required, at their next respective quarter or general sessions after *Easter* day yearly, to assess and rate the prices of all land carriage of goods whatsoever. . . ."

<sup>17</sup> "Development of Administrative Law in England," 31 L. QUART. REV. 148, 150-51.



without technical checks. Further, it is often necessary that the results be uniformly applied. Railway rates are a striking example. It would have been intolerable for the situation to continue in which forty-eight state courts could each apply their idea of what was a reasonable rate. Neither the railway nor the shipper could endure the condition.

From such a situation it was necessary, first, that the commission have the power to make a rule. When it had used its expert knowledge, it had to put that decision into a form which compelled a solution; it had, in a word, to issue an order. But that is a legislative function. Then it had to see that these orders were uniformly applied: that one tribunal did not interpret them in one fashion, while another reached an exactly opposite application. Accordingly the commission had to dominate the general administrative bodies which applied the law, that is, take over part of the functions of courts. And though we wobbled in the matter of verbiage, and hedged about conclusions with nebulous distinctions, this is exactly what we have been doing.

For example, the Interstate Commerce Commission. Within a year after its creation the federal courts repudiated the idea that it was a court.<sup>18</sup> Five years later it was said that the functions it exercised were "quasi-judicial";<sup>19</sup> and the present method of stating the result is that the Commission has full authority to inquire into judicial matters.<sup>20</sup> There was the clear development of the idea that judicial power had crept into the Commission's panoply. In its early history the courts suggested that general orders of the Commission could not have been contemplated by Congress because they were legislative.<sup>21</sup> Congress intervened

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<sup>18</sup> *Kentucky & I. Bridge Co. v. Louisville & Nashville R. Co.*, 37 Fed. 567 (1889), affirmed without opinion, 149 U. S. 777 (1892).

<sup>19</sup> *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, 64 Fed. 981, 982 (1894). "It has been held that the Interstate Commerce Commission is not a court. It is an administrative body . . . lawfully created, and lawfully exercising powers which are quasi-judicial."

<sup>20</sup> See *Missouri, K. & T. R. Co. v. Interstate Commerce Commission*, 164 Fed. 645 (1908), in which it was conceded that the Commission could inquire into judicial questions, though not to the exclusion of courts. And in *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, 167 U. S. 479, 501 (1897), it was said: "The power given is partly judicial, partly executive and administrative, but not legislative." Cf. *Nelson v. Bd. of Health*, 186 Mass. 330, 335, 71 N. E. 693 (1904).

<sup>21</sup> *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197 (1896).

before the courts had changed their way of thinking, and the present situation frankly arises from the fact that legislative power has been delegated.<sup>22</sup> All the while, of course, it has never been questioned that the Commission had executive powers.

And there is the triad of power. But the Commission's own concept of its power is not without interest, especially in its later phases. A case arose in which the Pennsylvania Railroad had failed to supply enough tank cars for shippers' needs, and set up in excuse that it had not the cars to supply. It further contended that the Commission had no power to order it to provide cars. The Commission in reply conceded that it had only administrative power in the premises, meaning thereby (so far as one can judge from the much abused word "administrative") that it had judicial power to grant reparation — specific reparation, like a decree in equity, to be sure — but still nothing more than an individual decision of a case between individuals.<sup>23</sup> But within a year, in passing upon a proceeding to compel reestablishment of a joint rate, the opinion recited that "the establishment of a through route, like the fixing of a maximum rate for the future, is not a judicial act, but administrative or ministerial in furtherance of the function exercised by Congress. . . ." <sup>24</sup> The language implies, and it is now conceded, that rate fixing is a legislative function. There, then, is yet another of the three powers concealed beneath this word "administrative" — a word which covers a body of powers wherein legislative and judicial capacities may be found. Yet this bit of history, applicable to the Interstate Com-

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And see *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, *supra*, note 20.

<sup>22</sup> *Louisville & Nashville R. Co. v. Interstate Commerce Commission*, 184 Fed. 118, 122 (1910). *A propos* of rate fixing, the court said: "As has been pointed out in the opinions of the Supreme Court, the power thus defined is legislative in its nature; and it is well settled upon a long series of decisions by that court . . . that, when this legislative power concerns the administrative affairs of the government, it may be delegated to an officer or a board . . . created for that purpose." The subsequent reversal of the decision did not reflect in any degree upon this holding.

<sup>23</sup> *Pennsylvania Paraffine Works v. Pennsylvania R. Co.*, 34 Int. Com. Rep. 179, 190 (1915). See also *Excelsior Rates from St. Paul*, 36 Int. Com. Rep. 349, 362.

<sup>24</sup> *Black & White River Transportation Co. v. Missouri Pacific Ry. Co.*, 37 Int. Com. Rep. 244, 248 (1915). The Commission in that same case refused to pass on the constitutionality of the Carmack Amendment, saying that this was for the courts alone.



merce Commission, might be repeated in the decisions concerning most of our great public service commissions; or indeed, for the matter of that, in the story of any similar body.

Since we have made this division into general and special administrative machinery, one confusion must be warded off before we leave the outlined distinction. The method of thought suggested involuntarily compels one to think along the line of administration, beginning with the laborious process of ascertaining the public will through a national election, through half-organized attempts to influence public opinion, through the more systematic program of legislative committee hearings, or through the most systematic method of a commission to investigate and recommend legislation; continuing, through the period of its enactment into some tangible form; of the statute, tossed into the hopper of executive and judicial machinery, to come out through some inferior police office as a full-fledged, effective, practicable rule, enforced instantly upon the community. And the instant query is — at the bottom of this mill, is not every instrument a special administrative? A police officer does not do the same work as any other police officer. He is dealing with a concrete situation — fitting a prohibitive law, for instance, to a given area. Why is not he of the same sort as a special commission?

The answer is, that though indeed he has a peculiar problem, it is not different in type from any other policeman's. He does not prohibit in the same place, and must to some degree fit his work to his community. But it is the same style of work. Further, he is the enforcing power behind every law. The next law of a general prohibitive nature will find him on his beat, putting the sanction of his night-stick and power of arrest behind it. In a word, he has not the blazing mark of a special administrative — a specialized field, calling for unusual, expert handling.

But the distinction may become nebulous. *Quære*, whether a traffic squad in New York City, under direction of the traffic division of the New York Police Office, is not a special administrative?

Nevertheless, we have our test. And it is not more difficult to apply than many similar tests in the common law. The distinction turns upon the limitation of the body under examination,<sup>9</sup> to action with reference to a particular type of problem.

*Fourth.* A special administrative body, to the extent of its jurisdiction, excludes the operation of the general machinery in its field.

This is the last proposition we may examine in as brief a statement as this essay.

When a shipper sought to bring a proceeding to test the reasonableness of a rate in a federal court, without a previous adjudication by the Interstate Commerce Commission, that court declined jurisdiction upon the ground that the Interstate Commerce Commission was set to solve such problems, and that until such a solution had been obtained for review, no suit could be entertained.<sup>25</sup>

When under the Massachusetts Workmen's Compensation Act, a workman brings action for compensation, he must do so before the Industrial Accident Board. This is by statute; but there is every reason to believe the rule would have been developed without this.

When there is a dispute as to the ownership of patentable ideas, and interference proceedings are under consideration in the Patent Office, a court will not take jurisdiction until the Patent Office has handed down an opinion.<sup>26</sup> And a court will not go into the question of patentability until the Patent Office has decided upon that question.<sup>27</sup>

In a famous and startling decision the very verge of this doctrine was reached when the United States Supreme Court conceded that, as immigration officers, with proceedings to determine whether citizens and others were properly admissible into the country, had specialized and specific knowledge in the field of determining whether persons entering the country from abroad could rightfully do so, courts could not pass upon the question at all.<sup>28</sup> It is

<sup>25</sup> *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1906). And see *Mitchell Coal & Coke Co. v. Penn. R. Co.*, 183 Fed. 908 (1911), *aff'd* 223 U. S. 733; *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506 (1911); *Baltimore & Ohio R. Co. v. U. S. ex rel. Pitcairn Coal Co.*, 215 U. S. 481 (1910).

<sup>26</sup> *Butler v. Ball*, 28 Fed. 754 (1886), is the only case looking *contra* to this doctrine, and even this is not flatly opposed. See *Standard Scale & Foundry Co. v. McDonald*, 127 Fed. 709, 710 (1904): "It never was the mind of Congress that an inventor, without complying with the statutory scheme of submitting his claim to the Patent Office . . . could go into a United States court in the first instance to have determined the question of his right to a patent."

<sup>27</sup> *Continental Store Service Co. v. Clark*, 100 N. Y. 365, 3 N. E. 335 (1885).

<sup>28</sup> *United States v. Ju Toy*, 198 U. S. 253 (1905).



submitted that so far as this goes the reasoning is right. The ground where we may sharply differ in opinion is the decision as to the point at which the administrative field stopped. Doubtless Ju Toy's citizenship came within the field of the special administrative — the immigration departmental officials — in the first instance. But it does not follow that this special administrative branched off from the general body so far up in the transmission of power that the operation of it was not subject to corrective by the federal courts. The question, in any event, is upon the limit of the special administrative field.

In the *Arlidge* case<sup>29</sup> the English courts uniformly held that the question presented was one primarily for the special administrative and that the courts did not have the responsibility of deciding it.

These are all cases where the special administrative has excluded the courts from its field. The question instantly arises, How about the legislature? Does the Interstate Commerce Commission prevent Congress from prescribing a given rate in a given case? No. But if Congress does it, it has to that extent diminished the special administrative's statutory field. So far as that rate is concerned, the Commission has been destroyed. The Commission having been created by Congress may of course be annihilated by it. But the Commission and Congress cannot operate together in the same field.

Though the writer has not before him any case upon it, perhaps it is obvious that such an administrative body would exclude the action of an executive general instrument. Suppose after the Public Service Commission had prescribed a street-railway fare the governor of the commonwealth, or the mayor of the city or town where the railway lay, were to try to abrogate it. The absurdity of the case forecasts what a court would do to it. And its simplicity lies in this: a special administrative is always statutory or constitutional, like the rest of the executive machinery. In creating it, therefore, the legislature must have taken away the power of the executive to act. It has deprived the general executive of a part of its power.

And hence our proposition. Of necessity, a special administrative must exclude the general body — the court, the legislature,

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<sup>29</sup> *Local Government Board v. Arlidge*, [1915] A. C. 120.

the governor and subordinate machinery — in so far as its field extends. Any other rule would mean chaos. It would mean the possibility of conflicting decisions, of situations in which, whatever the unfortunate subject of state regulation did, he would be violating some command; it would violate the basic ideas of common sense which underly the whole intensely practical question of administrative law.

There, then, is the frame into which we must fit our study of an individual commission. It is one portion of a body of administrative law. That body deals with the functioning of the machinery which transmits governmental power from the source of its origin to the point where it is applied in the form of an effective, enforced, active rule. Such power may be transmitted through great, general conduits — the usual governmental machinery. Much of that we study under constitutional law; too much of it we do not study at all. Or it may be transmitted in special conduits, reaching application through special instruments. The special conduit may branch from the main at any point. But after it has thus branched off, in its particular function it excludes the operation of the general device for transmission.

It is only at this last point that the subject of administrative law, as narrowly viewed, begins. But ought we not to endeavor to draw some general principles from the myriad monographs upon individual commissions and similar bodies? In a word, has there not been a real accumulation of precedent, from which we must derive the systematic body of law? Most important of all, can we continue to think upon the premise that any individual commission is, in its legal aspects, unrelated with the general government, or with other commissions?

Finally, *cui bono*? We have no right to follow academic northern lights if they lead to mere useless speculation. But we are using these administrative instruments. We are creating new ones. We are clutching, sometimes ill-advisedly, at them in an endeavor to use them to solve pressing problems. We are fearing them, lest they become tyrannous. It is necessary that each new body fall into some defined legal place. So alone shall we escape the dangerous and weakening period of floundering while business men, the administrative itself, and the courts solve what the sphere of the new



organism is to be. It is necessary that the constitutional principles be classified so that a commission need not spend a generation determining what are its powers. It is necessary to develop statutory construction in connection with the constitution to the end that the commission may be checked at the point where its tyranny may begin. These can be made certain only by a well-defined system of administrative law.

In any event, here is an angle of approach. It may well be erroneous. But if it is a working hypothesis, presenting an old problem from a point which has profitable suggestion, perhaps it may be of ultimate aid in liberating old administrative machinery from outworn limitations and in guarding the newer instruments from old ideas and older fears.

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BOSTON, MASS.

## THE ALIENABILITY OF CHOSSES IN ACTION: A REPLY TO PROFESSOR WILLISTON

IN a previous number of this REVIEW<sup>1</sup> I presented a view of the law relating to the alienability of *choses* in action at variance with that set forth by the late Dean Ames in his well-known essay entitled "The Inalienability of Choses in Action."<sup>2</sup> The conclusions

<sup>1</sup> 29 HARV. L. REV. 816.

<sup>2</sup> 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 580; reprinted in LECTURES ON LEGAL HISTORY, 210.

The intrinsic inalienability of *choses* in action asserted by Dean Ames is reasserted by Professor Beale in his treatise on the CONFLICT OF LAWS (1916), § 152, as follows:

"Transfer and extinguishment of rights of property. — It is a characteristic quality of rights of property that they continue in existence until extinguished by act of law or by destruction of the thing. Such a right must be capable of transfer, at least upon death, since the right is of a nature to outlast human life; and in fact in all civilized communities rights of property are also transferable *inter vivos*.

"A right is transferred when the transferee is put into exactly the same relation toward the thing that the transferor previously occupied. A transfer of title places the same title in the transferee; a transfer of possession puts the transferee in and the transferor out of possession.

"Rights in tangible things may of course easily be transferred, by consent of the parties; and the same is true of real intangible things. *In the case of commercial paper, a transferee takes the exact place of the transferor* by the very terms of the instrument.

"*Choses* in action, including contract rights and debts, are by their very nature incapable of transfer; for they are two-party relations, and the personalities of the parties are fundamental qualities of the relation. A new party could be inserted only by such a complete change in the nature of the obligation as would be a destruction of it and the creation of a new one; and this can be done only by mutual consent of both parties. Such a right, then, is incapable of transfer; it can only be assigned. An assignment is merely a contract that the assignee shall enjoy all the benefits of it, including that of suing. *It does not put the assignee into the position of the assignor, or affect his right except collaterally.*"

See my former article, 29 HARV. L. REV. 818, for a discussion of the meaning of such statements. The assertion that the assignment "does not put the assignee into the position of the assignor" is obviously at variance with the decisions of the courts.

In the recent case of *Portuguese-American Bank v. Welles*, 37 Sup. Ct. Rep. 3 (1916), Mr. Justice Holmes said: "When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse." The learned judge was discussing, not whether ordinary *choses* in action were alienable, but whether an attempted express limitation



which I reached in that article may be stated briefly as follows: Common law *choses* in action, inalienable in the early days of English law, became in the final development of our law fully alienable, at law as well as in equity. The requirement that the suit be brought in the name of the assignor was retained, in the absence of statutes, but was merely a matter of procedural form. In other words, the conclusion was that complete ownership of a *chose* in action, both at law and in equity, was by an assignment, coupled with notice to the debtor,<sup>3</sup> vested in the assignee.<sup>4</sup> Questions relating to the effects of an assignment upon defenses of the debtor, rights of set-off, "latent equities" of third persons, etc., were left for discussion at a later time.

In a recent number of this REVIEW<sup>5</sup> Professor Williston dissents from my conclusions as to the character of the assignee's ownership of the *chose* in action and argues that it should still be regarded as *merely equitable*. In doing so, naturally he discusses both the points made in my article and those portions of the subject which I had left for later treatment. In what follows I wish both to give my reasons for still adhering to my views as to the character of the assignee's ownership of the assigned claim, and to discuss to some extent those portions of the law of assignment touched upon by

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of the power to alienate would be valid. For a thorough analysis of the problems involved and citation of authorities, see the comment on this case in 26 YALE L. J. 304.

How Professor Beale comes to make the statement he does can be understood only by a very careful examination of his classification of rights into "static" and "dynamic." At the present time and place I can only say that what he calls "static" rights do not seem to me — if I understand his definition of them — to be jural relations and so ought not properly to be called rights at all. Even allowing for the unusual terminology used by Professor Beale, it seems clear that the attempted distinction between "static" and "dynamic" rights still leaves it difficult to reconcile his statements as to the alleged contrast between the alienability of negotiable paper obligations and that of ordinary *choses* in action.

<sup>3</sup> Before notice neither assignor nor assignee has complete ownership. 29 HARV. L. REV. 834. It is assumed also that the assignment is of the whole claim. Partial assignments will be discussed separately, as they were in my previous article. 29 HARV. L. REV. 836.

<sup>4</sup> 29 HARV. L. REV. 821-822.

Of course it is understood that there are certain classes of *choses* in action which are held to be inalienable on grounds of real or supposed policy. These are excluded from the discussion, which deals only with *choses* in action which are "assignable." Throughout the discussion it is also assumed that all the requisites of a valid assignment, including formal requisites, consideration, if that be necessary, etc., are present. The law relating to these questions is left for discussion at another time.

<sup>5</sup> 30 HARV. L. REV. 97.

Professor Williston but because of limits of space omitted from my former article.

If I understand Professor Williston's position, his argument may be divided into two parts. The first is based upon what he alleges to be the "fundamental characteristic" or "essential characteristic" of "equitable rights," "equitable obligations" or "equitable ownership" which differentiates them from "legal rights," "legal ownership" or "legal title."<sup>6</sup> The second part is based upon his belief that the recognition of legal ownership in the assignee would require us to attach to the assignment of a *chose* in action unfortunate jural effects<sup>7</sup> both upon the rights of set-off of the debtor and upon the "latent equities" of third persons and equitable interests of prior partial assignees. The jural effects which the learned writer asserts would, by inevitable logic or necessity,<sup>8</sup> follow from a recognition of the legal character of the assignee's ownership, he conceives to be not only unfortunate but also unsupported by legal principle or weight of authority. Without attempting to determine whether all these results would be so unfortunate as Professor Williston supposes, I shall attempt to show (1) that the part of the learned writer's argument which is based upon the alleged difference in the "fundamental" or "essential characteristics" of legal and equitable "rights" does not in any way disprove the validity of my conclusions; (2) that the jural effects which the learned writer deplures have no necessary or logical connection with the legal or equitable character of the ownership of the assignee, but that, on the contrary, the recognition of the assignee as owner by the court of law as well as by the court of equity is, so far as intrinsic necessity or logic is concerned, entirely compatible with all those jural effects of assignments of which the learned author approves.

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<sup>6</sup> The phrases in quotation marks are all used by the learned writer at various points in his argument, apparently without any attempt to discriminate carefully, for example, between such phrases as "equitable right" and "equitable ownership" or "legal right" and "legal ownership." With the desire to be entirely fair to the argument of my learned critic, I have therefore in the text repeated them all.

<sup>7</sup> In another place (15 COL. L. REV. 228) I have called attention to the fact that there is no term in common use to describe the consequences or effects of given facts both at law and in equity. "Legal effects" suggests that common law effects only are included. In this article I have adopted the phrase "jural effects" to cover both "legal effects at common law" and "legal effects in equity."

<sup>8</sup> See 30 HARV. L. REV. 101, 102, 104, 107, for the passages in question. They will be discussed in detail below.



## I

At the outset I find myself under the necessity of pointing out certain misconceptions of my position under which Professor Williston apparently labors. In the opening sentence of his article my learned friend says:

"The interesting article by my friend, Professor Cook, in a recent number of this REVIEW, on the alienability of *choses* in action, leads me to make some suggestions in opposition to his argument that the assignee of a *chose* in action should be regarded as having *a legal rather than an equitable right*."<sup>9</sup>

With all deference to Professor Williston, and in full recognition of the fact that he had no desire or intention to misstate my argument, I must hasten to say that this appears to me to be not merely an inadequate but also an erroneous statement of my conclusions. Moreover, it betrays at once the chief reason for the learned writer's dissent, *viz.*, that he has failed to follow the essential features of the analysis presented in my article and so has failed to understand what my conclusions really are. This failure naturally renders him quite unconscious of the fact that he is ascribing to me views which I have never entertained for a moment.

In order to clear up this misapprehension of my conclusions, in which some of the readers of Professor Williston's argument may naturally share, the present article will first of all point out specifically the ways in which the learned writer has misstated my position, and in doing so will restate and emphasize those portions of my analysis the overlooking of which has, it seems, led my critic into the error referred to.

In the first place, nowhere in my former article is it stated that the assignee ought to be regarded as having merely "*a legal right*." Even a superficial reading of my argument will disclose that it is based fundamentally upon the proposition that the "ownership" of a *chose* in action is a complex aggregate of jural relations and that the word "right" is entirely inadequate to describe the aggregate of rights *and other jural relations* which, according to the decisions of the courts, are vested in the assignee by virtue of the assignment. In my own thinking I have found it impossible to get along either

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<sup>9</sup> 30 HARV. L. REV. 97. The italics are those of the present writer.

with one fundamental legal conception — “right” — where several are needed, or with one word to describe several fundamentally different jural relations. The criticism of my learned friend has convinced me more strongly than ever of the absolute necessity for both an exact, scientific analysis of fundamental legal conceptions and an equally exact and scientific terminology.<sup>10</sup> Limits of space and time compel me to refer the learned reader to the article by my colleague already referred to for an adequate exposition of the fundamental conceptions and terminology which seem to me to be necessary to any adequate discussion of our problem. A detailed application of that analysis and terminology to the concrete problem of assignments is found in my original article.<sup>11</sup>

Stated in the terms of that analysis and terminology, my conclusions as to the jural character of the assignee's interest in the assigned claim may be restated briefly as follows: In the ultimate development of the common law, the assignee of a common law *chose* in action is in a court of law, after notice to the debtor, vested with all the rights, privileges, powers and immunities which go to make up that aggregate of jural relations commonly called the “legal ownership” of the *chose* in action; and, correspondingly, the assignor no longer is vested with the rights, privileges, powers and immunities which constitute so-called “legal ownership.” As long ago as 1801 James Kent, then a Justice of the Supreme Court of New York, in deciding a case involving the legal effects of the assignment of a judgment, expressed the same idea clearly, in the following words:

“The assignee of the judgment is to be recognized by this court, as *the owner*, and all acts of the plaintiff [assignor] subsequent to the assignment, and affecting the validity of the judgment, were fraudulent. He has no more power over the judgment than a stranger.”<sup>12</sup>

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<sup>10</sup> The attention of the learned reader is called, as it was in my former article, to the fact that the fundamental analysis and terminology used is that set forth by my colleague Professor Hohfeld, in his article on “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 23 YALE L. J. 16. Without an analysis similar to that there presented I do not see how legal problems of any sort can be adequately analyzed.

For an application of the analysis to the field of contract, see the article on “Offer and Acceptance” by my colleague, Professor Corbin, 26 YALE L. J. 169.

<sup>11</sup> 29 HARV. L. REV. 819-821.

<sup>12</sup> Wardell v. Eden, 2 Johns. Cas. (N. Y.) 258, 260 (1801).



An eminent Connecticut judge in an able opinion was equally emphatic in 1818:

"It is a well-settled principle of *common law* in Connecticut that *the property* in a *chose* in action may be assigned; and *courts of law* have long since recognized *the property in the assignee as fully as courts of chancery.*"<sup>13</sup>

As a corollary to my main proposition, it follows that the requirement that the suit in the common-law court be brought in the name of the assignor was substantially only a formality, demanding that a certain kind of title be given to the action; it did not as a rule affect the substance of things. On this point the able judge last quoted said in the same opinion:

"The *old form* of bringing the suit in the name of the obligee, is, indeed, continued; but it *is now mere form.*"<sup>14</sup>

From this summary of the conclusions presented in my original article the learned reader will see clearly the inadequacy of the statement that I argue "that the assignee . . . should be regarded as having a legal rather than an equitable right."<sup>15</sup> It ignores absolutely that very complexity of the jural relations involved which was not merely emphasized in my former article but made the very basis of my whole analysis and argument.

That this statement besides being inadequate as a description of my conclusions is also (though unintentionally so) quite misleading appears when we notice that it makes me argue that "the assignee . . . should be regarded as having a legal *rather than* an equitable right."<sup>16</sup> Even if there be substituted for "a legal right" the words which I used, *viz.*, "an aggregate of legal rights, privileges, powers and immunities," and for "an equitable right" the words "an aggregate of equitable rights, privileges, powers and immunities," the statement would still be a misdescription of my conclusions. It is not contended at any point in my article that the jural relations which go to make up the assignee's ownership of the claim became *exclusively* legal. Nowhere is it asserted that equity

<sup>13</sup> Smith, J., in *Colbourn v. Rossiter*, 2 Conn. 503, 508 (1818). The italics are those of the present writer.

<sup>14</sup> See a longer extract from the opinion, 29 HARV. L. REV. 830.

<sup>15</sup> The italics are those of the present writer.

<sup>16</sup> The italics are those of the present writer.

ceased to recognize the assignee as being the "owner" of the *chose* in action. The whole argument is that the rights, privileges, powers and immunities of the assignee become *legal as well as equitable*, instead of exclusively equitable. In my argument it is first pointed out that apparently there was a time in English legal history when the assignee's "ownership" of the claim was exclusively equitable.<sup>17</sup> It is then shown how by degrees the common law, adopting the equitable view, ultimately came to recognize the assignee as owner.<sup>18</sup> Of any view that equity ceased to regard the assignee as owner, because of this recognition of him by the common law court, there is no hint in anything that was said. Indeed, the following extract from the opinion by Smith, J., already referred to, quoted in my original article, shows that quite the contrary was intended:

"I speak not of *chancery*, merely. It is *the same at law*. There is *no hostility* between the different jurisdictions on this subject. . . . The courts of law have long since recognized the *property* in the assignee as *fully as courts of chancery*." <sup>19</sup>

Surely if this means anything it means that the ownership of the assignee is *concurrently legal and equitable*, *i. e.*, recognized and sanctioned both by common law and by equity. In view of prevailing modes of thought and use of terms, however, it is necessary to explain exactly what is meant by saying that a given jural relation is concurrently legal and equitable. This demands some consideration of the relations between law and equity as well as of the nature of legal and equitable rights and other jural relations.

## II

Commonly jural relations are classified as either "legal" or "equitable." The fact that many jural relations are *concurrently legal and equitable* is not usually recognized.<sup>20</sup> By the statement that a jural relation is concurrently legal and equitable is meant simply that it is recognized as valid and so is sanctioned by both courts. To apply this concretely to the case of assignments of *choses* in action, let us consider, for example, the jural relations

<sup>17</sup> 20 HARV. L. REV. 822.

<sup>18</sup> 20 HARV. L. REV. 824-28.

<sup>19</sup> 2 Conn. 503, 508 (1818). The italics are those of the present writer.

<sup>20</sup> An accurate analysis of the situation is presented by Professor Hohfeld in his article upon "The Relations between Equity and Law," 11 MICH. L. REV. 537.



which arise upon the assignment of a common law debt. The *right* of the assignee to have the debtor pay the money to him, and the correlative *duty* of the debtor to pay the money to the assignee, are concurrently legal and equitable, not merely legal or equitable. That is, both courts recognize and sanction the right of the assignee and the duty of the debtor. To be sure, ordinarily the assignee may not sue the debtor in equity, either in his own name or that of the assignor, for the reason that he has an adequate remedy at law.<sup>21</sup> It by no means follows that the right and its correlative duty are exclusively or purely legal, although that is commonly assumed. An accurate analysis shows that the right and duty are recognized and sanctioned by equity as well as by law. By refusing to interfere by injunction with the assignee's suit in a law court for the collection of the claim, the court of equity "indorses and sanctions the remedial proceeding in the law court,"<sup>22</sup> and so the right itself. If the view of equity were that the debtor's duty to pay is not in equity as well as at law owed to the assignee but to someone else — the assignor, for example — an injunction to stop the assignee from collecting the claim by means of a common law proceeding would be the normal thing. Moreover, when occasion arises equity stands ready to aid the assignee if for any reason the effective assertion of his right to payment requires such aid.<sup>23</sup> For example — referring now to the time when the testimony of parties to an action could not be had in a common law court — if to establish his right the assignee needed testimony from the debtor, equity would enable the former to obtain it by bill of discovery, brought in aid of the action at law.<sup>24</sup> So also if the assignee held the *chose* in action in trust for someone else and refused to enforce it for the benefit of the *cestui*, the latter could proceed directly by bill in equity against both assignee and debtor and compel payment by the latter.<sup>25</sup> Where because of defects in the common law — due chiefly to the technical rule requiring the action to be entitled with the name of the as-

<sup>21</sup> *Hammond v. Messenger*, 9 Sim. 327 (1838); *Hayward v. Andrews*, 106 U. S. 672 (1882). The latter case contains a review of the leading American authorities.

<sup>22</sup> Hohfeld, 11 MICH. L. REV. 569.

<sup>23</sup> Cf. the examples given by Hohfeld, *loc. cit.*

<sup>24</sup> Of course to-day the modification of the common law rules of evidence usually renders such a course unnecessary.

<sup>25</sup> *Fogg v. Middleton*, 2 Hill Ch. (S. C.) 591 (1837), and cases cited in AMES, CASES ON TRUSTS, 2 ed., 67.

signor — the assignee could not sue at law, he could sue directly in equity in his own name.<sup>26</sup>

A careful consideration of the other jural relations involved — the privileges, powers and immunities of the assignee — will show that they also are not exclusively legal<sup>27</sup> or exclusively equitable, but concurrently legal and equitable in the same sense. It is, for example, the *privilege* of the assignee to release the claim if he wishes, with or without receiving a consideration; he is under *no duty* to the assignor or others not to release, *i. e.*, they have “*no right*”<sup>28</sup> that he shall refrain from releasing. That the assignee has this privilege at law is shown by the fact that neither the assignor nor anyone else has a cause of action against him if he does execute a release. That the privilege is also equitable, *i. e.*, recognized and sanctioned by equity, is obvious, for clearly equity would not only refuse to enjoin him from releasing if he had not yet done so but also hold him guiltless of any wrong if he had. To assert that the privilege was not equitable as well as legal would be to assert that in equity as distinguished from law he was under a duty to someone — presumably the assignor — not to release. If so, equity would at the instance of the one to whom the duty was owed grant an injunction to stop the giving of the release or, if it had been given, order its surrender and cancellation or give such other relief as the occasion demanded.<sup>29</sup> Consideration of the other *privileges* of the assignee, with their correlative “*no-rights*” of others, shows that they are concurrently legal and equitable.<sup>30</sup>

The *powers* of the assignee and their correlative *liabilities*<sup>31</sup> are also concurrently legal and equitable. For example, the *power* of the assignee to give a valid release to the debtor is recognized by both law and equity. If it were not concurrently legal and equitable, but merely legal, the chancellor would of course refuse to

<sup>26</sup> *Person & Marye v. Barlow*, 35 Miss. 174 (1858).

<sup>27</sup> “Exclusively legal” and “exclusively equitable” jural relations are considered more carefully at a later point in the discussion.

<sup>28</sup> See the discussion of “no-rights” by Hohfeld, 23 YALE L. J. 32.

<sup>29</sup> Compare the situation in early days when payment of a bond did not *per se* discharge it at law unless it were so conditioned.

<sup>30</sup> For example, the privilege to transfer the claim to anyone else; the privilege not to enforce the claim by suit and thus to permit the statute of limitations to run, etc.

<sup>31</sup> See the scheme of jural “opposites” and “correlatives” in 23 YALE L. J. 30. One may of course have the *power* to do a thing and not the *privilege* of doing it.



recognize the validity of the release. An example of a situation of this kind is found in the case of a partial assignment. At law — at least in those jurisdictions in which the partial assignee's rights, etc., are purely equitable<sup>32</sup> — the assignor has a legal power to extinguish by release the whole claim. In equity, however, the claim is not recognized as extinguished, *i. e.*, the partial assignee can recover from the debtor the amount assigned to him.<sup>33</sup> The power of the assignor to release the claim in such a case is therefore exclusively legal.<sup>34</sup>

Finally, the *immunities* of the assignee and their correlative *disabilities*<sup>35</sup> are concurrently legal and equitable. Again a single concrete example must suffice for illustration. Suppose — after notice to the debtor of the assignment — the assignor were to execute under seal a release of the claim. This release would be without jural effect upon the validity of the claim, either at law or in equity. The assignor has no power, *i. e.*, is under a *disability*, both at law and in equity, to extinguish the claim; the assignee enjoys an *immunity* from having the claim extinguished in this way. If the *immunity* of the assignee, with its correlative *disability* of the assignor, were exclusively legal, the following situation would result: At law, since the assignor lacked the power to release, the release would be invalid and the claim still in existence; in equity, on the other hand, since by hypothesis the immunity in question does not exist, and so a power in the assignor to give a valid release is recognized, the claim would no longer be valid. Under such circumstances the chancellor would both refuse to aid in the assertion of the assignee's legal rights and also in a proper case compel the assignee to refrain from exercising his legal rights and even to surrender them.<sup>36</sup> The other immunities of the assignee — *e. g.*, from having the assignor

<sup>32</sup> Whether the partial assignee's ownership of the claim is concurrently legal and equitable or exclusively equitable is discussed later.

<sup>33</sup> AMES, CASES ON TRUSTS, 2 ed., 64.

<sup>34</sup> This was the situation in the case of total assignments at one period of the development of our law. The assignor could at law give a valid release, which however was not regarded as valid in equity.

<sup>35</sup> 23 YALE L. J. 30.

<sup>36</sup> Compare the situation which results when a *cestui* "releases" a claim against a third person held in trust. Equity would enjoin the trustee from asserting the claim at law, as well as refuse him equitable aid if he asked for it in what would otherwise be a proper case for equitable relief. The release would be valid in equity but not at law.

or anyone else transfer the claim to others<sup>37</sup> — prove to be concurrently legal and equitable if we examine them closely. Time and space, however, do not permit of such examination.

From every point of view, then, we may say with the eminent judge already quoted, "It is the same at law" as it is in equity; "there is no hostility between the jurisdictions on this subject."<sup>38</sup>

### III

Now that the conclusions set forth in my original article have been carefully restated and the misconceptions due to my learned critic's misunderstanding of them removed, we may turn our attention to the argument against their soundness. As already stated, it is based in part upon certain assumptions concerning the "essential characteristic" or "fundamental characteristic" of "equitable rights," "equitable obligations" or "equitable ownership" as distinguished from "legal rights," "legal ownership" or "legal titles." Professor Williston says:

"In discussing equitable rights there is always danger of confusion between the *essential character* of the *right* and the *tribunal* in which it is enforced. The fundamental characteristic of an equitable obligation is that it binds primarily a particular person, and binds others only when their relation to that person is such that in conscience they should be subject to his duties. The Court of Chancery has been the tribunal where such duties have ordinarily been enforced. But even in jurisdictions where the distinction between legal and equitable courts is still preserved, courts of law to-day enforce a great variety of equitable rights and duties without thereby changing their essential characteristics. To call such rights *legal in antithesis to equitable* merely because a court of law enforces them, is a natural tendency but a dangerous one. Of course no such confusion exists in the argument of Professor Cook. His view seems to be that the extent of the powers of the assignee of a *chose* in action involves the conclusion that he has more than that personal right which is typical of equitable ownership and should rather be designated as a legal owner, his ownership being qualified, to be sure, by certain limitations, as legal ownership often is."<sup>39</sup>

<sup>37</sup> If no notice has been given to the debtor, the problem of the rule in *Dearle v. Hall*, 3 Russell 1, 48 (1827), is raised. See discussion below.

<sup>38</sup> The method of sanctioning the particular jural relation may well be different, at law and in equity, as has been pointed out.

<sup>39</sup> 30 HARV. L. REV. 97-98. The italics are those of the present writer.



If it be "confusion" to attach to the word "right" the adjective "legal" when the right in question is recognized and sanctioned by a court of law, and the adjective "equitable" when the right is recognized and sanctioned by a court of equity,<sup>40</sup> I must plead guilty to being hopelessly confused, for that is precisely the way in which I have always used these terms. This seems to me to be not only their natural meaning but also the only really useful one to attach to them. To me the confusion appears to lie in the minds of those who assert that there is some "fundamental" or "essential" characteristic of "equitable rights" — aside from the fact that they are recognized and sanctioned by courts of equity — which differentiates them from all other classes of "rights" and requires us to regard them not merely as equitable but as *exclusively equitable* and *not legal*, even after they have come to be fully recognized and sanctioned by courts of law as well as by courts of equity. If I understand Professor Williston, just that is what he wishes us to say concerning the assignee's "rights"; they are *equitable, not legal*.<sup>41</sup>

To deal with the matter adequately we must go somewhat more fully into the relations between law and equity and "legal" and "equitable" jural relations than we have done. As Professor Hohfeld has shown in the article previously referred to,<sup>42</sup> all *genuine* jural relations in our system of law fall into two classes. The first consists of jural relations which are *concurrently legal and equitable*;<sup>43</sup> the second of those which are *exclusively equitable*.<sup>44</sup> What appears at first sight to be a third class, *viz.*, jural relations *exclusively legal*, is found upon analysis to consist of jural relations which are, so far as *genuine* law is concerned, only apparent.<sup>45</sup> That is, if we take our

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<sup>40</sup> In states where law and equity are "merged," the distinction to-day between the court of common law and the court of equity is chiefly between a tribunal with a jury and one without, with a different kind of appellate review, at least in cases where the sole relief sought is the payment of money. The equitable decree for the payment of money is enforced precisely like the common law judgments — in fact both are called judgments under the code procedure.

<sup>41</sup> 30 HARV. L. REV. 99.

<sup>42</sup> Note 20, *supra*.

<sup>43</sup> In the sense set forth above.

<sup>44</sup> The classification here adopted has of course no connection with the well-known classification adopted by Story and others dividing the jurisdiction of equity into concurrent, exclusive, and auxiliary.

<sup>45</sup> Hohfeld, 11 MICH. L. REV. 569.

whole system of law into account, we find that every exclusively legal jural relation is in conflict with some paramount exclusively equitable jural relation which has the effect of annulling the legal jural relation in question.<sup>46</sup> If this were not true, *i. e.*, if the equitable relation properly enforced did not in effect supersede and render of no effect the legal relation in question, the latter would not be exclusively legal but concurrently legal and equitable, *i. e.*, would be recognized and sanctioned by both courts.

It follows that rights and other jural relations which are commonly called and assumed to be "legal" as distinguished from "equitable" are really of two kinds. The first are genuine jural relations, concurrently legal and equitable, *i. e.*, recognized and sanctioned by both law and equity; the second are only apparent and are not genuine jural relations, since, being exclusively legal, they are in conflict with some paramount exclusively equitable jural relation which has the effect of annulling them.

Unfortunately the terminology in current use is not based upon a careful analysis of the situation. Professor Williston's misunderstanding of my former article — in which, perhaps unfortunately, I forbore introducing new terms — has convinced me that no progress can be made without the adoption of a terminology adequate to express clearly the relations between legal and equitable jural relations as they actually exist. It seems desirable, therefore, to adopt the phrases suggested by Professor Hohfeld, *viz.*, "concurrently legal and equitable," "exclusively equitable" and "exclusively legal" in classifying jural relations. That will be done in what follows. It must constantly be borne in mind that a jural relation which is *exclusively legal* is *not* a *genuine* jural relation at all; also that to say merely that a given relation is "legal" or "equitable" does not mean that it is exclusively so — it may be concurrent.

Coming now to the discussion of the passage quoted from Professor Williston's argument, it is obvious of course that he does not mean by "equitable right" a jural relation that is recognized and sanctioned exclusively by a court of equity, for he insists upon calling rights enforced by courts of law "equitable, not legal." A right which he would call "equitable, not legal" might, therefore, in the

<sup>46</sup> Many concrete illustrations are given in 11 MICH. L. REV. 555. Of course if the appeal is not properly made to the equity court, the action at law prevails.



terminology here adopted be either concurrently legal and equitable or exclusively equitable.<sup>47</sup>

An attempt on my part to formulate for my own satisfaction the argument of my learned friend into a series of definite propositions has yielded the following result. I have reached it by considering both the general trend of his article and particular phrases used at different points in it. Except where quotation marks are used, the phraseology is mine. I can only hope that it does not misrepresent in any material way what he has said.

1. "An equitable ownership" or "an equitable title" is "an equitable right" with a correlative "equitable obligation."

2. Every "equitable right" is "primarily personal," *i. e.*, it has the "fundamental" or "essential characteristic" that "it binds primarily a particular person, and binds others only when their relation to that person is such that in conscience they should be subject to his duties."<sup>48</sup>

3. Not only do all "equitable rights" have this characteristic, but every "right" which has this characteristic is "equitable, not legal," no matter in what court it is recognized and sanctioned.<sup>49</sup>

4. The "right" or "ownership" of an assignee of a *chose* in action has this characteristic and is therefore "equitable, not legal" even though now fully recognized and sanctioned by courts of law.

It is apparent that to Professor Williston "rights" are either legal *or* equitable. The conception of "rights" as concurrently legal *and* equitable seems to have no place in his analysis.<sup>50</sup> It will at once be seen that we are dealing, in part at least, with a question of terminology. However, this difference in terminology is not merely a question of choosing one rather than another of a number of non-significant labels, any one of which would serve the purpose equally well. Behind terminology lie concepts; behind confusion in terminology lies confusion in concepts.

As Professor Williston himself says:

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<sup>47</sup> Possibly it might be exclusively legal if it had the "fundamental characteristic" described but were recognized and sanctioned only in a court of law.

<sup>48</sup> 30 HARV. L. REV. 97.

<sup>49</sup> This seems to be the fair meaning of Professor Williston's argument, although I think it is not expressly stated.

<sup>50</sup> This, although not explicitly stated, seems fairly to be inferred from the whole argument and such phrases "as legal in antithesis to equitable" (30 HARV. L. REV. 97) and similar statements.

"Words have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas. . . . And more than one court has been led into the error of holding. . . ." <sup>51</sup>

Undoubtedly the really important difference between my learned critic and myself is in the matter of fundamental jural concepts. It is because Professor Williston does not recognize that rights and other jural relations may be at the same time both legal and equitable that he fails to see that to say that a right is legal is not necessarily to say that it is exclusively legal and so not equitable. As I have tried to show above, his misunderstanding of my conclusions is due in part to this antithesis between legal and equitable "rights" (jural relations) which seems ever to be present in his mind. The same cause leads him to say that the courts of law, when they came to sanction fully the ownership of the assignee, did so, "still recognizing . . . that his ownership was equitable, *not legal*."<sup>52</sup> The only opinion which he cites in support of that proposition is that in *Winch v. Keeley*.<sup>53</sup> All that was there said, however, was that the common law now recognized and enforced rights which were formerly enforceable only in equity, *i. e.*, the opinion recognized that the assignee's "rights" were equitable. It did not state that they were not also legal, and the plain truth of the matter seems to be that in any natural meaning of the terms they are both legal and equitable and not exclusively equitable.

In other words, Professor Williston has two terms — legal and equitable — to express two supposedly mutually exclusive funda-

<sup>51</sup> "The Repudiation of Contracts," 14 HARV. L. REV. 425.

"If terms in common legal use are used exactly, it is well to know it; if they are used inexactly, it is well to know that, and to remark just how they are used." JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE, 190.

"This does not mean that the effort for clear thought and exact statement can be relaxed. Rather the contrary; for the very breadth of the subject has made it easy to hide confusion of thought behind ambiguous and question-begging phrases." Dean Ezra Ripley Thayer, 27 HARV. L. REV. 318.

"The student of Jurisprudence is at times troubled by the thought that he is dealing not with things, but with words, that he is busy with the shape and size of counters in a game of logomachy, but when he fully realizes how these words have been passed and are still being passed as money not only by fools and on fools, but by and on some of the acutest minds, he feels that there is work worthy of being done, if only it can be done worthily." JOHN CHIPMAN GRAY, NATURE AND SOURCES OF LAW, viii.

<sup>52</sup> 30 HARV. L. REV. 99.

<sup>53</sup> 1 T. R. 619 (1787). See the passage quoted in 30 HARV. L. REV. 99, n. 3.



mental concepts. In his analysis, these two concepts cover the whole field; there is no room for a third. In the analysis which I am following, there are three fundamental concepts and three terms which correspond to them — exclusively legal, exclusively equitable, and concurrently legal and equitable.

Let us now examine the truth of the propositions in which I have attempted to summarize the fundamental parts of Professor Williston's argument. The first and second treat "equitable ownership" as an "equitable right" or "obligation" "primarily personal." This is, of course, the view maintained by the late Dean Ames, by Maitland, and others. To discuss it adequately would require far more space than can be given to it here, and a few words must suffice to indicate what to the present writer seems to be its fundamental weakness, *viz.*, that it is based upon a totally inadequate analysis of the fundamental jural relations involved in "ownership," whether the latter be concurrently legal and equitable or exclusively equitable.

Professor Williston's similar statement that "legal ownership is conceived fundamentally as a *right* good as against all the world" shares the same weakness. All statements of this kind which describe ownership merely as a *right* ignore totally the complex character of the jural relations involved. For the sake of simplicity, let us consider so-called "legal ownership" <sup>54</sup> first. A., for example, owns a chattel, free from any legal or equitable claims. It requires only a slight consideration to see that to say that A. has a *right* is insufficient. In the first place he has, not one right, but many rights. Commonly we express this by saying that he has a right *in rem*, but that expression is misleading unless very carefully defined. <sup>55</sup>

<sup>54</sup> This is of course concurrently legal and equitable where the property is owned absolutely, *i. e.*, not held in trust.

<sup>55</sup> The briefest consideration shows that we are dealing not with one right but with a multiplicity of rights, actual and "potential," meaning by the latter term that only a portion of the operative facts necessary for the existence of an actual right which can be violated are as yet in existence. Consider, for example, the situation in *Rylands v. Fletcher*, L. R. 3. H. L. 330 (1868). If (as, apparently, later decisions show) the rule applies only as between neighboring landowners, what is the situation before the water has been collected on the land? The right to have it kept off is potential, but becomes actual as soon as it has been collected. Whatever this right may be called, it is a part and only a part of a complex aggregate of rights which the land owner has. Consider the rights of the owner of a sheep. If no one in the jurisdiction owns a dog, it is difficult to conceive of the owner of the sheep as having an actual right against anyone

In addition, however, he has many privileges,<sup>56</sup> powers<sup>57</sup> and immunities.<sup>58</sup> If the so-called "legal ownership" is a genuine ownership, all the jural relations that are legal are also equitable, *i. e.*, concurrent. A complete analysis would show also that the complete ownership of the flock of sheep includes also jural relations exclusively equitable.<sup>59</sup> If we should modify Professor Williston's statement concerning "legal ownership" so as to make it read that "legal ownership" is conceived fundamentally as *including* a right "good against all the world" <sup>60</sup> it would be nearer the truth. The particular "right" Professor Williston seems to have in mind here is the "right" to recover the chattel from anyone into whose hands it may come. Even then as applied to chattels it would not be true in the original home of the common law, for the chattel could not be recovered from a purchaser in market overt. Nor would it be true of "legal ownership" of real estate acquired under an unrecorded deed in jurisdictions having recording acts.<sup>61</sup>

It must not be overlooked that in the cases just discussed the "legal owner" of the chattels or land has other "rights" which are "good against all the world." If, for example, the sheep have been stolen by a thief, the right of the owner to immediate possession will support an action of trover for the conversion of the sheep

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that dogs shall not injure the sheep. As soon as a number of persons do have dogs, however, and know of their propensity to injure sheep, the rights against such persons are actual; but as against all others in the jurisdiction, the owner's rights are potential. All of these rights are only a small part of the so-called right *in rem*. Consider another case. When A. is in New York and B. in Buffalo, can we say that A. has an actual right not to be assaulted by B.? Or must we say that the right is only "potential" until the physical possibility of a battery arises? It is not intended to answer these questions at this time, or to do more than to point out how superficial and misleading the present analysis and classification of rights into rights *in rem* and rights *in personam* really is. It is to be hoped that soon someone will give us a more careful analysis as well as a more scientific terminology.

<sup>56</sup> For example, the privilege to do all kinds of acts by way of using the chattel, selling it, mortgaging or pledging it, giving it away, etc., etc.

<sup>57</sup> For example, to transfer title by delivery, by deed; to pledge the chattel, or to mortgage it, etc., etc.

<sup>58</sup> For example, no one else has the power to transfer the ownership unless empowered to do so by appointment as agent or under valid execution process, etc.

<sup>59</sup> For example, the power to give an equitable mortgage without creating any legal interest.

<sup>60</sup> Of course no right is good against "all the world." It may be good against an indefinite number of people or people generally. See the discussion in my article in 15 COL. L. REV. 40-44.

<sup>61</sup> See the discussion of the recording act cases, *infra*, n. 87.



against anyone who steals them from the first thief, or who takes by gift from the first thief, etc.

From all this we may conclude that "legal ownership" must be conceived of as a complex aggregate of rights and other jural relations, and that the "right" which my learned critic apparently has in mind, *viz.*, to recover the chattel or land from persons into whose possession it has come, need not be good "against all the world" in order that the ownership be "legal." It seems clear that whoever disputes the last statement must be prepared to maintain that legal ownership of chattels never existed in England and that it does not exist to-day in the case of land under the recording acts.<sup>62</sup>

Referring now to Professor Williston's statements as to "equitable rights," is it really true to-day that the essential characteristic of "an equitable right" is that it is "primarily personal," *i. e.*, "binds primarily a particular person"? However true this may have been historically, does such a statement adequately describe the law of to-day when, as Professor Williston himself points out, "an equitable right" or "ownership" which is recorded includes "rights good against all the world" and may be "much more comprehensive" than "legal ownership?"<sup>63</sup> Apparently Professor Williston is willing to maintain that it does, arguing that "the same result" is reached by law and equity but by different roads.<sup>64</sup> If, as my learned critic seems to admit, the jural results at law and in equity are identical,<sup>65</sup> it is difficult to see how the "rights" of "equitable ownership" can be *fundamentally* different in their essential characteristics from those of "legal ownership." Moreover, as the learned author himself says, the reasons why "equitable rights" are available against particular persons or groups of persons are in the last analysis the same as those which lead us to make "legal rights" available against the same persons.<sup>66</sup>

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<sup>62</sup> There are many statutory modifications of "legal ownership" which apply the doctrine of innocent purchase for value so as to limit still farther "legal ownership" in ways unknown to the common law. Examples are found in the Factor's Acts, Uniform Bills of Lading Act, Uniform Warehouse Receipts Act, etc.

<sup>63</sup> 30 HARV. L. REV. 98.

<sup>64</sup> 30 HARV. L. REV. 99.

<sup>65</sup> I do not intend either to deny or admit the truth of the admission that the results are "the same," *i. e.*, *identical*. It is too large a subject to treat here.

<sup>66</sup> Doubtless the reasons which actually influenced courts of equity to establish the doctrines in question were not those which we to-day give as their justification.

In any event, a careful analysis of so-called "equitable ownership" will show that it is not primarily a *right*, but that, like "legal ownership," it is a complex aggregate of rights, privileges, powers and immunities,<sup>67</sup> and any treatment of the subject which ignores this is, to say the least, inadequate.

It may be noted in passing that the learned writer's statement as to the fundamental characteristic of "equitable rights" is not true of those jural relations which are commonly assumed to be merely "legal" but which are in fact concurrently legal and equitable. Since all legal jural relations which are genuine are of this character, it is obvious that many genuine jural relations which are equitable (but at the same time legal) are good "against all the world." For example, the right of an owner of land in possession to have "all the world" refrain from trespassing is equitable as well as legal. As an equitable right it is as much a "right *in rem*" as it is in its aspect as a legal right. Undoubtedly it was not of equitable rights of this kind that Professor Williston was writing, but only of those which originated in equity. Many of these are of course now concurrently legal and equitable; others are still exclusively equitable. It is to all of these, as I understand it, that Professor Williston attributes the characteristic referred to.

Even if it were to be admitted — merely for the sake of argument, but without actually determining the truth — that all the "rights" which historically were exclusively equitable in origin did possess in the beginning some such characteristic as that described by Professor Williston, it does not follow that they *necessarily* lost this characteristic when in the course of the development of our law they came to be recognized and sanctioned by courts of law, *i. e.*, became concurrently legal and equitable. There is no *inherent* reason why the chancellor should change his views as to their scope, or why the law court, recognizing their historical origin, may not give them precisely the same limitations they previously had when exclusively equitable.<sup>68</sup> Neither does there seem

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<sup>67</sup> A *cestui que trust* has many *privileges*, for example, ordinarily he has the privilege of transferring his interest. He also has a *power* to do the same thing. If the instrument creating the trust is recorded, his *immunity* from having his "ownership" destroyed is as complete as that enjoyed by "legal owners." If it is not recorded, this immunity is not so complete. He has of course other immunities, *e. g.*, no one else can transfer the "equitable interest" to others.

<sup>68</sup> It is extremely important therefore to know the history of a particular doctrine



to be any good reason why they should not be called what they are — concurrently legal and equitable.<sup>69</sup>

Professor Williston's conception of all jural relations as either legal or equitable and his failure to recognize that many of them are concurrently legal and equitable leads him to assert that so long as the common law procedure required the assignee to sue in the name of the assignor

"it was hardly possible to argue, and it was not argued, that the assignee was legal owner of the right";<sup>70</sup>

also that

"all the powers and rights upon which Professor Cook relies . . . may belong to the assignee whether the court travels on the theory that he has a legal ownership or on the theory that he has a legal power to collect but only equitable ownership."<sup>71</sup>

Nevertheless, so far as concerns the first of these statements, the "impossible" was achieved by Kent, C. J., in 1801; by Smith, J., in 1818, as is shown by the extracts printed above. Nor are these isolated instances, as others cited in the footnote will show.<sup>72</sup>

If I have made my argument down to this point entirely clear, the incorrectness of the second statement ought to require no demonstration. "The legal power to collect" is only one among the many jural relations which at law as well as in equity are vested in the assignee. The privilege and the power to release gratuitously; the privilege and power to transfer to others; the immunity from a power of the assignor, or anyone else to do these things — all these and many other jural relations<sup>73</sup> are recognized as vested in the assignee by courts of law as well as of equity. To call the "power to collect" "legal" but to deny the same name to these other jural

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if we are to be in a position to discuss the real problem involved in a discussion of its scope and limitations.

<sup>69</sup> If all that Professor Williston means is to insist that whatever limitations the assignee's "rights" had when purely equitable they should continue to have when they become concurrent, there is little occasion for controversy between us. Apparently however he means much more.

<sup>70</sup> 30 HARV. L. REV. 100.

<sup>71</sup> *Ibid.*

<sup>72</sup> Parris, J., in *Hackett v. Martin*, 8 Greenl. (Me.) 77, 78 (1831); *Morrow v. Inhabitants of Vernon*, 35 N. J. L. 490 (1872); *Bouvier v. Baltimore & N. Y. Ry. Co.*, 67 N. J. L. 281, 293, 51 Atl. 781 (1901); *Bird v. Caritat*, 2 Johns. (N. Y.) 342 (1807).

<sup>73</sup> For example, the *right* to have the sheriff levy execution for the assignee's benefit.

relations which are also recognized and sanctioned by courts of law seems inconsistent, to say the least. At the risk of tedious repetition, let me repeat: *According to the decisions of the courts*, all the jural relations which before the assignment were vested in the assignor have ceased to be so vested, and on the other hand the assignee has become by virtue of the assignment invested with all the jural relations which go to make up what we call "ownership" of the *choses* in action. There remains a false appearance of ownership in the assignor because of the requirement that the assignee's action in a court of law bear a misleading label, *viz.*, the name of the assignor.

That the label on the action was a mere procedural form was, I think, clearly shown in my previous article.<sup>74</sup> As apparently Professor Williston was not convinced and others may share his doubts, a few additional cases may perhaps be cited with profit. In *Mather-son v. Wilkinson*<sup>75</sup> the suit was brought in the name of the assignor. It appeared that because of his failure to comply with a statute the assignor could not sue. It was therefore argued that the assignee could not sue in the assignor's name. If the assignee had only a "power to collect" a claim, the "legal ownership" of which was vested in the assignor, it seems clear the objection was well taken. The court, however, brushed it aside, saying that the debt was "no longer the property" of the assignor; that the latter did "not own the claim after selling it and assigning it." Other courts on similar facts reach the same conclusion.<sup>76</sup>

In other fields of the law there are many similar requirements as to the way in which actions shall be entitled. Perhaps the most striking is the action of ejectment. As is well known, in its fully developed form the names of both plaintiff and defendant were purely fictitious. The declaration stated a purely fictitious lease to a fictitious lessee ("John Doe," the nominal plaintiff), a ficti-

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<sup>74</sup> 29 HARV. L. REV. 833.

<sup>75</sup> 79 Me. 159, 8 Atl. 684 (1887).

<sup>76</sup> *Quan Wye v. Chin Lin Hee*, 123 Cal. 185, 55 Pac. 783 (1898); *Citizens' Bank v. Corkings*, 9 S. D. 614, 70 N. W. 1059 (1897). In the case last cited a non-resident corporation, which was not entitled to sue in South Dakota on the claim because it had not complied with the South Dakota statutes, assigned the claim to a resident of the state. It was held that the latter could recover in his own name under the "real party in interest" clause. In these cases the assignor has the power by the assignment to give the assignee more than the assignor has.



tious entry and ouster of the fictitious plaintiff by the fictitious defendant. By means of the "consent-rule" the real defendant was ultimately substituted for the nominal defendant, but the real plaintiff was never substituted for the nominal plaintiff. Only by using this procedural form could the real plaintiff recover, and the judgment on its face merely directed that the nominal and fictitious plaintiff "John Doe" recover possession of his fictitious term. The writ of execution ("*habere facias possessionem*") followed the same form, directing the sheriff to put "John Doe" into possession.<sup>77</sup> Under this, however, it was the duty of the sheriff to put the real plaintiff into possession. The title of the action revealed, of course, who the real plaintiff was, as it described him as the lessor of the nominal plaintiff. We thus have a situation strikingly like that in the action of the assignee in the name of the assignor, where the nominal plaintiff (the assignor) apparently by the judgment recovers against the debtor, but the duty of the sheriff is to levy execution for the real plaintiff (the assignee). In both cases we are dealing with a procedural form. The analogy becomes still more striking when we recall that in the earlier days of ejectment the nominal plaintiff and defendant were real persons.<sup>78</sup>

Another equally striking analogy is found in the rule by which corporations sue or are sued not in the name of the real parties in interest — the stockholders or directors — but under a purely fictitious name, such as "The Copper King, Limited."<sup>79</sup> Similar also is the situation where by statute in one state a "joint stock association" which is not incorporated and so is really a partnership is permitted to sue and be sued under a fictitious name — *e. g.*, the "X Express Co.," or perhaps in the name of the president, or president and directors. The real parties in such an action are the members of the association; we are dealing merely with a procedural rule. In other jurisdictions without a similar statute, all the partners must join or be joined in their own names.<sup>80</sup> Purely procedural

<sup>77</sup> See the forms in ADAMS, EJECTMENT, Am. ed., 1821, 364-65, Forms No. 34 and 36.

<sup>78</sup> *Ibid.*, 1-17. Of course ejectment could be and was used by actual lessees. The reference here is to its use in cases where the real plaintiff had a freehold interest.

<sup>79</sup> *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49; *Bank of Australasia v. Harding*, 9 C. B. 661 (1850). Cf. Hohfeld, "The Nature of Stockholders' Individual Liability for Corporate Debts," 9 COL. L. REV. 285, 301-03, where the cases last cited are discussed.

<sup>80</sup> *Boston & Albany R. Co. v. Pearson*, 128 Mass. 445 (1879). The judgment under

also is the common requirement that an action by an executor be entitled "A. B., as executor of C. D." This appears clearly when we recall that a suit by a trustee — who occupies an analogous position — is required merely to be entitled with the trustee's own name without indicating his fiduciary character.

This brings us to a consideration of the statutes which permit the action to be brought in the name of the assignee. Very little need be added to what Professor Williston has said as to the forms which these statutes take. One or two things must however be said. In dealing with the code provision requiring all actions (with certain exceptions) to be brought in the name of the real party in interest, Professor Williston says:

"It would seem certainly that a mere provision that the real party in interest must bring the suit in his own name can effect only a change of procedure."

Unfortunately for the learned author's contention, the fact seems to be that, rightly or wrongly, this innocent-looking provision has been applied by some courts so as to produce important changes in substantive law.<sup>81</sup> As applied, however, to the assignment cases, the decisions of the court which hold that the change in the name of the action is procedure merely quite bears out my contention that the requirement of suing in the assignor's name was a mere form. So far do they come from militating against my position that they actually support it. We may put the matter as follows. For historical reasons the common law procedure required a certain form of entitling an action brought by an assignee claiming by virtue of a common law assignment. A provision changing this and permitting the assignee to entitle the action with his own name does not alter the procedural requirements of other jurisdictions. From this it follows that in these other jurisdictions (if they have no similar statutes) the assignee must still obey the local common law procedural rule (*lex fori*) and use the

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these statutes may simply read that the plaintiff recover from the officer of the association whose name as defendant the action bears, but execution does not run against his individual property, at least in the first instance, as the statutes usually require that satisfaction be had first out of the association property. *McCabe v. Goodfellow*, 133 N. Y. 89, 30 N. E. 728 (1892).

<sup>81</sup> See, for example *Kingsland v. Chrisman*, 28 Mo. App. 308 (1887); *Tilden v. Stilson*, 49 Neb. 382, 68 N. W. 478 (1896).



assignor's name. On the other hand, if by the statutory law of a given jurisdiction assignments not valid at common law are authorized in language which, fairly interpreted, says that the ownership of the claim may be transferred, the assignee suing in another jurisdiction (even though the latter has no similar statute) may well be held to be not subject to the ordinary common law procedural rule requiring an assignee to sue in the name of the assignor, on the theory that that rule applies only to assignments made in pursuance of the common law. It is not argued that this is a necessary result or indeed the actual result reached in all the cases, for it must be admitted that the analysis in most cases is not very clearly made. Many decisions, however, are in accord with it; and it seems to be the rule which will account for seeming inconsistencies. It was applied in an occasional case at the time when it could not be said that the common law had fully recognized the ownership of an assigned claim as vested in the assignee.<sup>82</sup> An example in relatively recent times is found in *Mayhew v. Pentecost*.<sup>83</sup> In that case an assignee in bankruptcy (*i. e.*, a statutory assignee under the federal bankruptcy law) who was also assignee in fact under an assignment made in Massachusetts (*i. e.*, a common law assignee) sued in Massachusetts in the name of the bankrupt. It was objected that the suit ought to have been in the name of the assignee, as the title to the bankrupt's *choses* in action passed to the assignee in bankruptcy, as a statutory assignee, by virtue of the federal bankruptcy act. The court, while admitting that the assignee could have sued in his own name; also recognized the assignment in fact as a common law assignment, permitting the assignee to sue in the name of the bankrupt assignor, in accordance with the common law rule of procedure which still obtained in Massachusetts at that time. The court, speaking through Mr. Justice Gray, said:

"The question whether a suit upon a *chose* in action shall be brought in the name of the assignor or of the assignee, is a question of *form* of remedy *only*, and is to be determined by the *lex fori*."

In effect the court decided that Massachusetts procedure required one form of entitling the action for common law assignments

<sup>82</sup> *O'Callaghan v. Thomond*, 3 Taunt. 82 (1810).

<sup>83</sup> 129 Mass. 332, 335 (1880). Italics are those of present writer.

and another for assignments operating under the federal bankruptcy act.

#### IV

In the second portion of his argument Professor Williston argues that the ownership of the assignee should not be recognized as "legal" because to do so would *necessarily* involve consequences which in his opinion would be not only unfortunate and unjust, but also violative of sound legal principles and inharmonious with the general trend of the decisions of the courts. He discusses cases involving:

1. The debtor's right to set off against the assignee claims against the assignor;
2. The effect of latent equities;
3. The effect of a subsequent total assignment on a prior partial assignment.

He states the law relating to the first of these problems as follows:

"The debtor is generally allowed to set off against the assignee not only claims existing at the time of the assignment, but those arising subsequently prior to the debtor's notice of the assignment. On the other hand a claim against the assignor acquired after notice of the assignment cannot be set off. There are a number of cases qualifying in one or another kind of case the right of set-off against the assignee, but the decisions need not be examined here, for all that is of importance to the present argument is that certainly everywhere the general rule is admitted that a claim matured at the time of assignment may be set off against the assigned claim. There seems *no possible ground on which to support this general rule, except that the legal title to the assigned claim still is in the assignor.*"<sup>84</sup>

It should be noted first of all that my statements as to the assignee's complete ownership of the claim, at law and in equity, were expressly confined to the situation *after notice* to the debtor. The situation before notice was stated as follows:

"Clearly here the assignor retains some of the powers of an owner — he can extinguish the claim by release, accepting payment, etc. Such acts on his part, of course, are wrongs against the assignee and render him liable to actions for damages. Translating this into the terms of our analysis, we may say that the assignor retains some of his legal powers but has lost his privileges as owner of the *choses*, and the assignee is as

<sup>84</sup> 30 HARV. L. REV. 101.



yet only partly owner because he lacks the immunities which are essential to complete ownership. The situation may be compared to that of a grantee of land under an unrecorded deed. In such a case we think of the grantee as owning the land, but his title is not complete: it is subject to a power on the part of the grantor to extinguish it by a conveyance to another purchaser who buys in good faith and complies with the recording act. Notice to the debtor plays the same part in the assignment of the *chose* in action that recording the deed does in the case of the grant of land."<sup>85</sup>

That portion of the statement of Professor Williston which I have placed in italics seems sufficiently answered by this quotation from my previous article. It is not necessary that at all stages of the transaction we attribute complete ownership to either assignor or assignee.<sup>86</sup> Surely Professor Williston would not contend that "there is no possible ground on which to support" the results of recording acts except that "the legal title" to the land is in the grantor in the case of an unrecorded deed.<sup>87</sup> Suppose, for example, that under the particular recording act a creditor of the grantor may obtain a valid attachment on the land after the deed has been given but not recorded. Is this because "the legal title" is in the grantor? Surely not. No more need we say so in the case of the assignment before notice has been given.<sup>88</sup>

<sup>85</sup> 29 HARV. L. REV. 834.

<sup>86</sup> The American law of mortgages, especially in so-called "lien-theory" states, is understandable only if we recognize that neither mortgagor nor mortgagee has complete "legal ownership."

<sup>87</sup> The effect of a recording or registration act is clearly stated by Cozens-Hardy, L. J., in *Capital & Counties Bank, Ltd. v. Rhodes*, [1903] 1 Ch. 631, 655-56. Speaking of what happens when the "registered proprietor" has made a second transfer which has been registered, the first not having been registered, he says: "The transfer by registered disposition takes effect by virtue of an *overriding power*, and *not by virtue of any estate* in the registered proprietor. . . . Notwithstanding that the land has become registered land, it may still be dealt with by deeds having the same operation and effect as they would have if the land were unregistered, subject only to the risk of the title being defeated . . . by the exercise of the *statutory powers of disposition* given to the registered proprietor, against which the mortgagee must protect himself by notice on the register." (The italics are those of the present writer.)

<sup>88</sup> In this case the grantee, while vested with many of the jural relations which go to make up that complex called "ownership," lacks some of them. If he were complete owner he would have a *right* that creditors of the grantor should not attach as well as an *immunity* from a valid attachment by them. They would be under both a correlative *duty* to refrain from attaching and a correlative *disability* to make a valid attachment. As it is, with the deed unrecorded, they have both a *privilege* and a *power*

In making the comparison which I have between notice in the case of assignments and recording in the case of deeds, I must not be understood to say that notice plays the same part in all respects that recording does. All that is meant is that in relation to the power of the assignor or grantor to defeat the assignee or grantee by a subsequent assignment or grant, notice and recording are alike in terminating this power. It may well be that as between the assignee and a creditor of the assignor who garnishees the debtor, after the assignment but before notice of the assignment has been given to the debtor, the former might be preferred.<sup>89</sup>

The justification for permitting creditors of the assignor to set off the claims referred to is to be found ultimately in principles of fairness, of public policy, etc., rather than in the supposed requirements of logic. Doubtless many decisions of the courts have, because of defective analysis of the problem, been based, at least ostensibly, upon these supposed logical requirements. It is believed, however, that in many of these cases notions of fairness and business convenience played, subconsciously, a larger part than appears upon the surface.

The second unfortunate effect which Professor Williston conceives would *necessarily* be the result of recognizing the "legal ownership" of the assignee is stated as follows:

"The effect of equities of third persons against the assignee seems also to depend upon the legal or equitable character of the assignee's rights. Though it is well settled that an assignee is subject to the equities of the obligor, it is a matter of dispute how far the assignee is subject to equities of third persons against the assignor; as, for instance, where the assignor was himself an assignee of the *chose* in action under an assignment which he had procured by fraud, or where for any reason the assignor held the assigned claim subject to a trust, actual or constructive, in favor of a third person. . . . Even though the assignee paid value with no knowledge of any outstanding claim, it is still true that the defrauded original owner or person beneficially entitled to the assignment has an equity prior in time and, therefore, superior to that of

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to attach; *i. e.*, the grantor has "*no-right*" that they shall not attach and also is under a "*liability*" to have a valid attachment made.

<sup>89</sup> The analysis here is similar to that in the preceding note relating to attaching creditors. The creditors of the grantor possess before notice *privileges* and *powers* of which notice deprives them. The authorities are collected in AMES. CASES ON TRUSTS, 2 ed., 413.



the ultimate assignee, if the latter's right is merely equitable. *If, however, the latter could be regarded as the owner of a legal right, his right would be superior to the original equity.* In fact, the latent or collateral equity against the assignor of an intangible *chose* in action has prevailed over the right of the subsequent purchaser in good faith, in the absence of an estoppel, in England and in a majority of the United States where the question has been raised."<sup>90</sup>

Here again the antithesis between "legal" and "equitable" appears. "Legal" means "not equitable" and *vice versa*. To make the objection apply to my conclusions we must amend the italicized portion so that it will read somewhat as follows. "If however the latter [the assignee] could be regarded as having a concurrently legal and equitable ownership, he would have priority over the holder of the original equity." The question at once arises, Why would he? Does the word "would" mean that that result would necessarily and inevitably follow? If so it must be because some principle of logic or some far-reaching and well-settled legal principle requires it.

Obviously logic in the abstract will not do. What legal principle is it that Professor Williston has in mind? Doubtless that relating to *bonâ fide* purchasers for value. Apparently, although he does not say so explicitly, he is assuming that there is a well-settled principle of our law that every *bonâ fide* purchaser for value of a "legal title" or "legal right" is protected from "equities." This was of course the view of the late Dean Ames, maintained with much vigor in his essay upon "Purchase for Value without Notice." It is there stated as follows:

"A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common law right acquired as an incident of his purchase."<sup>91</sup>

The facts seem to be that this wide and sweeping statement of a principle which Dean Ames regarded as "a far-reaching principle of natural justice"<sup>92</sup> is not justified by the cases. They have never established so broad a principle so far as the *actual decisions* go.<sup>93</sup>

<sup>90</sup> 30 HARV. L. REV. 102. The italics are those of the present writer.

<sup>91</sup> LECTURES ON LEGAL HISTORY, 254-55.

<sup>92</sup> *Ibid.*, 272.

<sup>93</sup> See, for example, the cases on overdue commercial paper, note 98, *infra*; also *Baker v. Snively*, 84 Kan. 179, 114 Pac. 370 (1911), which seems to be directly *contra*

To go into the matter fully would require a whole essay by itself. I can do no more than suggest what seems to me to be the true point of view, *viz.*, that the doctrine in question can be understood only in the light of its history. It has even been suggested by one writer that in many cases it produces entirely arbitrary results and that it is less equitable as applied, for example, to real estate held in trust than a rule which would divide the loss due to the rascality of a defaulting trustee between the innocent *cestui* and the equally innocent purchaser.<sup>94</sup> The truth seems to be that the doctrine as we have inherited it is the result of various more or less clear or confused ideas of expediency, justice, and supposed logic. As a principle in the living law of to-day it must be defended, if at all, upon grounds of real social policy and business convenience.

Recognizing that this is so, the real problem in connection with latent equities is this. Granted (for the sake of argument) that down to the time when *choses* in action became legally alienable the rule protecting innocent purchasers for value applied to all "legal titles" which could be transferred, does it follow that the same principle *must* be extended to cover the transfer of *choses* in action, when for the first time they become alienable at law? Logic does not require this, for confessedly the decisions do not cover the case. True, courts are likely to be misled by sweeping statements in prior opinions into thinking that the law upon the point really is settled, when as a matter of actual decision it is not. No doubt they have been so misled more than once. What ought to be done is to inquire into the real reasons back of the rule governing the rights of innocent purchasers and to try to find out whether the same reasons which justify the rule in the ordinary case — if indeed they do justify it — apply to this kind of property which can now for the first time be transferred at law. They may or may not; and the chances are we shall find that some kinds of *choses* in action ought to be brought within the rule and others excluded. Each class of *chose* in action — bond, share of corporate stock, insurance policy, etc., etc. — must be considered from the point of view of the needs of the business community in the long run. This may

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to Dean Ames's statement (on page 257 of his LECTURES ON LEGAL HISTORY) as to the effect of depositing a deed in escrow.

<sup>94</sup> Edward Jenks, "The Legal Estate," 24 L. QUART. REV. 147, 154-55.



make our law more complex, but it will certainly be correspondingly more just. What is needed is teleological rather than formalistic jurisprudence.

Let us restate the problem from this point of view. Originally, probably, the "ownership" of the assignee was exclusively equitable. Gradually it became also legal, *i. e.*, concurrent. While exclusively equitable the chancellor would naturally apply the usual rule that as between equal equities the one prior in time prevails. After the ownership of the assignee has come to be fully recognized by the law court, the chancellor (not the court of common law) is confronted by the question whether the recognition of the assignee by the common law shall lead equity to alter its views. On the one hand the argument is made that where the equities are equal the legal title will prevail; on the other hand it is argued that the assignee's ownership is equitable in origin. What has happened is that some courts have taken one view, others the other, but that there is probably much less conflict than is supposed if we consider particular classes of *choses* in action separately.<sup>96</sup>

The court of equity was confronted with a similar problem when a new kind of legal *chose* came into existence in the form of commercial paper. Obviously the rule of *bonâ fide* purchase "free from equities"<sup>96</sup> had to be applied to it if transferred before due or it would not circulate freely as commercial paper should. On the other hand, if it were overdue the policy was not so clear. Professor Williston disposes of this by saying that since the title passes it is taken free from collateral equities if transferred to an innocent purchaser for value.<sup>97</sup> In some jurisdictions however it has been

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<sup>96</sup> Professor Williston's statement on page 104 that "a *bonâ fide* purchaser of a certificate of stock is preferred to one having an equitable right against his assignor" is not borne out for England by the case he cites — *Colonial Bank v. Cady*, L. R. 15 A. C. 267 (1890) — and seems opposed to the decisions in some other cases. See *Ireland v. Hart*, [1902] 1 Ch. 522. The prevailing American rule is as he states it. Cf. *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589, 57 N. E. 455 (1900).

<sup>96</sup> The reference here is to real equitable claims. The common usage which calls the valid legal defenses of the person liable on the instrument "equities" merely because they are "cut off" if the instrument is transferred to a holder in due course is misleading and ought to be abandoned, as it leads only to confusion. The question what defenses are cut off by transfer is purely one of the "law merchant" as enforced by the courts; that of so-called "collateral equities" is a purely equitable problem for the chancellor.

<sup>97</sup> 30 HARV. L. REV. 103.

otherwise decided.<sup>98</sup> It is submitted that the decision should rest on a consideration of the real questions of policy involved.

The extension by statutes of the doctrine of innocent purchase for value to the cutting off of legal as well as equitable titles under recording acts, warehouse receipts acts, bills of lading acts, etc., shows that the real problem involved is purely one of business policy and not of logical deduction from supposed intrinsic characteristics of "legal" and "equitable" titles. The same thing is shown by the fact that under both the German and the French civil codes persons in possession of property but without other title may in many cases vest a valid title in innocent purchasers for value.<sup>99</sup>

Before leaving this part of the subject a few words must be said concerning the following statement of the learned writer:

"It has been held that a written assignment of a *chose* in action by one who seeks to avoid the assignment later on equitable grounds estops the claimant as against a *bonâ fide* purchaser who bought the *chose* in action on the faith of that writing."<sup>100</sup>

It was long ago pointed out by Dean Ames that estoppel is not an adequate explanation of the results reached in this group of cases.<sup>101</sup> It is difficult to see how a written assignment of a *chose* in action is in fact an assertion that it was obtained fairly or that it is not held in trust for the assignor or some third person. In the case of *Shropshire v. The Queen*<sup>102</sup> shares of stock were registered on the books of the company in the name of one who was in fact trustee for the corporation in question. The trust was not revealed in any way by anything on the certificates of stock. The trustee in breach of trust deposited the certificates with a third person (who had no notice of the trust) as security for a loan, and

<sup>98</sup> See 29 HARV. L. REV. 836, n. 49.

<sup>99</sup> FRENCH CIVIL CODE, § 2280; GERMAN CIVIL CODE, §§ 929-36. Lack of space will not permit me to set these forth or to comment upon them in detail. The provisions of the German code are clearly explained in SCHUSTER, PRINCIPLES OF THE GERMAN CIVIL LAW, 396-99. The slightest familiarity with provisions such as these must convince anyone that there is no *intrinsically necessary* connection between the doctrine of innocent purchase for value and so-called "equitable titles" as distinguished from "legal titles."

<sup>100</sup> 30 HARV. L. REV. 104.

<sup>101</sup> AMES, CASES ON TRUSTS, 2 ed., 310.

<sup>102</sup> L. R. 7 H. L. 496 (1875).



covenanted to execute a legal mortgage if required. After notice of the trust the creditor obtained from the trustee an instrument authorizing the transfer of the shares. In a *mandamus* proceeding it was held that the "equitable title" of the original *cestui* was superior to that of the creditor.

It is submitted that if a written certificate of stock asserting that a certain person owns a certain number of shares of stock is not a representation that the so-called "beneficial interest" is also vested in the "legal owner," then the same thing is true of a written assignment of a *chose* in action. It merely states that the claim has been or is now assigned; as to whether it is or is not held in trust there is no representation whatever. If there were, the estoppel theory would prove altogether too much, for obviously it would not be necessary for the one advancing money on the faith of the representation to obtain any transfer of the claim in order to assert the estoppel. It would come into operation as soon as the money had been advanced in reliance on the representation.<sup>103</sup>

This however does not prove that the result reached in the cases referred to by Professor Williston is erroneous. Since the legal as well as the equitable ownership passes to the assignee, we are at liberty to *extend* the protection of the rule as to innocent purchasers for value to this class of purchasers if it seems good policy so to do.<sup>104</sup> Very possibly it is good policy to do so; at least most courts seem to favor that view. After all, the real problem is, How freely do the demands of business, the needs of the business community, require that *choses* in action shall circulate? Whether we shall apply the doctrine of innocent purchase to a given class of *choses* in action ought to depend very largely upon the answer to that question.

A similar line of argument will, it is thought, dispose effectually of the third and last alleged unfortunate consequence which Pro-

<sup>103</sup> If the estoppel theory had been deemed applicable in *Shropshire v. The Queen*, the estoppel against the equitable claimant would have arisen as soon as the money was advanced in reliance upon the misrepresentation.

<sup>104</sup> On Professor Williston's theory that the assignee acquires at law only a "legal power to collect," the results he contends for can easily be justified if we also assume his doctrine as to innocent purchase for value. This "legal power to collect" having been obtained by fraud is held on a constructive trust. It and not the *chose* in action is the trust *res*. But it has always been the view that this legal power is alienable. It follows that an assignee of this trust *res* — the "legal power to collect" — acquire it free from the equities of the defrauded assignor.

fessor Williston foresees as the result of the legal recognition of the assignee. This relates to the relative rights of a prior partial assignee and a subsequent total assignee. On this point he says:

"It is, however, because of its effect on partial assignments that I am chiefly opposed to such a development of the law as shall give the assignee the legal ownership of the claim. The enormous weight of authority is to the effect that a partial assignee has but an equitable right. *While this rule persists it is impossible to deny that a subsequent total assignee if his ownership is legal will prevail over a prior partial assignment.*"<sup>105</sup>

Here again we find apparently the same assertion that by some kind of inevitable logic or intrinsic necessity the result stated will follow. If what has been said above is sound, it must be quite obvious that the *chancellor* (not the common law judge) would not be compelled, after the common law had recognized the assignee, to abandon the theory of priority which had previously been applied. It would be entirely possible to reach the result which my learned critic desires, *viz.*, to protect the prior partial assignee against the subsequent total assignee, and yet at the same time recognize the truth as to the legal character of the assignee's ownership. Time and space are wanting in which to elaborate the argument upon this question. It is believed to be unnecessary if previous points have been made clear.

A few words must, however, be said concerning the case of *King Bros. & Co. v. Central of Georgia Ry. Co.*<sup>106</sup> which held that the subsequent total assignee was entitled to prevail over the prior partial assignee. Professor Williston very properly criticises this case as laying down a rule not adapted to the needs of the business community. It is submitted that the decision of the court was not a necessary result, even under the Georgia code, and that it would not be reached if a sound analysis of the relations between law and equity were more familiar both to writers and to judges. It is a striking example of that formalistic jurisprudence which assumes that it is intrinsically necessary that "legal titles," whether acquired in accordance with common law principles or by virtue of some newly enacted statute, *must* prevail over "equities." It is submitted that the method of analysis and line of argument pursued throughout this article would, if followed by the court.

<sup>105</sup> 30 HARV. L. REV. 107.

<sup>106</sup> 135 Ga. 225, 69 S. E. 113 (1910).



have led to a rational decision based upon a consideration of the real meaning and object of the code provision in question.

In discussing partial assignments in my original article I made substantially the same statement that Professor Williston does, *viz.*, that nearly everywhere they are enforceable only in equity.<sup>107</sup> I am convinced now that this statement needs serious modification. Apparently — chiefly in code states having the “real party in interest” clause — a goodly number of jurisdictions are permitting the partial assignee to join with the assignor in an action at law to collect the claim.<sup>108</sup> This of course departs from the common law and is another example of a change of substantive law due, in part at least, to the code provision referred to. The device of the “power of attorney,” by means of which the common law succeeded in making total assignments valid, could not be applied to partial assignments, as obviously there is no basis for permitting the assignee to collect the whole claim. Since the common law was not willing to permit the claim to be split into two or more claims to be enforced separately, the assignee could not sue for his share alone. To permit the assignee to join with the assignor in a suit in the assignor’s name, indicating that the suit was in part for the benefit of the assignee, did not meet with approval for various reasons. Chief among these was a difficulty due to common law rules as to joinder of parties. If it were to be admitted that the partial assignee had a legal ownership of a portion of the claim, it would on common law principles be either a joint ownership or an

<sup>107</sup> 29 HARV. L. REV. 836.

<sup>108</sup> *Evans v. Durango Land & Coal Co.*, 80 Fed. 433 (1897) (applying Colorado code); *Guagler v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79 (1912) (applying Montana code); *School District v. Edwards*, 46 Wis. 150, 49 N. W. 968 (1879); *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332, 15 N. W. 468 (1883); 4 CYC. 101, n. 77; 5 CORP. JUR. 1000, n. 93; BLISS, CODE PLEADING, 3 ed., §§ 74–76. The same principle as to joinder of parties plaintiff has been applied to actions for damages brought by tenant for life and remainderman. *Schiffer v. Eau Claire*, 51 Wis. 385, 8 N. W. 253 (1881). Cf. *Tucker v. Campbell*, 36 Me. 346 (1853). In an occasional case in a code state, apparently without realizing fully the objections to such a rule, the partial assignee has been allowed to sue the debtor at law for his share of the claim without joining the assignor. *Caledonia Ins. Co. v. Northern Pacific Ry. Co.*, 32 Mont. 46, 79 Pac. 544 (1904); *Risley v. Phenix Bank*, 83 N. Y. 318 (1881). On the other hand, some code jurisdictions refuse to permit the partial assignee to join with the assignor in an action at law. *Pelly v. Bowyer*, 7 Bush (Ky.) 513 (1870); *Independent School Districts v. Independent School District No. 2*, 50 Iowa 322 (1879); BLISS, CODE PLEADING, 3 ed., § 76.

ownership as tenant in common with the assignor. Joint ownership had incidents, as Professor Williston rightly says, that were not adapted to the end sought.<sup>109</sup> If assignor and assignee were tenants in common, each had a separate interest. On common law principles, how could they join? If not, then, as Professor Williston says, to "hold that the partial assignee is the legal owner of a part of the claim . . . is to subject the debtor to an indefinite multiplication of claims."<sup>110</sup> Consequently the common law courts surrendered in despair and left the assignee to courts of equity.

The chancellor, however, was entirely accustomed to permitting persons having separate property interests to join in suits in equity where that seemed convenient.<sup>111</sup> He therefore had no difficulty in protecting the assignee by holding that in equity there was an equitable duty on the part of the debtor owed to the assignee to pay him his share, and another duty to the assignor to pay him the remainder, and that the two might join in a suit in equity for the enforcement of the claim.<sup>112</sup> In other words, the equitable doctrine is that assignor and assignee each own separate interests but may join in a suit against the debtor to compel payment. What has happened in states having codes of civil procedure is that the rules as to parties have been so modified as to apply to many common law actions the equitable rule as to joinder of plaintiffs having separate interests.<sup>113</sup> With "the real party in interest" clause to rely upon, it is therefore not surprising that some courts permit the assignee to join with the assignor in a suit at law. Since the assignor's claim is primarily, before assignment, enforceable at law, this seems a convenient rule although it thereby makes the partial as-

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<sup>109</sup> It must not be overlooked that on the orthodox common law theory that the partial assignee's ownership is exclusively equitable, the assignor retains an exclusively legal power to release the claim, even after notice to the debtor. Being exclusively legal, however, this power is ultimately ineffective if the assignee calls equity to his aid.

<sup>110</sup> 30 HARV. L. REV. 108.

<sup>111</sup> For example, separate owners of separate pieces of land may join in a bill to restrain acts which constitute a nuisance affecting all. *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59 (1845).

<sup>112</sup> Some of the cases are cited in 5 CORP. JUR. 1000, notes 89 and 93. Dean Ames suggested that a partial assignment is "in effect" an equitable charge. AMES, CASES ON TRUSTS, 2 ed., 148. If so, it seems that the debtor would still owe the whole sum in equity to the assignor. Apparently this is not the principle upon which the cases rest.

<sup>113</sup> See cases and references cited in n. 108, *supra*.



signee's ownership concurrently legal and equitable.<sup>114</sup> It has the great advantage of not changing the trier of fact from jury to judge just because a portion only of a claim is assigned. This is especially important where the claim assigned is for damages due to a tort. It fully protects the debtor from a multiplicity of suits. It has the additional advantage, from Professor Williston's point of view, that it makes it less difficult to persuade a court that a prior partial assignment has precedence over a subsequent total assignment. The argument now runs: Since the partial assignee under the new doctrine gets a legal ownership of a portion of the claim, the assignor has left the legal ownership of a portion only, and the subsequent "total assignee" gets only that remainder. Needless to say, the present writer does not indorse such reasoning as conclusive, for the problem ought to be settled on a less mechanical basis; but undoubtedly it would appeal to many courts.

It was originally my intention to discuss in this second article the so-called rule in *Dearle v. Hall*<sup>115</sup> and to show how the analysis here presented enables one to visualize the real problem involved. The rule referred to is the one which prefers, as between two or more total assignees, the one who first notifies the debtor. Recurring to the discussion above of the situation before notice of an assignment has been given to the debtor, it is clear that in jurisdictions where the rule in question is in force the assignor after the first assignment retains, in addition to the powers mentioned, a power to confer upon a second assignee a power to acquire a valid title to the claim by giving notice first. There is no difficulty of conceiving of the existence of this power even though many concurrently legal and equitable rights and other jural relations vested in the first assignee in spite of the lack of notice. Which one of the two innocent assignees should be preferred should depend not upon whether the first assignee acquired a concurrent or exclusively equitable incomplete ownership, but upon those broader questions of policy already referred to so frequently. An example of

<sup>114</sup> It is immaterial to the debtor how assignor and assignee divide the money. Apparently the judgment reads that each recover his share. If they cannot agree how the judgment should be entered, the code procedure provides a method for determining this. BLISS, CODE PLEADING, 3 ed., § 74; *School District v. Edwards*, 46 Wis. 150, 158, 49 N. W. 968 (1879).

<sup>115</sup> 3 Russell 1, 48 (1827). The rule in question is discussed in AMES, CASES ON TRUSTS, 2 ed., 326; also in 60 U. PA. L. REV. 668, where some of the recent cases are cited.

the type of reasoning which ought to prevail is found in cases which hold that, although under the code provisions of the jurisdiction in question the assignee acquires a "legal title" (*i. e.*, concurrently legal and equitable), the rule as laid down in *Dearle v. Hall* prevails, the decision being put on grounds of policy rather than mere logic.<sup>116</sup>

In closing this somewhat long discussion the present writer wishes to emphasize again the importance of both an exact scientific analysis of fundamental legal concepts and an equally exact scientific terminology in which to express them. It is fully realized that this goal is an ideal one, difficult to attain, and that doubtless in the present discussion many lapses have occurred. At the present time, when we are attempting not only to adapt our law to modern social and industrial conditions, but also to restate much of it in the form of codes of uniform state laws, the need for analytical jurisprudence is greater than ever before. If this work is to be done worthily, it must be carried on by men adequately trained to analyze with accuracy the fundamental concepts which lie at the basis of our legal system in a terminology which will not mislead. Thus and thus only will genuine progress be made.

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<sup>116</sup> *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627 (1899); *Widenmann v. Weniger*, 164 Cal. 667, 130 Pac. 421 (1913). See the comment on the California cases in 1 CAL. L. REV. 364.



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JURISDICTION TO ADJUDICATE THE OWNERSHIP OF A SHARE OF STOCK.  
— A recent decision of the United States Supreme Court brings into the foreground the much-tried question of jurisdiction to adjudicate the ownership of a share of stock in a corporation. *Baker v. Baker, Eccles & Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 115.

The court decided that in a suit concerning the right to certain stock in a Kentucky corporation, the Kentucky court was not bound by the Constitution of the United States to extend full faith and credit to a finding of fact made by a Tennessee court in a prior adjudication of the ownership of the stock, where the Tennessee court had the certificates of stock before it, but no jurisdiction over the corporation.<sup>1</sup> Indirectly this is a holding that the decree of the Tennessee court was made without jurisdiction.<sup>2</sup>

Any answer to the question presented to the court in this case depends primarily upon the view adopted as to the nature of a share of corporation stock. One might conceivably regard it as a property interest in the assets of the corporation. Courts have sometimes talked this way,<sup>3</sup>

<sup>1</sup> For a full statement of the facts of the case, see RECENT CASES, p. 516.

<sup>2</sup> There was no question of lack of proper service or notice, so that the decision must go on grounds of lack of jurisdiction in the sovereign, and hence lack of jurisdiction in the courts of that sovereign.

<sup>3</sup> See *Jellenik v. Huron Copper Co.*, 177 U. S. 1, 13; *Matter of Bronson*, 150 N. Y. 1, 8, 44 N. E. 707, 709. See 25 HARV. L. REV. 719.

but the theory is so clearly erroneous, involving as it does an utter disregard of the corporate entity, that it has had no real currency in our law and need not be considered.

Another more tenable suggestion is that the share is a property interest in the legal unit, in the corporate entity itself. The French notion of collective property is perhaps responsible for this idea.<sup>4</sup> Under this theory, the *property* devoted to an enterprise is emphasized. It is looked upon as a unit, dedicated to this particular business by the contributors and collectively owned by them. The corporate entity when raised is regarded as a legal unit created to own and manage more efficiently the collective unit of property, — in essence, a legal unit predicated upon the collective property. Where this view is held, the above analysis of the nature of a share of stock is very applicable. But where, as with us, the legal entity is regarded as predicated upon the group of persons or person, there is more difficulty with the idea.

If a share of stock is so regarded, however, the question of jurisdiction to adjudicate its ownership becomes comparatively simple. No sovereign can have jurisdiction of the property but the sovereign of the territory where the property is.<sup>5</sup> The legal entity, the corporation, can have no existence except at the place where it was created.<sup>6</sup> So that this sovereign only should have jurisdiction to adjudicate its ownership.<sup>7</sup>

Perhaps the most logical explanation of the nature of a share of corporate stock in our law, and the one most commonly accepted, is that the share of stock is a *chose* in action of a complicated character — an obligor-obligee relation between the corporate entity and the shareholder. Taking this view the question of jurisdiction assumes a more difficult aspect.

Let us look at a simple *chose* in action — a contract by R. to pay money to E., unevicenced by any instrument. A clear and constant recognition of the nature of a *chose* in action is essential to reach any true result. In our simple case above, E., the obligee, has a legal right against R., the obligor, to have R. pay him money, and R. on his side has a legal duty to pay the money to E. This is the totality of the legal situation. When a court assumes to adjudicate that E. no longer has this right against R., but that R. is now so obligated to X., or, to speak loosely, to adjudicate the "ownership" of the debt, what is it doing? It is adjudicating two things, — that there is a legal obligation upon R., and that E. has been divested of a legal right. Now in a situation where R. is domiciled in state A. and physically there, and E. is domiciled in state B. and physically there, what state has jurisdiction to adjudicate as suggested above?

<sup>4</sup> PLANIOL, DROIT CIVIL, §§ 3005 *et seq.*

<sup>5</sup> See *Arndt v. Griggs*, 134 U. S. 316, 323; 3 BEALE, CASES ON CONFLICT OF LAWS, SUMMARY, § 37.

<sup>6</sup> See *Shepard & Morse Lumber Co. v. Burleigh*, 27 App. Div. 99, 101, 50 N. Y. Supp. 135, 136; 2 MORAWETZ, PRIVATE CORPORATIONS, § 959. The intangible nature of this property offers no objection to its having a *situs*. There are many examples where intangible property may properly be said to be situated at a certain place, *e. g.*, good will of a business. If there has been an incorporation by other states, then the question becomes more difficult.

<sup>7</sup> The purchase of shares of stock, in a corporation of a certain state, would be sufficient consent by a non-resident owner to subject his interest to the jurisdiction of that state.



According to all established principles of international law no sovereign has jurisdiction to adjudicate that there is a legal duty upon a person, unless it has some control, some "hold," over the person,<sup>8</sup> or the person has consented to the jurisdiction of the state; correspondingly, on the other side of the obligation, no state has jurisdiction to adjudicate the divestment of a legal right unless it has some "hold" or there has been consent.<sup>9</sup>

In our supposititious case, then, only state A. could validly adjudicate that a legal duty rested upon R. and only state B. that E. was divested of his right. Neither state has jurisdiction to make an adjudication that E. no longer has a right against R., but that X. has acquired one.<sup>10</sup>

It follows that any inquiries as to what court has "jurisdiction of the debt" and as to the "*situs* of the debt" are entirely inappropriate in seeking to determine the existence of jurisdiction to adjudicate the "ownership" of the debt. Their currency in the books in discussions of this matter is the result of an attempt to treat a *chose* in action as a locally existent *res*, for the purpose of conflicts. The use of such language when the case clearly depends upon jurisdiction of the person, tends to confuse and should be avoided.<sup>11</sup>

On the hypothesis that a share of stock in a corporation is a *chose* in action, the principles applicable to the simple example above should equally apply to the share unless it has some peculiar attributes which would lead to a different result. A corporate share is a very complicated *chose* in action. It is not a right to a definite sum of money, but rather to a proportionate share of the assets of the company, whatever they may be, upon dissolution. There are in addition certain incidental rights and duties appended to the relation.<sup>12</sup> Again, the stock is represented by a certificate, often negotiable, a mercantile specialty, which is generally in current use in commercial transactions.

First, as to the fact that the *chose* in action is not for a definite amount,

<sup>8</sup> *Buchanan v. Rucker*, 9 East 192; *Pennoyer v. Neff*, 95 U. S. 714. This "hold" may arise from physical presence, residence, domicile, or nationality.

In garnishment cases the necessity for jurisdiction of the debtor's debtor in order to make a valid judgment *quasi-in-rem* has been recognized. *Chicago, etc. Ry. v. Sturm*, 174 U. S. 710; *McKinney v. Mills*, 80 Minn. 478, 83 N. W. 452; *Strauss v. Chicago Glycerine Co.*, 108 N. Y. 654, 15 N. E. 444; *Harris v. Balk*, 198 U. S. 215. *Contra*, *High v. Padrosa*, 119 Ga. 648, 46 S. E. 859.

<sup>9</sup> *Mahr v. Norwich U. F. I. Society*, 127 N. Y. 452, 28 N. E. 391. See, however, *Harris v. Balk*, 198 U. S. 215, where the Supreme Court of the United States recognized no such requirement for jurisdiction in a garnishment suit. This case seems incapable of support.

<sup>10</sup> It might be argued that, if the obligor lived in state A. at the time the contract was made and the obligee knew of this, he consented that his right should be dealt with by state A. But it seems clear that there is no actual consent in such a case.

If the question is one merely of adjudicating that a duty rests upon a person and no question of divesting a right, jurisdiction of the obligor is sufficient. See *infra*, note 22.

For a discussion of this entire matter, see Beale, "Jurisdiction in Rem to Compel Payment of a Debt," 27 HARV. L. REV. 107.

<sup>11</sup> The tendency to identify the question of jurisdiction to tax a *chose* in action and jurisdiction to adjudicate its ownership has added to the confusion. See *infra*, note 23.

<sup>12</sup> *E. g.*, the right to dividends, the right to have the assets of the corporation properly conserved. For a full description of the incidents of a share of stock, see 1 MORAWETZ, CORPORATIONS, §§ 235 *et seq.*

and as to the added rights and duties. None of these change the essential obligor-obligee nature of the relation, and as it is upon this that the principles governing the simple contract rest, these added features do not affect the applicability of the principles to the share of stock.

Next as to the certificate. This is merely evidence of the right.<sup>13</sup> In no sense is the obligation merged in the paper and thus to be treated as a chattel — the underlying obligor-obligee relation is not affected and so the principles evolved above apply. Hence the sovereign within whose territory the certificate lies has jurisdiction of the paper and can transfer the ownership of it.<sup>14</sup> This in many cases amounts in the ultimate to a transfer of the stock, for by the law of most states a rightful holder of a negotiable certificate properly indorsed has a power of attorney to effect a novation in accord with the company's initial agreement.<sup>15</sup> The judicial transfer will of course be recognized as rightful,<sup>16</sup> so that by the law of the proper sovereign, the transfer of the certificate will give the holder a good power of attorney which will be recognized by the sovereign having jurisdiction of the corporation. The corporation can thus be forced to make a transfer of the stock on its books, which will complete a novation. Thus an attachment or judicial sale of such a certificate will in the ultimate work a perfectly good attachment or sale of the stock. Nothing more than jurisdiction of the paper is necessary.<sup>17</sup>

The cases holding the attachment or judicial sale of a certificate of stock in a foreign corporation valid, can often be explained in this way.<sup>18</sup> The frequency of this power, through jurisdiction of the paper, validly to obtain the identical result which could have been obtained through jurisdiction to adjudicate the ownership of the stock has led to some confusion and misunderstanding of these cases. They have been cited as authority for the proposition that presence of the certificate gives jurisdiction of the stock, whereas they stand for nothing more than the

<sup>13</sup> The transfer of the certificate does not generally effect a complete novation as in the case of a negotiable promissory note or bill of exchange. In the usual case the share of stock may be said to include an agreement of the corporation with the primary purchaser, to effect a novation upon proper application and a surrender of the certificate. The transfer of the certificate properly indorsed gives a power of attorney to the transferee to apply for the novation, which is completed by a transfer upon the books of the corporation. Where words of negotiability are present in the power of attorney it is generally given the attributes of a negotiable instrument.

<sup>14</sup> If the owner of the stock is not within the jurisdiction, his consent to subject his interest to the jurisdiction of this sovereign must of course be found.

<sup>15</sup> See *ante*, note 13. In this analysis we are assuming a share of stock of the usual kind. Were the stock fully transferable by a transfer of the certificate as is sometimes the case, then the machinery would be the same as in the case of a bill or note. See *infra*, note 17.

<sup>16</sup> See *Alcock v. Smith*, [1892] 1 Ch. 238.

<sup>17</sup> Cf. *William v. Colonial Bank*, 38 Ch. Div. 388, 399.

The same situation exists in the case of promissory notes and bills of exchange. See *Alcock v. Smith*, [1892] 1 Ch. 238. The machinery by which the result is reached is a bit different, however. The rightful holder of a bill or note properly indorsed has become the obligee; a novation has been completely effected. Where the certificates are not negotiable, or not properly indorsed, the attachment or judicial transfer of the paper would probably have no resultant effect on the *chose* in action. This would, of course, depend upon the law of the proper sovereign.

<sup>18</sup> See *Merritt v. American Barge Co.*, 79 Fed. 228; *Blake v. Foreman Bros. Banking Co.*, 218 Fed. 264.



eminently true proposition that the presence of the paper gives jurisdiction over it.<sup>19</sup>

There is nothing, then, in the mechanical features of a share of stock which so differentiates it from an ordinary *chose* in action that different principles should apply. There remains to be considered mercantile policy. A certificate of stock is a mercantile specialty, in use continually in commercial transactions. Should, then, mercantile policy lead the courts to depart from the rules which should logically govern such a mechanism, and hold that where the certificate is, there is jurisdiction of the stock? Such a result would perhaps be favorable to commercial certainty, but in any event a change in the rules of jurisdiction is scarcely the proper means to the end. A rule of conflicts inconsistent with the nature of the rights involved can lead only to confusion.<sup>20</sup>

Upon the assumption then that stock in a corporation is a *chose* in action, on strict logical principles, jurisdiction of the corporation is necessary to adjudicate the ownership of the stock,<sup>21</sup> and if the divestment of a shareholder's right is being adjudicated jurisdiction of the shareholder is also necessary.<sup>22</sup>

The cases generally hold indiscriminately that only the sovereign where the corporation is created has jurisdiction to adjudicate the ownership of the stock.<sup>23</sup> This result can only be justified upon one of two

<sup>19</sup> See *Beal v. Carpenter*, 235 Fed. 273. For a discussion of this case, see *infra*, note 20.

<sup>20</sup> The theory adopted as to the nature of a share of stock would of course be immaterial if the mercantile view were taken. Where the certificate is, there would be jurisdiction of the stock, regardless of the nature of the stock.

In a recent decision, a federal court has seemingly taken this mercantile view. *Beal v. Carpenter*, 235 Fed. 273. The court there held that the purchaser at a judicial sale of certificates in a joint stock company whose assets were situated in a foreign jurisdiction, could force the company to transfer the stock to him upon the books of the company. The court placed its decision squarely upon the grounds that jurisdiction of the certificates gave jurisdiction of the interest which they represented. As it does not appear that the certificates were indorsed so as to give a power of attorney upon transfer, the case seems to go clearly on the grounds of commercial policy. Stock in a joint stock company is really a proportionate property interest in the assets of the company, and upon ordinary principles, only the sovereign where the property is should have jurisdiction to make a judicial sale of it. The case cites the federal cases noted *ante*, note 18, as authority; but these, as has been seen, may be explained upon a different principle. In addition, the decision rests itself upon the authority of the cases which allow the sovereign in whose territory a certificate of corporate stock is situated to tax the stock. The confusion of jurisdiction for taxation purposes with jurisdiction for purposes of adjudication has done much harm. Jurisdiction for the latter purpose does not follow from the existence of jurisdiction for the former. The validity of any taxation rests upon a *quid pro quo* principle. If the state furnishes protection to any property having value, it may tax it. The stock certificate is in constant use as a means of transferring the stock. A sale of the certificate means a sale of the stock. The certificate is the currency for the stock. It has commercial value up to the value of the stock. The state where it is gives it the protection of its laws, and there would seem to be no reason why it should not lay a tax upon it in return.

<sup>21</sup> This jurisdiction may be obtained by consent, so that any state in which a corporation was doing business under a statute which provided for a method of suit would have jurisdiction to adjudicate such a duty upon it.

<sup>22</sup> In the principal case the shareholder is dead, so that there is no question of adjudicating a divestment of his right.

<sup>23</sup> *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1; *Sohege v. Singer Mfg. Co.*, 73 N. J. Eq. 567, 68 Atl. 64; *Barber v. Morgan*, 84 Conn. 618, 80 Atl. 791.

The cases holding the taxation of stock at the place where the certificate is, and at

grounds, that the stock is viewed as a share in the corporation — the legal entity; or, taking the *chose* in action theory, as a rule of convenience to overcome the difficulty of getting the corporation and the shareholder together.<sup>24</sup> It is difficult to discover upon what reasoning the courts proceed. Too often they say that the *situs* of the stock is here or there, and go no further into the question.<sup>25</sup>

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THE USE OF THE POWER OVER INTERSTATE COMMERCE FOR POLICE PURPOSES. — Does the power to regulate commerce between the several states include the power to use such regulations to promote the general welfare, or is the use restricted to securing merely the prosperity of that commerce? Only within recent years has this question been authoritatively answered. The first case<sup>1</sup> in which there was presented a regulation of interstate commerce to achieve what may be briefly designated a police purpose was the Lottery Case<sup>2</sup> in 1902. There a federal statute prohibiting the interstate shipment of lottery tickets by common carrier was sustained. Then the Pure Food and Drug Act,<sup>3</sup> the White Slave Act,<sup>4</sup> and the Lacey Act,<sup>5</sup> barring from interstate commerce game taken or killed contrary to the law of a state, were in turn upheld. Also a statute excluding from interstate and foreign commerce "movie" films of prize fights was approved in cases arising under foreign commerce.<sup>6</sup> On January 8, 1917, the Supreme Court sustained the Webb-Kenyon Law forbidding the shipment of liquor into a state in violation of any

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the domicil of the owner valid, are often cited as authorities on this matter, but wrongly, as they depend on entirely different principles. The power to tax at the *locus* of the certificate we have spoken of *ante*, note 20. The cases apparently upholding a tax of the stock at the domicil of the owner can be explained on the grounds that the tax is a personal tax, scaled to the individual power to pay. The stock is taken into consideration as one of the assets in determining the power to pay. Such a tax is perfectly valid.

<sup>24</sup> There is something to be said for the latter as a rule of expediency, though it is contrary to the recognized principles of international law to adjudicate the right of a person without jurisdiction of the person. Cf. the garnishment case, *Harris v. Balk*, 198 U. S. 215.

Clearly if jurisdiction of the shareholder is not to be required it is better to be thoroughly illogical and limit the jurisdiction to the domicil of the corporation rather than to extend it to all states where the corporation has consented to be sued.

<sup>25</sup> The principal case clearly seems to adopt the *chose* in action theory. It is to be regretted that the facts called for no decision as to the necessity of jurisdiction of the shareholder also.

<sup>1</sup> It is true that early in the nineteenth century embargoes were used for retaliation, but these applied only to foreign commerce, and are omitted from consideration in order to avoid raising the question of the relative scope of the power over foreign and interstate commerce.

<sup>2</sup> *Champion v. Ames*, 188 U. S. 321. See Paul Fuller, "Is there a Federal Police Power?," 4 COL. L. REV. 563. *United States v. Popper*, 98 Fed. 423, a district court decision in 1899, had upheld the exclusion from interstate commerce of medical devices intended for an immoral use.

<sup>3</sup> *Hipolite Egg Co. v. United States*, 220 U. S. 45.

<sup>4</sup> *Hoke v. United States*, 227 U. S. 308.

<sup>5</sup> *Rupert v. United States*, 181 Fed. 87. See *Silz v. Hesterberg*, 211 U. S. 31, 44.

<sup>6</sup> *Weber v. Freed*, 239 U. S. 325.



law of that state.<sup>7</sup> And on January 15, 1917, the White Slave Act was construed to forbid the interstate transportation of a woman for an immoral purpose,<sup>8</sup> even though no commercial intent be involved. So construed, the act was considered constitutional, although in result it amounts to a federal regulation of private morals. Within recent years there have been a number of other acts<sup>9</sup> dealing with various subjects, which have not yet been passed upon by the courts; one of the most seriously discussed of these was the Child Labor Law<sup>10</sup> passed on September 1, 1916. It forbids the shipment in interstate or foreign commerce of any article produced in a mine or factory employing child labor. Until recently the typical regulation under the commerce clause has been designed to protect, encourage, or expedite in some manner the conduct of commerce itself. Witness the regulation of rates and the Safety Appliance Act. The common feature of the measures described above, however, is that the power of regulation, often assuming the form of a flat prohibition, is being used to effect an end which is not only ulterior to commerce itself, but one the control of which would normally rest with the police power of the state.

The causes of this recent development of the latent commerce power are rather for the historian and the economist to elucidate than for the lawyer. The whole *post bellum* trend toward governmental centralization is involved; a complete analysis of this would require a critical examination of nearly the whole of American life and activity during the period. Economically the development of the railroad, the telegraph, and the telephone have reduced state lines to a geographical fiction. And as a result of the concentration of capital business has become more and more interstate and even nation wide.<sup>11</sup>

The results which this extended use of the commerce power are calculated to produce are to the lawyer of more immediate importance. These show at least two distinct tendencies. If the prohibition is absolute, and concerns a business that cannot survive without the use of interstate commerce, Congress by enacting the prohibition undertakes to impose an affirmative policy upon the whole country. If, however, the business can be conducted purely intrastate, or if the prohibition is quali-

<sup>7</sup> *James Clark Distilling Co. v. Western, etc. Ry. Co.*, Oct. Term, 1916, Nos. 75, 76.

<sup>8</sup> *Caminetti v. United States*, Oct. Term, 1916, Nos. 139, 163, 464.

<sup>9</sup> Obscene literature and articles designed for immoral use, 29 U. S. STAT. AT L. 512, c. 172. Meat Inspection Act, 34 STAT. AT L. 674; Nursery Stock Act, 37 STAT. AT L. 315; Prohibition of shipment of certain virus, serum, and toxin for the treatment of animals, 37 STAT. AT L. 832.

<sup>10</sup> Act of September 1, 1916, c. 432, § 1. "No producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock P. M. or before the hour of six o'clock A. M."

<sup>11</sup> See JUDSON, *INTERSTATE COMMERCE*, 3 ed., 135.

fied, as in the Webb-Kenyon Act, Congress appears merely as an impartial referee aiding each state to work out its own social progress unhampered by the competition of more backward states. Thus the exclusion from interstate commerce of cotton goods manufactured by the aid of child labor would prevent such employment of children on any considerable scale; for, since there are only a few localities in the country in which that business can economically be conducted, the use of interstate commerce is essential to it in order that it may market its goods. Where, however, a given business can be carried on in any kind of a locality and with only a limited area for a market, exclusion from interstate commerce will not cause even a substantial suppression of that business. Thus the complete prohibition of interstate shipments of liquor would leave the liquor business largely untouched, for distilleries and breweries can suffice with local trade and thrive in almost any part of the country. But were Congress not to possess and exercise the power of excluding liquor from interstate commerce, the original package doctrine would render a dry state powerless to prevent the importation of liquor from a wet state and even its direct sale. This produces a situation in which the commercial interest of other states, however slight, would always prevail over the dry state's interest in its own welfare, however urgent, and Congress would be powerless to ameliorate the evil.<sup>12</sup> In other words, so long as one state continued to allow the manufacture of liquor, it could ship that liquor into every other state, to be sold in the original package, but by closing the channels of interstate commerce to liquor, each state is enabled to work out its own social salvation according to its own lights.<sup>13</sup> The Webb-Kenyon Act illustrates particularly well the prevention of this sort of outside interference with the police regulations of a state, in that it does not prohibit all interstate shipments of the article, but only those into a state in violation of any law of that state.<sup>14</sup> The two sorts of results, while distinct in nature, are not to be thought of as mutually exclusive; on the contrary, in regulations of such objects as child-labor products the two effects may be present side by side in nearly equal degree.

The authorities would seem to do away with the need of arguing the technical question of the constitutionality of so employing the commerce power for police purposes.<sup>15</sup> The legal justice and propriety of such a use, however, have often been seriously doubted.<sup>16</sup> But that Congress may properly deny the use of the mails to a person seeking to use them for an

<sup>12</sup> See W. T. Denison, "States' Rights and the Webb-Kenyon Law," 14 COL. L. REV. 321, 324.

<sup>13</sup> The commercial interest of local manufacturers and sellers is also protected. Thus, if state A. forbids the manufacture and sale of certain impure food articles, persons within its borders cannot make nor sell such goods. Yet by means of interstate commerce the market of state A. is open to sellers from state B. This of course gives the outside dealer an entirely unfair advantage. A federal prohibition puts the local and the outside sellers on terms of equality.

<sup>14</sup> For a discussion of the constitutional basis of the Webb-Kenyon Act, see 17 COL. L. REV. 144.

<sup>15</sup> See T. I. Parkinson, "The Federal Child Labor Law," 31 POL. SCI. QUART. 531.

<sup>16</sup> See 38 AM. L. REV. 194. William R. Howland, "The Police Power and Interstate Commerce," 4 HARV. L. REV. 221. William Draper Lewis, "The Commodity Clause of the Hepburn Act," 21 HARV. L. REV. 595.



immoral, fraudulent, or otherwise improper purpose,<sup>17</sup> is now uncontested. The reasoning is that the post office, as an agency created by Congress, and under its sole control, may with entire propriety be closed to anyone seeking to use it for an improper purpose; otherwise Congress, through furnishing this agency, would be rendering affirmative aid in the perpetration of the scheme. Now it is quite true that the agencies of interstate commerce, unlike the post office, are not the direct creatures of Congress.<sup>18</sup> But over interstate commerce Congress has exclusive jurisdiction. Except in matters of local interest not requiring uniformity, the states may not act even in the absence of any legislation by Congress.<sup>19</sup> Thus a state has no power of itself to exclude liquor from interstate commerce within its borders.<sup>20</sup> Must Congress, then, possessing sole control over interstate commerce, allow that commerce to be used for the furthering of all sorts of injurious schemes? There is a certain rough analogy to the reasoning pursued by equity in refusing its aid to a plaintiff coming into court with unclean hands. The underlying principle is that an instrumentality created or controlled by the state ought not to be allowed to be used by any person to attain for his own benefit an end injurious to the community.<sup>21</sup> Not only is it constitutional, then, to look beyond the intrinsic qualities of the commodity offered for shipment, but to do otherwise would be to lose sight of the fact that commerce is but a means whereby various human ends are achieved. Any regulation that is completely intelligent should scrutinize not only the immediate subjects and agencies of commerce, but also the changes which are being wrought in the community through the use of this commerce. If this be kept in mind such regulations will not appear as perverted uses of the commerce power.

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**THE TERMINATION BY A SURETY OF HIS LIABILITY ON A FIDELITY BOND.** — In the law of suretyship or guaranty the question frequently arises as to the effect to be given to a notice by the surety that he will no longer remain liable. The problem is squarely presented in cases where the surety or guarantor is bound for the faithful performance by an

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<sup>17</sup> *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110.

<sup>18</sup> As to whether the right to engage in interstate commerce is conferred by the state or the federal government, see E. P. Prentice, "The Origin of the Right to Engage in Interstate Commerce," 17 HARV. L. REV. 20.

<sup>19</sup> *Cooley v. Board of Wardens, etc.*, 12 How. (U. S.) 299.

<sup>20</sup> *Leisy v. Hardin*, 135 U. S. 100.

<sup>21</sup> It has been attempted to draw a distinction between the child labor product on the one hand and the lottery ticket, pure foods, and "movie" films on the other. In the latter, it is argued, the injury is not done until the goods reach the consumer, therefore interstate commerce participated in causing the injury. But in the former, since the injury is done to the producer, transportation causes no further injury, and therefore a prohibition is improper. See 2 WILLOUGHBY, CONSTITUTIONAL LAW, 739. Henry Hull, "The Federal Child Labor Law," 31 POL. SCI. QUART. 519, 524. The fallacy of this view, however, is its failure to recognize that unless the child-labor product were able to reach its market through interstate commerce, its production could not be continuous. The power to regulate should not turn on the temporal accident of transportation succeeding the injury instead of preceding it.

employee or agent of his contract to his employer or principal. If one wishes to generalize at the expense of discrimination, one may state the general law to be that notice of withdrawal given by the surety to the employer ends the surety's liability, if, and only if, there has been dishonesty on the part of the employee.<sup>1</sup> A recent Vermont case decides, that, even if there has been no dishonesty or even no misconduct on the part of the employee, yet notice will end the surety's liability after a reasonable time. *Ricketson v. Nizotte*, 98 Atl. 801.<sup>2</sup> The reasons given in this and other cases lack uniformity, and therefore frequently soundness. For example, courts sometimes say that notice will end the liability of a guarantor but not that of a surety. This distinction is often merely arbitrary and at the most represents an idea which can be more clearly expressed in other words.<sup>3</sup> In view of this unsettled state of the law the problem invites analysis.

If the surety<sup>4</sup> has made merely a continuing offer to the employer to be accepted by the continuance of the employment, the surety could, of course, at any time withdraw his offer as to future employment. But, if there is independent consideration given to the surety or if his promise is under seal, the surety may not escape liability on this ground.<sup>5</sup> If, however, there is a contract, the application of another elementary principle, that of reasonable construction, will also help to decide many cases. It often happens that no definite time is expressed for the duration of the suretyship contract. If there is a definite term for the employment, this may fix the term of the suretyship.<sup>6</sup> Or it may be fixed by the amount of consideration given the surety. On the other hand, there may be no such circumstances. In that case it seems hardly probable that the surety intended to bind himself for the life of the employee. It may be very reasonable to construe the contract as intended to last until the surety revokes it,<sup>7</sup> or to be ended by the most serious of defaults by the employee, to wit, his dishonesty.<sup>8</sup>

However, where it is established that there is a contract and that it extends for a definite time, if the surety has the right to end his liability,

<sup>1</sup> Notice given by the surety after the dishonesty of the employee was held to give a defense in the following cases: *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Emery v. Baltz*, 94 N. Y. 408; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180. See *Conn. Mutual Life Ins. Co. v. Scott*, 81 Ky. 540, 544; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 343, 1 N. E. 805, 811. Where there had been no dishonesty, death of the surety or express revocation by him, notice was held in the following cases not to end his liability: *Lloyd's v. Harper*, 16 Ch. D. 290; *Shackamaxon Bank v. Yard*, 150 Pa. 351, 24 Atl. 635. See *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, 371, 10 So. 539, 541. Cf. *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390. See *contra*, *La Rose v. Logansport Nat. Bank*, 102 Ind. 332.

<sup>2</sup> For a fuller statement of the facts, see RECENT CASES, p. 526.

<sup>3</sup> Thus in *Saint v. Wheeler & Wilson Mfg. Co.*, *supra*, "guaranty" as used means an offer to a contract which can be revoked, while "surety contract" means a completed contract which cannot be revoked.

<sup>4</sup> In this discussion "surety" will be used in place of "guarantor" or "surety" or "prospective surety."

<sup>5</sup> This distinction was expressly recognized in *Saint v. Wheeler & Wilson Mfg. Co.*, *supra*.

<sup>6</sup> See *Lloyd's v. Harper*, 16 Ch. D. 290.

<sup>7</sup> *Phillips v. Foxall*, *supra*, seems to have been decided on this ground.

<sup>8</sup> This construction was rejected in *Shackamaxon Bank v. Yard*, *supra*.



he must get it on some equitable<sup>9</sup> ground. "Equity abhors a forfeiture."<sup>10</sup> Equity's most direct way of enforcing this principle is by frankly varying the terms on which parties have contracted. Thus it declares a penalty good only for actual damages, and it gives the mortgagor an equity of redemption. In the suretyship contract the liability which the surety may incur is always greatly in excess of any consideration which the surety may receive. Yet, in view of the business sanction for this form of insurance, such a contract, in itself, certainly does not fall within the rule against forfeitures. Furthermore, in case the employer were bound by contract with the employee, it would be unjust to deprive him of his suretyship. Where, however, there has been dishonesty by the employee, there is so much chance of such a large liability falling on the surety that denying him relief against the strict terms of the contract may indeed be the enforcement of a "forfeiture." There is the additional consideration that to require the employer to discharge the dishonest employee is only to require him to exercise a right which he has and which it is natural to exercise. Consequently, there would seem little reason why equity should not read into the suretyship contract the condition that, on the dishonesty of the employee, the surety should be able to terminate the contract. It might well be that the surety, as a condition to his right, should be required to pay the employer the value of a suretyship contract for an ordinary employee during the remainder of the term.

This is the most honest method by which equity could relieve the surety. It is, however, perhaps less likely to find favor with courts than the extension of two better recognized equitable principles. One such principle is found in the rule that after a repudiation by one party to a contract the other may recover only the damages which he could not reasonably have avoided.<sup>11</sup> In the suretyship case, where the employee has been dishonest and the surety has given notice that he will not go on, it may be urged that the employer can recover no damages which he could have avoided by discharging the employee. But, in order not to deprive himself of a secured employee, which he is certainly under no duty to do, he must get a new employee and a surety for him. The rule of damages probably does not require a party to take this much trouble to reduce damages.<sup>12</sup> Consequently, if this rule is to solve the suretyship problem it must be by an extension of it beyond its normal scope.

Another equitable principle, applicable only to suretyship law, is that a surety is released when there has been certain inequitable conduct on the part of the principal. It may be contended that in the case under consideration it is inequitable for the employer to refuse to discharge the dishonest employee, and therefore the surety should be released.<sup>13</sup> In the first place this may be objectionable because it would allow the

<sup>9</sup> In this discussion "equitable" will be used to include those principles equitable in their origin or nature as well as those administered in a court of equity.

<sup>10</sup> For a discussion of this well-known principle, see 1 POMEROY, EQUITY JUR., §§ 434, 450.

<sup>11</sup> For a discussion of this well-known principle, see 1 SEDGWICK, DAMAGES, 9 ed., § 205.

<sup>12</sup> The limits of the rule are set forth in general in 1 SEDGWICK, DAMAGES, 9 ed., § 221, 221 a.

<sup>13</sup> A release was given on this ground in *Emery v. Baltz*, *supra*. See *Rapp v. Phoenix Ins. Co.*, *supra*.

employer no damages for the value of the rest of the suretyship contract. But a much more cogent objection is that the rule of inequitable conduct has never been held to require any affirmative action by the principal.

These doctrines of limiting damages and of a defence from inequitable conduct are only examples of equitable relief against the express terms of a contract. Since, as we have seen, release of the surety falls within the established limits of neither doctrine, is it not better, if the surety is to be released, to let it be by frankly recognizing a new application of the broader principle of equitable variation of the contract?

**NEUTRAL SHIPS AND CONTRABAND CARGOES: HAS A CHANGE IN INTERNATIONAL LAW BEEN EFFECTED?** — The law of nations has been changed, in respect to condemnation by a belligerent of neutral vessels engaged in carrying contraband, according to two recent decisions of the Admiralty Division of the High Court of Justice, sitting in Prize.<sup>1</sup> Since the Napoleonic wars at least<sup>2</sup> Great Britain has consistently held the mere carriage of contraband, uncoupled with evidence of knowledge by the shipowner of the character of the cargo, to be insufficient to subject the carrying ship to confiscation.<sup>3</sup> This view was taken also by the United States<sup>4</sup>

<sup>1</sup> *The Hakan* and *The Maricaibo*, [1916] P. 266.

<sup>2</sup> This rule was definitely adopted by the decisions of Lord Stowell, then Sir William Scott, in 1798 and 1799. *The Sarah Christina*, 1 C. Rob. 237, 242; *The Mercurius*, 1 C. Rob. 288. See also *The Staadt Embden*, 1 C. Rob. 26, 30; *The Ringende Jacob*, 1 C. Rob. 89, 90; *The Neutralitet*, 3 C. Rob. 295. In *The Ringende Jacob* it was said: "I do not know that under the present practice of the law of nations a contraband cargo can affect the ship. . . . By the ancient law of Europe such a consequence would have ensued; nor can it be said that such a penalty was unjust, or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, and I believe of other nations also, a milder rule has been adopted, and the carrying of contraband articles is attended only with the loss of freight and expences; except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo, has been connected with other malignant and aggravating circumstances."

Bynkershoek and older writers had supported the more stringent rule, which, it will be observed, Lord Stowell held still defensible.

<sup>3</sup> See 5 CALVO, *LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE*, 5 ed., §§ 2776, 2777; HALL, *INTERNATIONAL LAW*, 6 ed., 666; MOSELEY, *WHAT IS CONTRABAND AND WHAT IS NOT*, 55; TUDOR, *CAS. MERCANTILE AND MARITIME LAW*, 3 ed., 986, 991-92; 2 WESTLAKE, *INTERNATIONAL LAW*, 2 ed., 291.

<sup>4</sup> 7 MOORE, *DIGEST OF INTERNATIONAL LAW*, § 1263. Cf. *The Commercen*, 1 Wheat. (U. S.) 382. See Chase, C. J., in *The Bermuda*, 3 Wall. (U. S.) 514, 555 *et seq.*: This "indulgent rule" is "a great but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband, as well as the cargo. But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof. The rule requires good faith. . . ."

In *The Hakan* the court attaches an importance perhaps undue to its interpretation (which is not very exact) of the United States Naval War Code of 1900, and to the later views of Rear-Admiral Stockton. Cf. WILSON, *DRAFT NO. 1 FOR PROVISIONAL INSTRUCTIONS FOR THE NAVY, DEFINING . . . CONTRABAND OF WAR*, NAVAL WAR COLLEGE, 1913. It should be observed that neither Rear-Admiral Stockton, nor any



and by a majority of the continental countries.<sup>5</sup> It is this rule which a British court has now deliberately abandoned in favor of a more strict one, to wit, that the neutral ship is to be confiscated whenever more than half its cargo, by value, weight, volume, or freight value, is contraband. This new rule had previously been promulgated by an Order in Council, upon which, however, under the rule of *The Zamora*,<sup>6</sup> the court rightly declined to rely. The decision is based, instead, upon an alleged adoption of the new rule by most of the other maritime nations, consequent, the court seems to think, to Article 40 of the ill-fated Declaration of London.

The practical results of the decisions are relatively unimportant, for it is rare indeed that a modern shipowner will be unaware that more than half his cargo is contraband, difficult though it might be to prove his knowledge. The new rule is substantially as just to the shipowner as was the former English rule. And although this may afford a belligerent, under given circumstances, a rather facile method of building up a mercantile marine, or, as in England's case, of retaining an already-won supremacy in that field, the old rule also had possibilities of this.

The principle upon which the court rests the decisions may, however, be perilous in the extreme. Article 40 of the Declaration of London, which adopted the half-cargo rule, must be read with Article 35, which exempted from capture conditional contraband on a neutral vessel bound to a neutral port.<sup>7</sup> In the second of these cases, *The Maricaibo*, the new rule is unhesitatingly applied to precisely that case. For its new rule in entirety, then, the court can draw from the Declaration of London not even the dubious sanction of an unratified declaration of principles. Accordingly it is compelled to rely solely upon an alleged prior adoption of the new rule, or its equivalent, by a majority of maritime powers.<sup>8</sup> It is clear that the new rule cannot have been adopted before the commencement of the present war.<sup>9</sup> What the court relies upon is an adoption of the rule in the course of the war by both groups of belligerents.<sup>10</sup>

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publication of the Naval War College, necessarily expresses the official views of the United States. The present view of the United States may perhaps be that of Article 8 of the Code of Maritime Neutrality, which exempts neutral vessels from confiscation for carrying contraband, in all cases. See note 12, *infra*.

<sup>5</sup> 5 CALVO, *supra*, § 2778: "Deux principes paraissent guider la pratique des nations maritimes: les unes limitent la confiscation à la portion illicite du chargement du navire neutre, tandis que d'autres l'étendent au chargement tout entier et au navire même, lorsque la contrebande forme la partie principale de la cargaison." Cf. *The Hakan*, 278 *et seq.*

<sup>6</sup> [1916] 2 A. C. 77, discussed in 30 HARV. L. REV. 66.

<sup>7</sup> See 2 WESTLAKE, *supra*, 255 *et seq.*

<sup>8</sup> In *The Hakan* the court makes a comprehensive summary of the law of the nations participating in the International Naval Conference of 1908-1909, preceding the Declaration of London. Even from this not wholly accurate summary it appears that Japan only, of the nations represented, could be considered to hold the half-cargo rule at that time.

<sup>9</sup> WHEATON, *ELEMENTS OF INTERNATIONAL LAW*, 5 ed. (an English text of authority), 751, considers the British rule in 1916 to be exactly that laid down by Lord Stowell in 1798, despite the Declaration of London and the divergent views of continental countries. See PYKE, *THE LAW OF CONTRABAND OF WAR* (English, 1915), 231 *et seq.* Cf. note 8, *supra*.

<sup>10</sup> See *The Hakan*, 280, 281. The United States is erroneously regarded as having adopted the rule also. See note 4, *supra*.

While the fact of such an acceptance by the Triple Alliance is not wholly clear,<sup>11</sup> for the purposes of this note it will be assumed. It should be observed that no neutral country has at any recent time held the new rule.<sup>12</sup> It is a rule whose adoption can hardly injure belligerents; it can only injure neutrals directly, or (theoretically only) discourage the carriage of contraband. Even assuming the latter effect to follow in fact, the only possible injury which the rule can inflict upon the opposing belligerent is to force it to pay higher freight rates for its contraband. The justification for the rule's adoption by a belligerent is, upon an international balance of considerations, slight indeed. The primary motive of the belligerents in adopting the rule must have been, it would seem, not even the doubtfully legitimate one of injuring their enemies, but to transfer from neutrals to themselves a part of what has now become internationally the most important of property. In setting up the new rule under such circumstances the belligerents, although perhaps constituting "a sufficiently general consensus of view and assent" of the Great Powers, have nevertheless failed, it is submitted, to establish a new rule of international law. In adopting it they sat, not as legislators, but as self-seekers; in construing it they are not judges, but parties in interest. It may indeed be further said that no change of international law by belligerents in the course of a war, no matter how numerous or important they may be, can be valid against unconsenting neutrals.<sup>13</sup> Only thus can international law retain even the pretence of morality. And without at least the appearance of morality it can no longer be law.

Acquiescence by neutrals in the rule of the principal cases seems doubtful.<sup>14</sup> The only merit of the rule — that it fixes a mathematical test easy to apply, for the confiscation of neutral property by a belligerent — will hardly be appreciated even by nations that have no policy of permanent neutrality. It will take other considerations to produce neutral consent, it would seem. The possibility that Great Britain's

<sup>11</sup> This fact is indeed vital for the validity of the new rule, even accepting the court's reasoning. Article 41 of the German Prize Code is the same as Article 40 of the Declaration of London, it is true; but the restrictive Article 35 of the Declaration of London is also to be found in the German Prize Code. So that a German prize court would probably have released such a ship as *The Maricaibo*, which the British court condemned. See HUBERICH and KING, *THE PRIZE CODE OF THE GERMAN EMPIRE AS IN FORCE JULY 1ST, 1915*, especially at pp. 30 and 105. There is no reason to believe that the German prize court decisions cited in *The Hakan* (*The Batavia*, June 1, 1915, and *The Brilliant*, August 14, 1915) are on facts similar to those of *The Maricaibo*. Austria-Hungary likewise appears to have done no more than adopt both Articles 35 and 40 of the Declaration of London.

<sup>12</sup> Cf. Article 8 of the proposed Code of Maritime Neutrality, of the American Institute of International Law, made up of representatives from almost all the American republics, in session at Havana in January. The code is reprinted in full in *THE CHRISTIAN SCIENCE MONITOR*, January 25, 1917.

<sup>13</sup> Cf. the somewhat extreme views of Sir Francis Piggott, late Chief Justice of Hong-Kong, in *THE NEUTRAL MERCHANT*, ix: "Arbitration after the war, and compensation, are the only remedies when neutral property has been injured. Then, and then only, can any new departure by a belligerent be tested by a reference to fundamental principles. The reason is obvious. International law is a progressive science; it has not yet pronounced its last word on the relations between belligerency and neutrality. A neutral government is not entitled to assume that it alone is the judge of what that last word will be."

<sup>14</sup> See note 12, *supra*.



ends may be identical with the United States' has already been recognized by this REVIEW.<sup>15</sup> Whether that possibility still exists when the situation to be approved is the maintenance of the present mercantile marine status of the nations, is another question.

THE CONFLICT OF PRESUMPTIONS ON SUCCESSIVE MARRIAGES BY THE SAME PERSON. — In the recent California case of *In re Hughson's Estate: Brigham v. Hughson*,<sup>1</sup> the plaintiff, who had been married to the decedent by a ceremonial marriage, claimed a share in the estate as surviving wife. The defendant proved a ceremonial marriage between herself and the decedent, subsequent in time to the marriage of the plaintiff with the decedent, and proved that the marriage relation so created had continued till the time of decedent's death. It appeared that the plaintiff had remarried twice after the disappearance of the decedent, believing him dead. It further appeared that there were ten children by the marriage between the decedent and the defendant. The plaintiff declared that her marriage with the decedent continued down to the time of his death. The court held that the burden of proving that the first marriage had not been set aside by divorce was on the plaintiff, and that this burden had not been met, and that a divorce would therefore be presumed in favor of the second marriage.

Presumptions must necessarily play a large part in the proof of marriages. Actual evidence of the ceremony, or of its incidents, cannot always be procured, and proof of valid marriages would fail if such evidence were required. As a result a broad presumption in favor of the validity of apparent marriages characterizes English and American law.<sup>2</sup> This presumption not only dispenses with proof of ceremonial formalities where some form of marriage is shown to have been performed,<sup>3</sup> but predicates marriages, regardless of forms, on cohabitation and repute in the community.<sup>4</sup> Moreover, marriages, once established, are presumed to continue, aside from affirmative evidence to the contrary, or conflict of presumptions,<sup>5</sup> and the burden of proof is heavy upon one who attacks the validity of the protected status.<sup>6</sup>

As is usually the case where the law is related in terms of presumptions, difficulties arise where two presumptions in the same field conflict. So where a husband or wife contracts a second marriage before the termina-

<sup>15</sup> 30 HARV. L. REV. 279, 283.

<sup>1</sup> 160 Pac. 548.

<sup>2</sup> *Piers v. Piers*, 2 H. L. Cas. 331; *Dickerson v. Brown*, 49 Miss. 357, 371, 372. The maxim *semper praesumitur pro matrimonio* seems to be an application of the general common law presumption in favor of innocence.

<sup>3</sup> *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78; *Winter v. Dibble*, 251 Ill. 200, 95 N. E. 1093. See *Cooley, J.*, in *Hutchins v. Kimmell*, 31 Mich. 126, 130, and cases cited. The authority of the celebrant and the capacity of the parties, etc., are covered by the presumption.

<sup>4</sup> *Mitchell v. Mitchell*, 11 Vt. 134. See 1 BISHOP, MARRIAGE, SEPARATION AND DIVORCE, §§ 935, 936. See a complete collection of cases in L. R. A. 1915 E, 8, 56, 87. Common law marriage has been changed in many states by statute.

<sup>5</sup> *Wallace v. Pereles*, 109 Wis. 316, 85 N. W. 371.

<sup>6</sup> *Patterson v. Gaines*, 6 How. (U. S.) 550.

tion of the first marriage the presumption in favor of the second marriage is opposed to the presumption in favor of the continuance of the first, and a difficult situation results. In discussing this situation we must limit our inquiry to cases where the validity of the second marriage is *being attacked*<sup>7</sup> on the ground that the first marriage still continues, and to cases where no question of criminal law is raised.<sup>8</sup> It is also necessary to rule out cases where one of the marriages was a common law marriage, so called.<sup>9</sup> In the narrowed field thus left it is generally law that the presumption in favor of the second marriage will prevail,

This presumption takes three forms. Occasionally it is based on the presumed invalidity of the first marriage.<sup>10</sup> But more generally it is based on the discontinuance of the first marriage by death or by divorce. The presumption of the death of a former spouse is thoroughly established in our law,<sup>11</sup> but it is obviously swallowed up in the larger and more recent presumption of the termination of the former marriage by divorce. And the presumption of divorce seems to be as clearly settled.<sup>12</sup>

The limits of the divorce presumption, however, are by no means exact. The periods of separation which must intervene between the termination of the first relation and the establishment of the second differ in different jurisdictions, and there is a marked diversity of opinion in regard to the weight to be attached to such factors as the remarriage of the other

<sup>7</sup> It is only where the second marriage is attacked that the law protects it fully with presumptions. If an affirmative attempt is made to prove the validity of the second marriage, an attack on the first marriage is entailed and the presumption shifts to protect the first marriage. *Clark v. Cassidy*, 62 Ga. 407; *Re Hamilton*, 76 Hun 200, 27 N. Y. Supp. 813; *Wilson v. Allen*, 108 Ga. 275, 33 S. E. 975.

<sup>8</sup> In criminal cases the presumptions in favor of the legality of one marriage are met by the presumptions in favor of the legality of the other and the prosecutor must prove his case without a legal bias either way. *Lowerey v. People*, 172 Ill. 466, 50 N. E. 165; *Reg. v. Lumley*, L. R. 1 Cr. Cas. Res. 196.

<sup>9</sup> No presumption will be made "in favor of the guilty parties" where a common-law marriage, or rather the ingredients thereof, is shown subsequent to a ceremonial marriage which has not been dissolved. *Nossaman v. Nossaman*, 4 Ind. 648. A possible exception to the above statement is the presumption that marriage is created by the continuance of the cohabitation after the impediment of the former marriage has been withdrawn, whether or not the parties know of its withdrawal. *De Thoren v. Atty. Gen.*, 1 A. C. 686. And the presumption of marriage from cohabitation and repute will not alone overthrow a later ceremonial marriage. *Waddingham v. Waddingham*, 21 Mo. App. 609. See *Haupt v. Haupt*, 5 Ohio Rep. 539.

<sup>10</sup> *Palmer v. Palmer*, 162 N. Y. 130, 56 N. E. 501.

<sup>11</sup> *Lockhart v. White*, 18 Tex. 102, 110; *Spears v. Burton*, 31 Miss. 547; *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232; *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756; *Cash v. Cash*, 67 Ark. 278, 54 S. E. 744; *Nixon v. Wichita Co.*, 84 Tex. 408, 19 S. W. 560; *Murchison v. Green*, 128 Ga. 339, 57 S. E. 709; *Smith v. Fuller*, 138 Iowa 91, 115 N. W. 912; *McCausland's Estate*, 213 Pa. 189, 62 Atl. 780; *Gilroy v. Brady*, 195 Mo. 205, 93 S. W. 279; *Wagoner v. Wagoner*, 128 Mich. 635, 87 N. W. 808.

<sup>12</sup> *Blanchard v. Lambert*, 43 Iowa 228; *Harris v. Harris*, 8 Ill. App. 57; *Klein v. Laudman*, 29 Mo. 259; *Coal Run Co. v. Jones*, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; *Hull v. Rawls*, 27 Miss. 471, 473; *Carroll v. Carroll*, 20 Tex. 731, 740; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445; *Howton v. Gilpin*, 24 Ky. L. 630, 69 S. W. 766; *Re Wile's Estate*, 6 Pa. Super. Ct. 435; *In re Thewlis's Estate*, 217 Pa. 307, 66 Atl. 519; *Huff v. Huff*, 20 Idaho 450, 118 Pac. 1080; *Shepard v. Carter*, 86 Kan. 125, 119 Pac. 533; *Ross v. Sparks*, 79 N. J. Eq. 649, 83 Atl. 1118; *Goset v. Goset*, 112 Ark. 47, 164 S. W. 759; *Wilcox v. Wilcox*, 171 Cal. 770, 155 Pac. 95; *Bowman v. Little*, 101 Md. 273, 61 Atl. 223; *In re Rash*, 21 Mont. 170, 53 Pac. 312; *Lyon v. Lash*, 79 Kan. 342, 99 Pac. 598; *Gamble v. Rucker*, 124 Tenn. 415, 137 S. W. 499; *Haile v. Hale*, 40 Okla. 101, 135 Pac. 1143; *Re Grande*, 80 Misc. 540, 141 N. Y. Supp. 535.



party to the first marriage, or the existence of children by the second marriage. Some states, as notably Iowa, require a foundation in fact for the presumption,<sup>13</sup> and refuse to entertain it where the former spouse has not behaved in a way inconsistent with the marriage relation. And Iowa has a further peculiarity in refusing to exercise the presumption in order to "barricade" the rights of one of two rival claimants to the status of surviving widow<sup>14</sup> — a position which seems to lose sight of the reasons underlying the whole use of presumptions in the law of marriage. The lengths to which the presumption will be carried are as uncertain as its scope. Massachusetts and Wisconsin,<sup>15</sup> on the one hand, refuse to notice any presumption of divorce, while a recent New York case,<sup>16</sup> on the other, holds that if the presumption of divorce is overthrown, a presumption that the former marriage has been annulled will arise in its place. Another New York decision<sup>17</sup> which does not deal with divorce is yet significant as showing the length to which a sane court will be carried by its "zeal for legitimacy." In order to validate a common law marriage two prior marriages, together with the requisite parties thereto, were presumed, a third marriage was voided by the presumptive parties, and one of the imagined parties was presumptively deceased in time to make the marriage in question presumptuously valid and its offspring legitimate.

Where a presumption has been carried to such lengths, the important questions become, How much evidence, and evidence of what kind, will be required to rebut the inference? It is clear that something more than the inferential testimony of near relatives that they had never heard of a divorce is necessary.<sup>18</sup> There must be direct proof that there has been no divorce, for the law may require proof of a negative where a negative is essential to the existence of a right.<sup>19</sup> And the question is, What evidence will suffice to establish the negative?

Aside from the Iowa exceptions noted above, proof by a former spouse that he, or she, had never procured a divorce, and had never been served with notice of a divorce, will not suffice.<sup>20</sup> This seems so generally established that it may safely be said that the party attacking the second marriage must prove neither party to the first marriage has obtained a divorce.<sup>21</sup> With this position hypothesized it becomes apparent that the burden of overthrowing the second marriage may be extremely onerous,

<sup>13</sup> *Ellis v. Ellis*, 58 Iowa 720, 13 N. W. 65; *Gilman v. Sheets*, 78 Iowa 499, 43 N.W. 299; *In re Colton*, 129 Iowa 542, 105 N. W. 1008. The argument advanced is that the presumption of the innocence of the party contracting the second marriage is met by a presumption that he or she would not have procured a divorce on false testimony.

<sup>14</sup> *In re Colton*, *supra*. Either the theoretical ground of innocence or the practical ground of policy in maintaining established relations would seem irreconcilable with this exception. More is at stake than the rights of A. or B. to a widow's legacy.

<sup>15</sup> *Randlett v. Rice*, 141 Mass. 385, 6 N. E. 238; *Williams v. Williams*, 63 Wis. 58, 23 N. W. 110. The argument in the Wisconsin case fails to discriminate between cases of common law and cases of ceremonial marriage, and argues from criminal to civil cases.

<sup>16</sup> *Lazarowicz v. Lazarowicz*, 91 Misc. App. 116, 154 N. Y. Supp. 107.

<sup>17</sup> *In re Biersack*, 159 N. Y. Supp. 519.

<sup>18</sup> *Nixon v. Wichita Co.*, 84 Tex. 408, 19 S. W. 560.

<sup>19</sup> *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445. See 2 GREENL. EV., § 454.

<sup>20</sup> *Pittinger v. Pittinger*, 28 Colo. 308, 64 Pac. 195; *Coal Run Co. v. Jones*, 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; *Hull v. Rawls*, 27 Miss. 471, 473.

<sup>21</sup> *Chancey v. Whinnery*, 147 Pac. 1036 (Okla.).

since the party who remarried may have lived anywhere in the interim since the termination of the original relation. And, logically developed, the above position would lead to the result achieved by the Oklahoma court which held, that, although the records of the counties of known residence showed no divorce, the deserting party might yet have obtained a divorce elsewhere.<sup>22</sup> But the sensible rule seems to be that the presumption may be rebutted if the records of the counties of residence of both parties to the first marriage show no divorce.<sup>23</sup>

THE RIGHT OF CREDITORS AGAINST SUBSCRIBERS TO CORPORATE STOCK ISSUED IN RETURN FOR OVERVALUED PROPERTY. — That an examination of the nature and extent of a creditor's right against a subscriber to stock issued for overvalued property is desirable, becomes clear in view of the persistently inadequate treatment accorded this question.<sup>1</sup> A., B. and C. were the incorporators of a company with a capital stock of \$60,000, promoted by A., B., C. and D. Stock to the par value of \$21,900 was issued as fully paid up to A. and B. in return for a secret process turned in by them.<sup>2</sup> The promoters did not believe the secret process to be worth \$21,900 at the time, but they believed the corporation would be able to earn a dividend on a capital stock of \$60,000. The "value" of the process was determined by subtracting the value of the other corporate assets from \$60,000. D. contracted to buy of the incorporators, for \$15,000, one half of the total capital stock, of a par value of \$30,000, reserving an option to quit the company at any time and receive back his money. After paying \$13,600, D. exercised his option and, on the surrender of the shares to the company, received from it a mortgage to secure the indebtedness. The trustee in bankruptcy petitioned to have the mortgaged property applied to the payment of the general creditors, who became such after D. filed his mortgage. The court refused to grant such relief.

The whole question has been confused by the lack of any clear analysis of the nature of the problem. Many American courts have concluded that by common law the issue of stock for overvalued property is in law a fraud on the creditors, for whose benefit subscriptions to stock are held as a trust fund.<sup>3</sup> From this follows the prevailing notion that the pro-

<sup>22</sup> *Haile v. Hale*, 40 Okla. 101, 135 Pac. 1143.

<sup>23</sup> *Smith v. Fuller*, 138 Iowa 91, 115 N. W. 912; *Sullivan v. Grand Lodge*, 97 Miss. 218, 52 So. 360; *Hammond v. Hammond*, 43 Tex. Civ. App. 284, 94 S. W. 1067; and *Wingo v. Rudder*, 103 Tex. 150, 124 S. W. 899, present sane variations.

<sup>1</sup> See *Durand v. Brown*, 236 Fed. 609.

<sup>2</sup> It was held in *O'Bear-Nester Glass Co. v. Antiexplo Co.*, 101 Tex. 431, 106 S. W. 180, that an unpatented secret formula was not "property" within the meaning of a similar statute. It is submitted that the principal case presents the better view in holding this secret process to be "property" within the statute.

<sup>3</sup> The doctrine was invented by Story, J., in *Wood v. Drummer*, 3 Mason (U. S. C. C.) 308. Perhaps the best known case invoking the doctrine is *Scovill v. Thayer*, 105 U. S. 143. Without resorting to the statute under which the corporation was formed, the court declared, in regard to the issue of shares at a discount, that such a transaction "is a fraud in law on its creditors, which they can set aside. . . . The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors."



priety of the value placed upon the property by the incorporators depends upon their good faith and lack of wicked motives — upon the absence of some species of common law fraud.<sup>4</sup> But on common law principles, it is hard to see why a corporate person, like any other person, may not create against itself such obligations as it pleases, subject of course to the laws of deceit and fraudulent conveyances. To make it improper for it to create against itself an obligation which a natural person might properly create against himself, requires some statutory prohibition. This calls for a careful analysis of the statutes under which the corporation was organized.<sup>5</sup>

The corporation in the principal case was specifically authorized to issue stock in return for property; and the value placed on this property by the incorporators is declared to be conclusive "in the absence of actual fraud."<sup>6</sup> The court held that a conscious and gross overvaluation

<sup>4</sup> The weight of American authority has followed this doctrine, even into questions of statutory construction, to the extent that the criterion of propriety is taken to be "fraud," and not statutory illegality. See *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343; *Penfield v. Dawson Town & Gas Co.*, 57 Neb. 231, 77 N. W. 672; *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W. 1117. See also *Horton v. Sherrill-Russell Lumber Co.*, 147 Ky. 226, 143 S. W. 1053.

<sup>5</sup> Lord Herschell said, in *Ooregum Mining Co., Ltd. v. Roper*, [1892] A. C. 125: "Except when the legislature has expressly or by implication forbidden any act to be done by a company, their rights must be governed by the ordinary principles of law, and they are free to make . . . such contracts as they please." This, it is submitted, states the only common-law principle applicable to the situation.

In *Hospes v. Northwestern Mfg. & Car Co.*, *supra*, Mitchell, J., said: "This 'trust-fund' doctrine, commonly called the 'American Doctrine,' has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application." In speaking of *Wood v. Drommer*, where the notion had its origin, he says: "Upon old and familiar principles this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution among the stockholders, — a proposition that is sound upon the plainest principles of common honesty. . . . In the case of *Wabash, etc. R. Co. v. Ham*, 114 U. S. 587, the court said: 'The property is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of the debtor in fraud of the existing creditors is void.' This is probably what is meant when it is said, as in *Clark v. Bever*, 139 U. S. 96, 110, that the capital stock is a trust fund *sub modo*. . . . But it means very little, for the same thing could be truthfully said of the property of an individual or of a partnership."

See also *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 7 N. E. 773.

The much-criticised opinion in *Southworth v. Morgan*, 205 N. Y. 293, 98 N. E. 490, may be explained on the ground that the court did not have before it the provisions of the statute under which the corporation was organized.

<sup>6</sup> PUBLIC ACTS, MICH., 1903, No. 232, provides that the articles of incorporation should state: "*Fourth*, the amount of total authorized capital stock, which shall not be less than one thousand dollars and not more than twenty-five million dollars; the amount subscribed shall not be less than fifty per cent of the authorized capital stock; *Fifth*, the number of shares in which the capital is divided, which shall be of a par value of ten dollars or one hundred dollars each; *Sixth*, the amount of the capital stock paid in at the time of executing the articles, which shall not be less than ten per cent of the authorized capitalization, and in no case less than one thousand dollars, except in case of a capitalization of two thousand dollars or under, when it shall be twenty-five per cent thereof. . . . Such capital stock may be paid in, either in cash or in property, real or

of the present cash value of the property was not improper.<sup>7</sup> Undoubtedly this is sound if the premise, noted above, that "actual fraud" necessarily includes some element of bad faith and intention to deceive, is sound. The meaning of "actual fraud" important for our purposes is that in which the Michigan legislature used it, and not as the common law may have interpreted it.

The Michigan legislature prescribed that stock must have a certain money par value, and that such stock "may be paid in, either in cash or in property." Standing alone, these requirements indicate an intention that the stock "may be paid in, with reference to the par value, either in money or in money's worth." Further, limits in terms of dollars and cents are prescribed for the capital stock, indicating an intention to regulate the monetary size of the corporation, and an assumption that the capital stock shall be paid in money or full money's worth. The provisions that the corporation must start with one half its capital stock subscribed to, and one tenth actually paid in, points to the same intention and assumption. And the requirement that in case property is received an itemized description and statement of the value put on each item must be filed, provides a safeguard for the enforcement of these provisions. These considerations seem to indicate clearly that the legislature contemplated that the par value of the capital stock should represent the amount of assets received in return, that the number of dollars' worth of stock issued should equal the number of dollars' worth of value received. Under this statute, no sensible meaning can be placed on "value" other than "present value in money." Under this interpretation alone can the legislative intent be carried out.<sup>8</sup> Construed, the statute reads, "that the incorporators shall fix the present

personal; but where payment is made otherwise than in cash there shall be included in the articles an itemized description of the property in which such payment is made, with the valuation at which each item is taken, which valuation shall be conclusive in the absence of actual fraud."

<sup>7</sup> This is in accord with what is probably the weight of American authority. Under a statute essentially like that in the principal case, but not containing the "actual fraud" clause (which would appear to make the requirements more strict than in the principal case), see *Coffin v. Ransdell*, *supra*; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343; *Penfield v. Dawson Town & Gas Co.*, *supra*; *Hospes v. Northwestern Mfg. & Car Co.*, *supra*. Under a statute in all essentials like that in the principal case, see *Monk v. Barnett*, 113 Va. 635, 75 S. E. 185, in which the court declared that the statute did away with and replaced the "common law"; *Medler v. Hotel Co.*, 6 N. M. 331, 28 Pac. 551. In *Graves v. Brooks*, 117 Mich. 424, 75 N. W. 932, patents worth \$20,000 were capitalized at \$100,000, but the court held that the stockholders were not liable to creditors; that it was necessary to show not only an overvaluation, but that it was "either an intentional fraud in fact, or such reckless conduct . . . that fraud may be inferred"; and in *Bank v. Belington Coal Co.*, 51 W. Va. 60, 41 S. E. 390, the court declared: "Our statute throws the gate wide open for the sale of stock and purchase of property in payment therefor at such price and on such terms and conditions as the contracting parties may agree upon." Cf. *Dieterle v. Paint & Enamel Co.*, 143 Mich. 416, 107 N. W. 79. See also *In re Wrapp, Ltd.*, [1897] 1 Ch. 796.

<sup>8</sup> In *See v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843, Pitney, V. C., in construing provisions of a statute essentially like those in the principal case, said: "The intent of the legislature, expressed in these sections in question manifestly was, that the capital stock of all corporations should at the start represent the same value whether paid for in property or money. That result can only be obtained by supposing that the property is to be appraised at its actual cash value." See *Elyton Land Co. v. Birmingham Co.*, 92 Ala. 407, 9 So. 129.



value in money of the property, *which* valuation shall be conclusive in the absence of actual fraud." The incorporators admittedly did not believe \$21,900 to be the present value in money of the secret process. They knew it to be only a slight fraction of this amount. When charged by the legislature to fix the present cash value, the incorporators willfully substituted an honest, but highly speculative, estimate of future worth. This, it is submitted, was "actual fraud" within the statute, and the valuation was illegal.<sup>9</sup>

The creditors are entitled to take advantage of this illegality.<sup>10</sup> It is for their benefit, if for anyone's, that the legislature has created it. They do so by requiring the subscriber to pay in enough to make up the par value of his stock. This obligation runs to and can be enforced against a purchaser with notice of the stock from the shareholder.<sup>11</sup> The result is that if nothing more were present the creditors in the principal case would be entitled to have D. pay in the difference between the actual value of the process when turned in and \$21,900.

But the court further declared that, even if the issue of stock was a wrong to these creditors, D. escaped such liability through the exercise of his option and the filing of his mortgage before the creditors' rights arose. Such action by an individual in a situation analogous to that of the corporation would have been proper. Again we have a question of statutory

<sup>9</sup> Construing a statute essentially like that in the principal case, but not containing the "actual fraud" provision, several courts have held improper an issue of stock for property taken at a value known to the parties to be in excess of its actual present value. See *Douglass v. Ireland*, 73 N. Y. 100; *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644. And in *See v. Heppenheimer*, *supra*, Pitney, V. C., said: "Nor is it necessary that conscious overvaluation or any other form of fraudulent conduct on the part of these primary valuers should be shown to justify judicial interposition. Their honest judgment, if reached without due examination of the elements of value, or if based in part on an estimate of matters not property, or if plainly warped by self-interest, may lead to a violation of the statutory rule as surely as would corrupt motive." And in *Herron v. Shaw*, 165 Cal. 668, 133 Pac. 488, the court said: "The further fact found by the court that the directors acted in good faith and honestly believed that the property could and would be developed so that its market value would eventually exceed [the value put upon it] will not relieve or excuse the stockholders from such liability. It is the value of the property at the time of the exchange that determines the liability." See also *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 891. These decisions, although not having presented to the court the construction of "actual fraud," give us, it is submitted, the proper basic construction of a statute such as the one in the principal case, narrowing our inquiry to the effect of the added liberalizing "fraud" clause.

Further, the word "fraud" as used in connection with the valuation of such property has not been given, by many well-reasoned authorities, a strict common-law meaning requiring a wicked intent to defraud. See *Hastings Malting Co. v. Iron Range Co.*, 65 Minn. 28, 34, 67 N. W. 652, 654; *Johnson v. Tenn. Oil Co.*, 74 N. J. Eq. 32, 69 Atl. 788; *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518.

Under a statute in all essentials like that in the principal case, the following cases held a similar overvaluation illegal: *Dilzell Engineering Co. v. Lehmann*, 120 La. 273, 45 So. 138; *Crawford v. Rohrer*, 59 Md. 599; *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618; *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. E. 857.

<sup>10</sup> Since all the creditors in the principal case are subsequent to the issue of the stock, and have no notice, actual or constructive, of the nature of such issue, they are entitled upon any theory of the nature of the obligation. As to whether the trustee in bankruptcy is the proper person to enforce the obligation, see 29 HARV. L. REV. 854.

<sup>11</sup> *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494; *Coleman v. Howe*, 154 Ill. 458, 39 N. E.

construction. We have seen that the legislature means to regulate the corporation so that the amount of the capital stock issued by it should be no greater than the present value of the assets it received in return. This procedure amounts to an unannounced reduction of the announced capital stock. If this is proper, of what purpose or protection are the statutory requirements that stock must have a par value, and that it must be paid in either in money or in money's worth, when the corporation may at will, by buying in its stock, secure the same discrepancy between the par value of its announced stock and the value of its assets which the statute aimed to prevent? Furthermore, the Michigan legislature has prescribed a statutory method for reducing the capital stock.<sup>12</sup> This makes it doubly certain that such a reduction as that practiced in the principal case was illegal.<sup>13</sup>

But it is objected that the creditors in this case cannot complain, for they should have known of this reduction because the mortgage was filed before they dealt with the corporation. But even conceding constructive notice of the covert reduction of stock, so likely to mislead subsequent creditors, the original wrongful issue remains. The corporation, forbidden to sell stock for overvalued property, may still disregard the illegal portion of the sale and compel the former shareholder to pay the deficiency. Though the creditors in the principal case were subsequent to the return of the stock, they were also subsequent to the illegal issue, and the liability incurred then should not be permitted to be avoided now on the ground of constructive notice of an illegal act.<sup>14</sup>

Nor is there any business necessity for legalizing this sort of a transaction. If in fact D. was a creditor who desired later, if things turned out well, to become a stockholder, why did he not loan the money in the ordinary way, taking a mortgage back, and reserving an option to become a shareholder? The situation looks far more as if D. became a stockholder for the benefits thereof, with a reservation, if things went wrong, to escape the liabilities.

It follows, then, that the trustee in bankruptcy should be able to set aside the transaction out of which arose D.'s mortgage and also to hold D. liable for any amount up to the difference between the value of the property given for his stock and its par value.

<sup>12</sup> PUBLIC ACTS, MICH., 1903, No. 232: "The amount of capital stock and the number of shares . . . may be diminished at any annual meeting . . . by a two-thirds vote of the capital stock of the corporation. . . . The president and majority of the directors shall make a certificate thereof, which shall be signed and recorded. . . ."

<sup>13</sup> It is almost universally agreed that such a reduction is void as against existing creditors. See *Clapp v. Peterson*, 104 Ill. 26; *Hall v. Henderson*, 126 Ala. 449, 28 So. 531; *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460. But cf. *Dupee v. Boston Water Power Co.*, 114 Mass. 37. It will be noticed that no statute is necessary to reach this result. It is in its nature a conveyance in fraud of creditors, and would be void if made by a natural person. But the weight of American authority holds such a reduction good as against future creditors. See *Vent v. Duluth Coffee Co.*, 64 Minn. 307, 67 N. W. 70; *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226; *Morgan v. Lewis*, 46 Ohio 1, 17 N. E. 558. See also *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99, 14 S. E. 501; *City Bank v. Bruce*, 17 N. Y. 507.

<sup>14</sup> This is the English view. *Trevor v. Whitworth*, L. R. 12 A. C. 409. See also *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19. Cf. *West Penn. Chemical & Mfg. Co. v. Prentice*, 236 Fed. 891.



NON-TESTAMENTARY CONVEYANCES TO TAKE EFFECT AFTER DEATH. — A. signs, seals, records, and delivers to B. an instrument drawn in the form of a warranty deed conveying Blackacre to B. and his heirs. Consideration is recited. In the *habendum* is inserted the clause: "this deed to take effect upon the death of the grantor." Courts of final appeal in this country entertain three widely divergent views as to the legal consequences of such a transaction. The Supreme Court of Iowa, in the case of *Shaul v. Shaul*,<sup>1</sup> decided last November, held an instrument of this sort to be an attempted testamentary disposition, and void under the Wills Act because of the lack of attesting witnesses.<sup>2</sup> A few courts have construed such a document as a valid conveyance of an estate *in futuro* with a resulting fee in A. subject to a conditional limitation in fee in favor of B.<sup>3</sup> The great majority of the cases seem to take an intermediate position. They hold that the instrument is a valid deed, which apparently vests the fee at once in B., with the enjoyment thereof postponed until A.'s death, or with a more or less vaguely defined "life estate" reserved "by implication" or "operation of law" in A.<sup>4</sup> It is submitted that the second view is the correct one, and that the result reached by the Iowa court is unsound and undesirable.

At the common law a deed purporting to convey an estate *in futuro* was void. Leake gives, as the reason for this rule, that the exigencies of tenure required that the seisin should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready to meet the claims of the lord for the duties and services of the tenure.<sup>5</sup> But since the Statute of Uses such a deed may operate as a bargain and sale to convey an estate *in futuro*.<sup>6</sup> A social reason underlay the courts'

<sup>1</sup> 160 N. W. 36 (Iowa).

<sup>2</sup> The following cases seem in accord: *Sperber v. Balster*, 66 Ga. 317 ("Said deed of gift to be of full effect at my death"); *Ransom v. Pottawattamie County*, 168 Iowa 570, 150 N. W. 657 ("This indenture to be effective after my death"); *Turner v. Scott*, 51 Pa. St. 126 ("In no way to take effect till after death of grantor"); *Coulter v. Shelmadine*, 204 Pa. St. 120, 53 Atl. 638 ("This assignment shall not be of any effect until after my death"); *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411 ("This deed is to take effect from and after my death"); but see *West v. Wright*, 115 Ga. 277, 41 S. E. 602.

<sup>3</sup> *Shackleton v. Sebree*, 86 Ill. 616 ("This deed not to take effect till after my decease"); *Vinson v. Vinson*, 4 Ill. App. 138 ("Do convey, at my death"); *Wyman v. Brown*, 50 Me. 139 ("This deed is not to take effect during my lifetime"); *Abbott v. Holway*, 72 Me. 298 ("This deed is not to operate as a conveyance until my decease"); *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563 ("The deed shall go into full force and effect at my death.")

<sup>4</sup> *Abney v. Moore*, 106 Ala. 131, 18 So. 60 ("This conveyance not to take effect till after my death"); *Harshbarger v. Carroll*, 163 Ill. 636, 45 N. E. 565 ("Only to take effect on death of grantor"); *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548 ("To be in force from and after my decease and not before"); *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726 ("To be equally divided between them at my decease and after paying my funeral expenses"); *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50 ("The above obligation to be of none effect until after the death of the said B. C."); *Kelley v. Shimer*, 152 Ind. 290, 53 N. E. 233 ("This deed is to take effect on and after the death of the grantor"); *McLain v. Garrison*, 39 Tex. Civ. App. 431, 88 S. W. 484, and 89 S. W. 284 ("This deed is to take effect at my death and not before"); *Gorham v. Daniels*, 23 Vt. 600 ("Not to come into possession of it till after my decease"); *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986 ("But this deed shall take effect when the said W. L. shall depart this life and not sooner").

<sup>5</sup> *Roe v. Tranmer*, 2 Wils. 75. LEAKE, LAW OF PROPERTY IN LAND, 2 ed., 33.

<sup>6</sup> LEAKE, LAW OF PROPERTY IN LAND, 2 ed., 88. True, a series of Massachusetts

readiness to recognize this indirect effect of the statute. By the reign of Henry VIII the feudal structure of society was fast breaking down. An attempt to curtail the means already evolved for mitigating the burdens of tenure and the feudal system of conveyancing, was not to be tolerated. To-day the same result should be reached. That the instrument was intended primarily to operate under one of our modern statutes permitting the transfer of land by deed, will not preclude it from operating if necessary as a bargain and sale.<sup>7</sup> And, moreover, such statutes would seem to offer a second ground upon which its validity may be rested. Since they dispensed with the feudal requirements of livery of seisin and the like, should not a conveyance under them be entitled to the same freedom in the creation of estates as when made by devise or by conveyance to uses?<sup>8</sup> Indeed many jurisdictions have a separate statute specifically permitting the creation of estates *in futuro* by deed. Of these Iowa is one.<sup>9</sup> If, then, in the instrument we set out to consider, the troublesome clause had read in so many words "the estate to vest," instead of "the deed to take effect" upon the death of the grantor, it would seem impossible to have questioned its validity.<sup>10</sup>

Yet it is to the feeling that somehow or other, even so, the deed would have been invalid that we owe the strained and unfortunate construction placed upon an instrument in the form originally supposed by those courts which follow the Iowa view. Their argument runs as follows: the inserted clause shows an intent on A.'s part not to convey anything *in praesenti*, but only after his death; therefore the instrument is "testamentary," and void for lack of proper attestation. Note there the confusion of two very different intents. That the grantor did not intend to convey an estate *in praesenti* is evident: that, as we have seen, has no bearing upon the validity of the instrument as a conveyance. But to argue that the clause establishes an effective intention that the instrument shall remain revocable is quite a different matter. The document is in form a deed; it has been recorded by the grantor; and its possession voluntarily surrendered to the grantee. Normally the strongest kind of evidence would hardly suffice to rebut the resulting presumption of "delivery" and show that a valid, irrevocable conveyance had

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cases deny this proposition. *Wallis v. Wallis*, 4 Mass. 135; *Brewer v. Hardy*, 22 Pick. 376. But the accidental origin of the Massachusetts doctrine and the fallacy of the reasoning by which the later cases attempted to justify it has been repeatedly pointed out. *Wyman v. Brown*, 50 Me. 139; *Abbott v. Holway*, 72 Me. 298; *Chandler v. Chandler*, 55 Cal. 267. See GRAY, RULE AGAINST PERPETUITIES, § 57. Even in Massachusetts it has been substantially repudiated under cover of a second erroneous doctrine that a money consideration will support a covenant to stand seized. *Trafton v. Hawes*, 102 Mass. 533.

<sup>7</sup> This is fundamental. See *Roe v. Tranmer*, 2 Wils. 75; *Thatcher v. Omans*, 3 Pick. (Mass.) 521; *Foster v. Dennison*, 9 Ohio 121.

<sup>8</sup> See KALES, FUTURE INTERESTS IN ILLINOIS, § 152. GRAY, RULE AGAINST PERPETUITIES, § 67. See also *Kuuku v. Kawainui*, 4 Hawaiian 515, holding a conveyance *in futuro* valid although the Statute of User was not in force.

<sup>9</sup> IOWA, CODE OF 1897, § 2917. A good example of the spirit in which such a statute is, however, sometimes construed is found in *Leaver v. Gauss*, 62 Iowa 314, 17 N. W. 522.

<sup>10</sup> Some courts, however, have done so. See, for example, *Blackstock v. Mitchell*, 67 Ga. 768 ("Bargain and sell . . . unto the said J. P. . . . at our death"). And compare *Leaver v. Gauss*, 62 Iowa 314, 17 N. W. 522, referred to in note 9, *supra*.



not in fact been made. Insistence to the extent necessary to accomplish that result, upon the literal meaning of the words, is surely unsound once the validity of estates *in futuro* is freely acknowledged. For they are then capable of another construction, consistent with, instead of squarely opposed to, the other evidence of the grantor's intent. Clearly the true intent, however inaptly expressed, was merely to postpone the vesting of the estate given. Many additional arguments support this view. It may well be urged that the grantor must have intended to accomplish something, and must in fact have known that without witnesses the instrument could not operate as a will.<sup>11</sup> Then it is well recognized that "it is the duty of a court to seek by construction to maintain rather than to defeat the deed."<sup>12</sup> In short, to construe a clause, the intended meaning of which is scarcely even doubtful, so as to invalidate the entire document and thwart the other clearly expressed intentions of the maker is as undesirable as it is unnecessary. It offers an example worthy of three centuries ago of the technicality and injustice of which the law is sometimes capable. It can only be explained as the result of an extraordinary harking back to a feudal notion of the invalidity of estates *in futuro* which the courts that interpreted the Statute of Uses definitely repudiated.

As to the state of the authorities, it is to be noted that the majority of the cases are of the intermediate class already alluded to.<sup>13</sup> These in so far as they hold the deed valid and irrevocable are in accord with the position contended for. In so far, however, as they shun the possibility of an estate *in futuro*, and rely upon an implied reservation of a life estate, they are, it is submitted, unsound. The law is strongly opposed, always, to the implication of life estates.<sup>14</sup> The language used would seem to negative any intention that the grantee should acquire an estate in the land during the grantor's life. And as we have seen, it is unnecessary to resort to any such implication.<sup>15</sup>

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FRANCHISE TAXES ON CORPORATIONS INCORPORATED IN MORE THAN ONE STATE. — A recent case in the United States Supreme Court raises the question of the effect of incorporation of the same body under the laws of several states upon the taxing power of each of the incorporating states under the due process clause of the Constitution. *Kansas City, M. & B. R. Co. v. Stiles*, 37 Sup. Ct. Rep. 58.<sup>1</sup> It is not due process to

<sup>11</sup> That is the argument of the court in *McLain v. Garrison*, 39 Tex. Civ. App. 431, 88 S. W. 484.

<sup>12</sup> *Trafton v. Hawes*, 102 Mass. 533.

<sup>13</sup> See note 4, *supra*.

<sup>14</sup> See *KALES, FUTURE INTERESTS IN ILLINOIS*, § 158 b.

<sup>15</sup> Moreover, in a large proportion of these cases the only point in issue was the validity of the deed. Suit had not been brought until after the death of A., when under either view B. held in fee. The discussion of what A. had retained before his death was therefore mere *dictum*.

The case of *In re Bybee*, just reported in 160 N. W. 900 (Iowa), is interesting as possibly showing a tendency to stretch a point in upholding as a will an instrument of the sort here considered, which the same court had previously held invalid as a deed. See *Ransom v. Pottawattamie County*, 168 Iowa 570, 150 N. W. 657, cited in note 2, *supra*.

<sup>1</sup> For a fuller statement of the facts, see RECENT CASES, p. 527.

tax property having a permanent *situs* outside of the territorial jurisdiction of the taxing state.<sup>2</sup>

In the first place, it is to be remembered that there is a vital, if elusive, difference between corporate franchise taxes<sup>3</sup> and taxes on corporate property. The former may be levied arbitrarily by a state as excise taxes in return for the right to have corporate existence or to do business in that state;<sup>4</sup> by hypothesis they are not taxes on property outside of the state.<sup>5</sup> The latter, as the name implies, are taxes upon property and must respect the *situs* of that property. This difference being one of substance, the courts go behind the legislative form and name of a tax law in every case. Of course, if the legislature has called it a property tax, the problem is comparatively easy:<sup>6</sup> to decide on what property the tax shall fall. But if the legislature has called it a franchise tax, the court is confronted with the difficult problem of deciding whether the legislature has not, after all, levied a property tax.<sup>7</sup> This problem comes before the Supreme Court in every case, for, as in cases arising under the contracts clause,<sup>8</sup> the state court's construction of the state law is not accepted,<sup>9</sup> but is reviewed under the rule that "every case involving the validity of a tax must be decided on its own facts; and if the tax purports to be laid upon a subject within the taxing power of the states, it is not to be condemned by the application of any artificial rule but only when the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."<sup>10</sup> The decided cases do not clearly show what facts will support the burden of proving that the necessary effect of what the state court has called a franchise tax is to lay a tax on property

<sup>2</sup> Union Transit Co. v. Kentucky, 199 U. S. 194.

<sup>3</sup> Throughout this note by "franchise tax" is meant an excise levied by a state upon a privilege to exist as a corporation of the state or a privilege given a foreign corporation to do business in the state, regardless of the value of the privilege. Franchises are often taxed as valuable property, but "franchise tax" is not used here to designate such a tax. See North Jersey St. Ry. Co. v. Jersey City, 73 N. J. L. 481, 483, 63 Atl. 833, affirmed in 74 N. J. L. 761, 67 Atl. 33; Phillipsburg R. Co. v. Assessors, 82 N. J. L. 49, 81 Atl. 1121.

<sup>4</sup> See COOLEY, TAXATION, 3 ed., 153, 154.

<sup>5</sup> See Home Ins. Co. v. New York, 134 U. S. 594, 601. "From the very nature of the tax being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital is invested."

<sup>6</sup> Fargo v. Hart, 193 U. S. 490; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341.

<sup>7</sup> Some of the confusion no doubt arises from the double meaning given to "franchise tax." See Louisville, etc. Ferry Co. v. Kentucky, 188 U. S. 385, in which a "franchise tax" was held invalid since "it was not competent for Kentucky . . . to tax the franchise which its corporation lawfully acquired from Indiana and which franchise or incorporeal hereditament had its *situs* for purposes of taxation in Indiana."

<sup>8</sup> McCullough v. Virginia, 172 U. S. 102.

<sup>9</sup> This rule has not been reached without vigorous opposition. In Galveston, H. & S. A. Ry. Co. v. Texas, 210 U. S. 217, 228, Mr. Justice Harlan, in a dissenting opinion in which the Chief Justice, Mr. Justice White, and Mr. Justice McKenna concurred, said: "In my opinion the court ought to accept the interpretation which the Supreme Court of Texas places upon the statute in question. In other words, it should be assumed that . . . the State intended to impose only an occupation tax."

<sup>10</sup> See Kansas City Ry. Co. v. Kansas, 240 U. S. 227, 233. The same idea that a valid tax may be measured as the legislature sees fit was used to support a federal excise tax on corporations measured by income in Flint v. Stone Tracy Co., 220 U. S. 107.



outside of the state.<sup>11</sup> They vaguely indicate, however, that the measure of a tax should have some relation to the subject of the tax and that it is dangerous to base a franchise tax upon a valuation of property, without adding some clause, such as a maximum imposition or a pro-rating of assets to business in the state, to negative any inference that a tax based on property values must be a tax on property.<sup>12</sup> The Alabama franchise tax attacked in *Kansas City, M. & B. R. Co. v. Stiles*<sup>13</sup> did not approach this danger limit; it levied a tax on domestic corporations based upon paid-up capital stock, regardless of values.<sup>14</sup>

It was argued, however, that the railroad, being incorporated in other states, was not a domestic corporation in Alabama. The argument is hard to support. At least for purposes of jurisdiction, a corporation incorporated in several states is domestic in each of them.<sup>15</sup> The few cases which have said that the federal courts must consider it a corporation only of the state originally creating it<sup>16</sup> have been explained by the fact that in those cases the incorporation in other states was required as a condition precedent to doing business therein and in substance was not incorporation.<sup>17</sup> Furthermore, in garnishment proceedings against a railroad incorporated in three states, a motion to dismiss the suit for want of jurisdiction was overruled, the court saying that the debt subject to garnishment had a *situs* wherever the corporation had its domicile, which was in any one or all of the three states.<sup>18</sup> It has been held that a statute levying a tax on domestic corporations included those incorporated in other than the taxing state.<sup>19</sup> Succession taxes of any one of the incor-

<sup>11</sup> Most of the cases go off on the point that state taxation puts a burden on interstate commerce; the question of due process is seldom raised. For a review of the decisions on state taxes affecting interstate commerce, see *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, and note in 28 HARV. L. REV. 93.

<sup>12</sup> See *Society for Savings v. Coite*, 6 Wall. (U. S.) 594, affirming 32 Conn. 173 (tax on total deposits partly invested in federal securities); *The Delaware Railroad Tax*, 18 Wall. (U. S.) 206 (tax based on an unequal pro-rating of capital stock); *Home Ins. Co. v. New York*, 134 U. S. 594 (tax based on dividend partly derived from federal securities); *Ashley v. Ryan*, 153 U. S. 436 (tax based on total capitalization); *Galveston, etc. Ry. Co. v. Texas*, 210 U. S. 217 (tax based on gross receipts); *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, affirming 207 Mass. 381, 93 N. E. 831 (tax based on total authorized capital, with a maximum of \$2000); *Kansas City Ry. Co. v. Kansas*, 240 U. S. 227, affirming 95 Kan. 261 (same); *Crane Co. v. Looney*, 218 Fed. 260 (tax based on capital, surplus, and undivided profits).

<sup>13</sup> *Ubi supra*.

<sup>14</sup> GENERAL ACTS OF ALABAMA, 1911, 170.

<sup>15</sup> *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581; *Patch v. Wabash R. Co.*, 207 U. S. 277. In the latter case the court, at p. 283, said: "Therefore the question is raised how a corporation . . . thus organized shall be regarded for purposes of a suit like this. No nice speculation as to whether the corporation is one or many, and no details as to the particulars of the consolidation are needed for an answer. The defendant exists in Illinois by virtue of the laws of Illinois. . . . It cannot escape the jurisdiction by the fact that it is incorporated elsewhere." *Goodwin v. New York, N. H. & H. R. Co.*, 124 Fed. 358; *Goodwin v. Boston & Maine R. Co.*, 127 Fed. 986; *Wasley v. Chicago, R. I. & P. Ry. Co.*, 147 Fed. 608; *Case v. Atlanta & C. A. L. Ry. Co.*, 225 Fed. 862. See 19 HARV. L. REV. 134.

<sup>16</sup> *Nashua & L. R. Co. v. Boston & L. R. Co.*, 136 U. S. 356; *St. Louis & S. F. Ry. Co. v. James*, 161 U. S. 545; *Southern Ry. v. Allison*, 190 U. S. 326.

<sup>17</sup> See *Goodwin v. New York, N. H. & H. R. Co.*, 124 Fed. 358, 359. The opinion of Lowell, J., in this case gives a complete review of the authorities.

<sup>18</sup> *Johnson v. Union Pac. Ry. Co.*, 145 Fed. 249.

<sup>19</sup> *Quincy Bridge Co. v. Adams County*, 88 Ill. 615. Breese, J., said, at p. 619: "the

porating states apply to the stock of the corporation incorporated in several states.<sup>20</sup>

In seeking incorporation in more than one state, therefore, a corporation seeks to become a domestic corporation in each state. The privileges and advantages which it gains thereby in each state are neither greater nor less than the corporate privileges of every corporation of that state. And so it is only reasonable to conclude that a tax on those privileges may be based on any measure that is valid as to domestic corporations not organized elsewhere. This conclusion was reached in the principal case and in the only authority previous to it on the same point.<sup>21</sup> There is a single *dictum* to the contrary.<sup>22</sup>

## RECENT CASES

**ATTACHMENT — SAVINGS ACCOUNT — SUBSEQUENT DIVIDENDS.** — Pending the termination of his suit against members of a trade union, the plaintiff attached their savings accounts in the defendant bank. Later the depositors assigned the dividends subsequently accruing upon the deposits. Both the assignees and the plaintiff, who has secured judgment against the depositors, claim the dividends. *Held*, that the attachment lien covered the dividends. *Savings Bank of Danbury v. Loewe*, U. S. Sup. Ct., Oct. Term, 1916, No. 713.

An attachment only reaches effects of the debtor in the hands of the garnishee at the time of service upon the latter. Thus, wages or salary not earned or due at the time of the service of the process cannot be reached. *Coburn v. Hartford*, 38 Conn. 290; *Taber v. Nye*, 12 Pick. (Mass.) 105. See 12 HARV. L. REV. 141. But whatever binds the principal should bind that which is incident to the principal. Accordingly, an attaching creditor may recover the interest upon a

corporate existence of appellants, considered as a corporation of this State, must spring from the legislation of this State. . . . As argued by the appellee, the only possible status of a company acting under charters from two States is that it is an association incorporated in and by each of the States, and when acting as a corporation in either of the States it acts under the authority of the charter of the State in which it is then acting. . . .” *Easton Bridge v. Metz*, 32 N. J. L. 199. See *Keokuk & H. Bridge Co. v. People*, 161 Ill. 132, 43 N. E. 691.

<sup>20</sup> *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 891; *Attorney General v. New York, N. H. & H. R. Co.*, 198 Mass. 413, 84 N. E. 737; *Cooley's Estate*, 186 N. Y. 220, 78 N. E. 939. See *Richardson v. Vermont & Mass. R. Co.*, 44 Vt. 613, 623.

<sup>21</sup> *Lumberville Bridge Co. v. Assessors*, 55 N. J. L. 529, 26 Atl. 711. The tax law said: “All . . . corporations incorporated under the laws of this State . . . shall pay a yearly license fee or tax of one tenth of one percent on the amount of capital stock of such corporations.” At page 537. *Garrison, J.*, said: “The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the State, whereas the franchise with which we have to do is the right to exist in corporate form without reference to the powers that under such form the company may exercise. . . . The power, as in the case of the right to own and operate a railroad, is taxed as property having a true value. . . . On the other hand, the naked right of existing as a corporation is taxed . . . , not at its true value, . . . but at a sum arbitrarily imposed by the legislature as an annual fee, the amount of which is to be computed by reference to the capital of the company as a criterion.”

<sup>22</sup> In *State Treasurer v. Auditor General*, 46 Mich. 224, 9 N. W. 258, the court held that a corporation incorporated in several states did not come within the terms of a certain tax, *because* to bring it within the terms would be to tax its property outside the jurisdiction. But this *dictum* is weakened by the fact that the court does not clearly hold that it was dealing with a franchise tax.



debt, bearing interest, unless the garnishee was prevented from paying the debt by the garnishment. *Adams v. Cordis*, 8 Pick. (Mass.) 260; *Woodruff v. Bacon*, 35 Conn. 97. It has been held that dividends declared upon attached corporate stock follow the attachment lien. *Jacobus v. Monongahela Nat. Bank*, 35 Fed. 395; *Norton v. Norton*, 43 Ohio St. 509, 525. See *Moore v. Gennett*, 2 Tenn. Ch. 375, 379. Yet such dividends are declared only at the discretion of the directors of the corporation. See *Gibbons v. Mahon*, 136 U. S. 549, 558. In the principal case, the bank was under a statutory duty to pay over a certain portion of the net income to the depositors. CONN. GEN. STAT., §§ 3440, 3441. As the debtor had a vested right to the dividends, which were as certain as interest, the creditor, who succeeds to his rights, is entitled to the dividends as well as the deposits.

BILLS AND NOTES — DEFENSES — FAILURE OF CONSIDERATION — LIABILITY OF ACCEPTOR OF BILL OF EXCHANGE. — The defendant purchased a consignment of salmon, terms "f.o.b.," payment to be made on receipt of the goods or bill of lading. The consignor drew a draft on the defendant for the purchase price and sold the draft, with the bill of lading attached, to the plaintiff bank, which forwarded the draft to its New York correspondent for collection. Defendant accepted the draft. On the day of its maturity, defendant tendered payment, but the draft and bill of lading could not be found. Later in the day defendant was notified that the documents had been found and they were tendered to him the next day. *Held*, that defendant is liable on his acceptance. *First National Bank of Seattle v. Gidden*, 162 N. Y. Supp. 317 (App. Div.).

The court rests its decision upon the general proposition that an acceptor is liable absolutely on his acceptance, regardless of the surrender to him of the attached bill of lading. Now it is undoubtedly well settled that failure of a pledgee to surrender collateral upon tender of payment of the debt does not discharge the debt. *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189. See JONES, PLEDGES, 3 ed., § 543 ff. Where the collateral has been converted by the pledgee, the pledgor has merely a counterclaim for the value of the security or a defense *pro tanto* to the action on the debt. *Cass v. Higenbotam*, *supra*; *Harrell v. Citizens Banking Co.*, 111 Ga. 848, 36 S. E. 460. See JOYCE, DEFENSES TO COMMERCIAL PAPER, § 613. But in a situation like that in the principal case it would seem that the bill of lading is more than mere collateral. Under the contract between the buyer and seller, it is the agreed exchange for the payment of the draft. It is clear that total failure of consideration is a good defense as between the original parties to a promissory note. *Perkins v. Brown*, 115 Mich. 41, 72 N. W. 1095; *Wyckoff v. Runyon*, 33 N. J. L. 107; *Divine v. Divine*, 58 Barb. (N. Y.) 264. Similarly, the drawer-payee of a bill of exchange cannot recover from the acceptor where the consideration for the acceptance has totally failed. *French v. Gordon*, 10 Kan. 370; *Hazeltine v. Dunbar*, 62 Wis. 162, 22 N. W. 165. See JOYCE, DEFENSES TO COMMERCIAL PAPER, § 202. And if an indorsee of the payee takes a bill or note with notice of the failure of consideration between the payee and the obligor, he cannot recover on the instrument. *Russ Lumber & Mill Co. v. Muscuppiable Land & Water Co.*, 120 Cal. 521, 52 Pac. 995; *Carey v. Nissle*, 145 Mich. 383, 108 N. W. 733. The indorsee should be in no better position where, having assumed control of the document which he knows to be the consideration for the payment of the draft, he himself causes the failure of consideration. The indorsee must then be taken to assume the seller's duties as well as his rights. *Cf. Walker v. Squires*, Hill & D. (N. Y.) 23; *Guaranty Trust Co. v. Grogan*, 114 Fed. 433. It might be urged that in any event the transfer to the buyer of the beneficial ownership of the goods is a sufficient performance of the contract to preclude a defense of entire failure of consideration. See *Linnell v. Leon*, 206 Mass. 71, 73, 91 N. E. 895. But in fact what the buyer contracted for was a delivery to him of the goods or the bill of

lading, a prerequisite to the ready sale of the goods. On the particular facts of the principal case, however, the conclusion of the court must be supported, for there was not such a material delay as to excuse performance on the part of the defendant. Cf. *Smith v. Vertue*, 9 C. B. (N. S.) 214; *Linnell v. Leon*, *supra*.

**BILLS AND NOTES — PURCHASER FOR VALUE WITHOUT NOTICE — RIGHTS OF PAYEE OF A STOLEN CERTIFIED CHECK WHO HAS GIVEN VALUE FOR IT.** — A. drew a check on the defendant bank, payable to the plaintiff. The defendant certified the check. B. stole it and negotiated it to the plaintiff by posing as a messenger from A. The plaintiff sues for the amount of the check. *Held*, that he cannot recover. *Empire Trust Co. v. Manhattan Co.*, 162 N. Y. Supp. 629 (App. Div.).

At common law a payee could be a holder in due course. *Watson v. Russell*, 3 B. & S. 34; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596. *Contra*, *Charlton Plow Co. v. Davidson*, 16 Neb. 374. But under the Negotiable Instruments Law such a result is not so easily reached. For the definition of a holder in due course apparently requires negotiation. See BRANNAN, NEG. INST. LAW, § 52. And "negotiation" of a bill "payable to order" is accomplished by "the indorsement of the holder completed by delivery." See BRANNAN, *supra*, § 30. As the maker does not pass the bill to the payee by indorsement, in capacity of a holder, this would seem to preclude the payee from becoming a holder in due course. But the general definition of negotiation is a transference "from one person to another in such manner as to constitute the transferee the holder thereof." See BRANNAN, *supra*, § 52. And a payee may be a holder. See BRANNAN, *supra*, § 190. Evidently considering the troublesome phraseology before mentioned as not being an intended modification of the general definition, many courts have held that a payee may be a holder in due course. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646; *Brown v. Rowan*, 91 N. Y. Misc. 220, 154 N. Y. Supp. 1098. See *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794, 808. The court, however, in the principal case distinguishes these cases on the ground that in them the improper negotiation was by an agent, and not by a thief. This, it was argued, prevented the payee from being an "immediate" party and thus allowed him to be a holder in due course. It would seem, however, that such analysis is founded on feeling rather than construction. For granted the inference in the clause requiring "indorsement of the holder," then in neither case can the payee be a holder in due course; while if the general definition is to cover, it must apply equally well in either case.

**BILLS AND NOTES — RIGHTS OF A DONEE AFTER MATURITY OF A NOTE VOIDABLE FOR ILLEGALITY.** — The defendant executed and delivered his promissory note, bearing a secular date, on Sunday. The plaintiff who is suing on the note is a donee after maturity without actual notice. *Held*, that he may recover. *Gooch v. Gooch*, 160 N. W. 333 (Ia.).

A contract entered into on Sunday is voidable merely and not void under the Sunday law of Iowa. *Collins v. Collins*, 139 Ia. 703, 117 N. W. 1089. See CODE, § 5040. The defense of the maker of a note voidable for this or any other reason is usually considered to be personal or equitable. See 2 AMES, CASES ON BILLS AND NOTES, 812. It follows on well-known principles that neither a donee nor a purchaser after maturity should recover. *Bank of British North America v. McComb*, 21 Manitoba 58; *Wing v. Dunn*, 24 Me. 128; *Cowing v. Altman*, 71 N. Y. 435. Courts of Iowa have, however, held that the indorsee for value without notice of a matured note made on Sunday but dated on a secular day may recover. *Leightman v. Kadetska*, 58 Ia. 676, 12 N. W. 736. See *Johns v. Bailey*, 45 Ia. 241. The theory of these cases on which the court in the principal case relied is that "it is only against a person in equal fault that a defendant can be allowed to allege his own turpitude." *Leightman v. Ka-*



*detska, supra*. Thus the defense of illegality is not considered to be an equity in favor of the maker. By such a decision the clearly announced and accepted policy of the legislature that secular transactions shall not take place on Sunday is practically defeated. Where the transferee has paid no value there can be no possible counterbalancing policy requiring his protection.

CARRIERS — BILLS OF LADING — CONSTRUCTION OF "RESTRAINT OF PRINCES" IN A BILL OF LADING. — The captain of a German ship when in mid-ocean obeyed an order from the owners to return to New York on account of the declaration of war between Germany and the Entente Powers. The ship is libeled for non-delivery of a cargo billed to Plymouth and Cherbourg on a bill of lading which contained the usual "restraint of princes" exemption. The court found, as facts, that the captain acted under orders, and not in the use of his discretion as master; that, at the time, war was imminent, but was not actually declared until two days later; and that, if the ship had proceeded at its usual speed and without harbor delays it would have cleared the ports about thirteen hours before the declaration of war. *Held*, that the libellant may recover. *Guaranty Trust Co. v. Kronprinzessin Cecelie*, 56 N. Y. L. J. 915 (C. C. A., 1st Circ.).

It was apparently conceded in the case that no liability arises in favor of cargo owners, if the decision of a captain in an emergency turns out adversely to their interests. The liability in the principal case was predicated on the fact that the captain was acting on the owner's orders. But it seems probable that the conceded rule, as that of general average, is based on the idea that ship and cargo are a joint maritime enterprise. See HUGHES, ADMIRALTY, § 20. The individual interest is subordinate to that of the many. So it would seem justifiable to extend in law what the wireless has extended in fact, and allow a freedom from liability to follow the owner's discretion when circumstances make him the better judge. In any case, the "restraint of princes" exemption in the bill of lading should prevent recovery. Early cases lay down the rule that the restraint must be actual and operative, not merely expected and contingent. *Atkinson v. Ritchie*, 10 East 530, 531; *Hadkinson v. Robinson*, 3 Bos. & P. 388, 392; *King v. Delaware Ins. Co.*, 6 Cranch (U. S.) 71. But the modern law, pursuing a general tendency to construe contracts rationally rather than literally, has modified this rule, and it seems that a well-founded fear of restraint is sufficient. See ABBOTT, SHIPPING, 14 ed., 627; STEPHENS, BILLS OF LADING, 53. Thus, where a blockade has been established, the clause is held to cover this contingency even though there are chances for the ship to get through. *Geipel v. Smith*, L. R. 7 Q. B. 404, 409; *The Styria*, 101 Fed. 728, 731, aff'd 186 U. S. 1. Cf. *contra*, *Kacianoff v. China, etc. Co.*, [1913] 3 K. B. 407. Furthermore, even though no actual blockade has been established, a grave danger of capture is considered sufficient restraint to bring the case within the saving clause. *Nobel's Explosives Co. v. Jenkins & Co.*, [1896] 2 Q. B. 326, 331. But cf. *Matsui & Co. v. Watts, etc. Co.*, 114 L. T. R. (N. S.) 326. Even danger to shipping from mine fields is considered within the term "restraint of princes." *East Asiatic Co. v. S. S. Tronto Co.*, 31 T. L. R. 543. If a given condition creating reasonable risk of capture is within the clause, it would seem but just that likewise a reasonable risk of a condition which would result in capture should come within the clause.

CONFLICT OF LAWS — SHARES OF STOCK — JURISDICTION TO ADJUDICATE OWNERSHIP. — A resident of Tennessee died possessed of stock in a Kentucky corporation the certificates being in his possession. A Tennessee court granted letters of administration to the widow, and finding that the deceased was domiciled in Tennessee, decreed that the widow was entitled to the stock according to Tennessee law. The widow brought suit against the corporation in Kentucky to have the stock transferred to her on the books of the corpora-

tion. The mother of the deceased, who was not before the Tennessee court at the time of the decree, intervened, claiming that the domicil of the deceased was in Kentucky, and that by Kentucky law, she, as next of kin, should share with the widow. The widow claimed full faith and credit for the finding of the Tennessee court as to domicil. The Kentucky court refused full faith and credit on the grounds that the Tennessee court had no jurisdiction of the stock. The widow then prosecutes this writ of error. *Held*, that full faith and credit under the Constitution of the United States need not be extended to the finding of the Tennessee court. *Baker v. Baker, Eccles & Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 115.

For a further discussion of this case, see NOTES, p. 486.

CONSIDERATION — WHAT CONSTITUTES CONSIDERATION — CONTRACT TO SUPPLY INDEFINITE BUSINESS REQUIREMENTS. — By the terms of a contract, the defendant, a sugar manufacturer, agreed to sell, and the plaintiff, a wholesale grocer, agreed to buy, all of the plaintiff's "August requirements" of sugar at a fixed price. Upon a breach by the defendant, the plaintiff brings suit. *Held*, that the contract is void for lack of mutuality. *T. W. Jenkins & Co. v. Anaheim Sugar Co.*, 237 Fed. 278.

An agreement to supply a commodity merely as the buyer may desire is unenforceable for lack of consideration, since the buyer incurs no detriment. *American, etc. Co. v. Kirk*, 68 Fed. 791; *Teipel v. Meyer*, 106 Wis. 41, 81 N. W. 982. But if, as in the principal case, he agrees to buy from no one else, this limitation on his freedom of action furnishes sufficient consideration, although he may not be bound actually to buy from the seller. See 14 HARV. L. REV. 150. This is generally so in a contract to supply in such quantities as the buyer may desire for his business, or conversely, to buy as much of a product as the producer may desire to sell. *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Burgess, etc. Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367. Some courts, however, have erroneously taken the view that the obligation supporting the promise to sell is a corresponding promise to buy. To reach this result it was necessary to presume that the business was to continue, and hence that the buyer would buy, even if the market price fell. But in the principal case this presumption cannot be made, since the commodity supplied is not incidental to an established business, but is the entire subject of the business. Therefore if prices fall, the buyer may escape buying by ceasing to trade in the commodity. On this basis the court holds the contract void for lack of mutuality. Now the requirement of mutuality can properly mean only that a bilateral contract, to be enforceable, must be binding on both parties. This is so, if consideration is furnished by each party. But the theory of the principal case further requires that the obligations must be correlative — that if one party is bound to sell, the other must be bound to buy. This result is indefensible and adds an unwarranted technicality to the law of contracts. See *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 345-46, 64 N. E. 680, 683. Another recent federal case makes a sound application of the principles here involved. *Ramey Lumber Co. v. Schroeder Lumber Co.*, 237 Fed. 39.

CONSTITUTIONAL LAW — VALIDITY OF LAWS REGULATING THE SALES OF GOODS IN BULK. — The New York "Sales in Bulk Act" provides that the sale or transfer in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of trade shall be void as against the creditors of the seller or transferor unless certain formalities calculated to notify such creditors of the transaction are observed. LAWS, 1914, c. 507; PERSONAL PROPERTY LAW, § 44. The constitutionality of this statute was recently put in issue. *Held*, that the act is constitutional. *Klein v. Maravelas*, 56 N. Y. L. J. 1257 (Ct. of App.).



The history of this legislation is interesting. Similar acts are in force in many jurisdictions, but their validity has in several instances been subjected to vigorous attack. In fact an earlier New York statute which, except for being held to apply to merchants only, was identical to the present act, was declared unconstitutional on the two distinct grounds that it limited the liberty to contract and denied to merchants the equal protection of the laws. *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404. Other states, however, held such statutes unconstitutional solely on the ground that a special small class was benefited. *McKinstier v. Sager*, 163 Ind. 671, 72 N. E. 854; *Off & Co. v. Morehead*, 235 Ill. 40, 85 N. E. 264. When such statutes therefore were amended to a form similar to that of the present New York statute, limiting the effect of the act to no special class, they were upheld in the very jurisdictions which formerly condemned them. *Hirth, Krause Co. v. Cohen*, 177 Ind. 1, 97 N. E. 1; *Johnson v. Belosky*, 263 Ill. 363, 105 N. E. 287. And, except in Utah, such an act is uniformly held unobjectionable. *Lemieux v. Young*, 211 U. S. 489; *Kidd, Dater & Price Co. v. Musselman Grocery Co.*, 217 U. S. 461; *Squire Co. v. Tellier*, 185 Mass. 18, 69 N. E. 312; *McDaniels v. J. J. Conelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37; *Kett v. Masker*, 86 N. J. L. 97, 90 Atl. 243. But see *Block v. Schwartz*, 27 Utah 387, 76 Pac. 22. The objection that this is class legislation seems accordingly to be effectively silenced, but the New York court had also decided that it unduly limited the right to contract. In order to uphold the validity of the present act, therefore, the court was forced to reverse itself, which it very frankly did.

CORPORATIONS — RIGHT OF TRUSTEE IN BANKRUPTCY AGAINST TRANSFEE OF STOCK ISSUED FOR OVERVALUED PROPERTY — "ACTUAL FRAUD" — CONTRACT BY CORPORATION TO BUY BACK THE STOCK. — A., B. and C. were the incorporators of a company with a capital stock of \$60,000, promoted by A., B., C. and D. Stock to the par value of \$21,900 was issued as fully paid up to A. and B. in return for a secret process received from them. Neither A., B., C. nor D. believed the process to be worth \$21,900 at the time; but all of them believed the corporation could pay dividends on the total capital stock. D. contracted to buy of A. and B. 300 shares, or half the capital stock, for \$15,000, reserving an option to return the shares and receive the money back at any time. After paying in \$13,600, he exercised the option and the corporation executed a mortgage to him to secure the indebtedness. The trustee in bankruptcy petitioned to have the mortgaged property applied to the payment of the general creditors who had become such after D. filed his mortgage. *Held*, that the property could not be applied to their benefit. *Durant v. Brown*, 236 Fed. 609.

For a discussion of the case, see NOTES, p. 503.

DIVORCE — ALIMONY — REFUSAL TO PAY ALIMONY PUNISHED AS CONTEMPT. — In divorce proceedings, the court ordered the husband to pay alimony *pendente lite*. On his failure to pay he was ordered to show cause why he should not be committed for contempt. He answered that he had no property and was unable to procure employment. After jury trial with verdict finding the defendant guilty of contempt, an order of commitment was made from which the defendant appeals. *Held*, that the commitment was proper. *Fowler v. Fowler*, 161 Pac. 227 (Okla.).

The Oklahoma constitution expressly forbids imprisonment for debt. OKLA. CONST., Art. 2, § 13. The obligation to pay alimony is an expression of a social duty, and that it is not a debt is shown by the fact that the amount may be varied in the discretion of the court granting it. *Cox v. Cox*, 3 Add. Ecc. 276. See *Amos v. Amos*, 4 N. J. Eq. 171; *Moe v. Moe*, 39 Wis. 308. As a result the great weight of authority is to the effect that commitment for failure to pay alimony is not imprisonment for debt. *Andrew v. Andrew*, 62 Vt. 495, 20 Atl.

817; *Wightman v. Wightman*, 45 Ill. 167; *Chase v. Ingalls*, 97 Mass. 524. *Contra*, *Coughlin v. Ehler*, 39 Mo. 285; *Steller v. Steller*, 25 Mich. 159. Cf. *Haines v. Haines*, 35 Mich. 138. See *Murray v. Murray*, 84 Ala. 363, 4 So. 239; 11 HARV. L. REV. 552. Granting that imprisonment for failure to pay alimony is constitutional, some cases hold that a court of equity is without power to punish a defendant for failure to pay alimony. *Ex parte Todd*, 119 Cal. 57, 50 Pac. 1071; *Messervy v. Messervy*, 85 S. C. 189, 67 S. E. 130. However, the objection does not rest in lack of power, but rather in the practical difficulty of requiring a person to find work while imprisoning him during the period in which he is supposed to find it. *Webb v. Webb*, 140 Ala. 262, 37 So. 96. But the application of pressure in such a case will often energize a defendant without ambition, or bring a contumacious one to terms. So the balance of convenience would seem to favor commitment in this class of cases. *Lester v. Lester*, 63 Ga. 356; *Lansing v. Lansing*, 41 How. Prac. (N. Y.) 248.

DUTY OF CARE — TRESPASSERS — MISFEASANCE AND NONFEASANCE — MORAL DUTY. — Plaintiff's intestate, while riding as a trespasser on the top of a freight car of a railroad company, was struck by a wire of the defendant company, which a storm had caused to sag so low as to endanger the safety of all persons on cars of that character and which the defendant had failed to repair. As a result he was thrown to the ground and killed. There was evidence tending to show that the defendant was a trespasser in carrying its wires over the railroad company's line. *Held*, that the plaintiff may recover. *Ferrell v. Durham Traction Co.*, 90 S. E. 893 (N. C.).

As the deceased was a trespasser and the death was occasioned by a mere condition of the premises, it seems clear that no recovery could be had against the railroad company. See Jeremiah Smith, "Landowners' Liability to Children," 11 HARV. L. REV. 349. Now a landowner, or those claiming under him, may recover from one having a right to use the premises for nonfeasance as to a condition of the premises over which he has been given control. *Hawkin v. Shearer*, 56 L. J. (Q. B.) 284. Cf. *Elliott v. Roberts & Co.*, 32 Times L. R. 478. See 30 HARV. L. REV. 186. So it would seem, on a doctrine akin to estoppel, that recovery might also be had from a trespasser under similar circumstances. Hence, in the principal case, if the deceased had been an employee of the railroad company, the defendant would be liable. But, as both the deceased and the defendant were trespassers upon the premises of another, its liability must be determined upon elementary principles. Where there is foreseeability of danger to others, one must modify his conduct accordingly. See *Garland v. B. & M. R. Co.*, 76 N. H. 556, 86 Atl. 141. So if the death had been caused by a continuously active force, such as electricity, the defendant would be liable. See 28 HARV. L. REV. 818. But here there was no action by the defendant; its liability, if any, must be founded upon nonfeasance. But there was no legal relation between the defendant and the deceased from which a duty to act would arise. It would seem that the case is another instance of liability founded upon moral duty. See 30 HARV. L. REV. 289. But it is of especial significance, as hitherto the so-called "humanitarian doctrine" has been applied only to railroads and other inherently dangerous instrumentalities.

EVIDENCE — OPINION EVIDENCE — NON-EXPERT OPINION AS TO AGE. — In a prosecution for selling liquors to minors, non-expert witnesses were allowed to give their opinions, based upon the appearance of the vendees, that the vendees were under eighteen years of age. *Held*, that the evidence was improperly admitted. *State v. Koettgen*, 99 Atl. 400 (N. J.).

Whether appearance may be used to prove age, is a matter to be determined, like all questions of relevancy, by a balance of convenience; the probative value of the evidence must outweigh any tendency to prejudice or confuse the jury. Clearly the probative value of the appearance of a grown person is



high — the counterbalancing tendencies are slight. Accordingly, the courts usually allow the jury to consider the appearance of the person whose age is in question. *Commonwealth v. Hollis*, 170 Mass. 433, 49 N. E. 632; *State v. Thomson*, 155 Mo. 300, 55 S. W. 1013. See WIGMORE, EVIDENCE, § 222. *Contra, Thinger v. State*, 53 Ind. 251. But the fact that appearance is clearly relevant is not decisive of the question whether opinion of non-experts based upon appearance is competent. The general rule for the admission of non-expert opinion is that the facts upon which it is based must be such that they cannot adequately be described to the jury, and they must be such as can be readily comprehended by an ordinary observer. See *Commonwealth v. Sturtivant*, 117 Mass. 122, 133; WIGMORE, EVIDENCE, § 1924. Such testimony is really a necessary summary of facts. Under this rule, non-experts have been allowed to give their opinions that a person was insane, or scared, or intoxicated, or even that a spot was made by blood. *Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S. 612; *State v. Ramsey*, 82 Mo. 133; *People v. Eastwood*, 14 N. Y. 562; *Greenfield v. People*, 85 N. Y. 75. Opinion as to age, based on appearance, meets these conditions, and so most courts have admitted it. *State v. Bernstein*, 99 Iowa 5, 68 N. W. 442; *Jones v. State*, 32 Tex. Cr. App. 108, 22 S. W. 149. Cf. *Commonwealth v. O'Brien*, 134 Mass. 200. See *Elsner v. Supreme Lodge*, 98 Mo. 640, 645, 11 S. W. 991, 992; WIGMORE, EVIDENCE, § 1974. *Contra, Marshall v. State*, 49 Ala. 21. Moreover, the application of the rules governing this sort of evidence should rest in the discretion of the trial court, and its decision ought not, ordinarily, to be reversed by a reviewing court. See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 516.

EVIDENCE — TESTIMONY OF PARTIES IN SUIT FOR DIVORCE — MUTUAL CORROBORATION. — In a suit for divorce on the ground of adultery, the petitioner testified to the fact and another witness testified to a full confession by the respondent. By the settled law of the state neither the uncorroborated confession of the defendant nor the uncorroborated testimony of the petitioner is sufficient to warrant a decree. *Held*, that a divorce cannot be granted on mutual corroboration. *Garrett v. Garrett*, 98 Atl. 848 (N. J.).

The law of the state in the principal case that a decree of divorce will not be granted upon the uncorroborated testimony of the petitioner is supported by numerous other jurisdictions. *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564; *Grover v. Grover*, 63 N. J. Eq. 771, 50 Atl. 1051. See MINN. GEN. STAT. 1913, § 8465. See 3 WIGMORE, EVIDENCE, § 2046. *Contra, Baker v. Baker*, 195 Pa. St. 407, 46 Atl. 96. So likewise the rule that a decree will not ordinarily be granted upon the uncorroborated confession of the respondent has much support. *Betts v. Betts*, 1 Johns. Ch. (N. Y.) 197; *Kloman v. Kloman*, 62 N. J. Eq. 153, 49 Atl. 810. See 3 WIGMORE, EVIDENCE, § 2067. But it cannot be laid down as either logically or legally impossible that two pieces of evidence, either insufficient alone, should be mutually corroborative. See JOY, EVIDENCE OF ACCOMPLICES, 100 ff. Whether mutual corroboration is equivalent to corroboration *aliunde* must depend upon the reason why corroboration is required in each case. The requirement that the petitioner's testimony be corroborated is merely a survival, in large part, of the ancient rule of the Roman and Canon law that more than one witness is necessary to prove any fact. See 3 WIGMORE, EVIDENCE, §§ 2032, 2046. Therefore, since the respondent is a second witness, his confession is sufficiently corroborative. But the reason for refusing to grant a decree on the uncorroborated confession of the respondent is more than merely quantitative; it is the danger of collusion. It should not be within the power of the parties to sever the marriage relation at will. *Holland v. Holland*, 2 Mass. 154. Corroboration by the petitioner cannot, therefore, satisfy this rule. And, since both rules must be satisfied to warrant a decree, the decision in the principal case must follow. Such is the conclusion reached in other cases. *Johnson v. John-*

son, 182 S. W. 897 (Ark.); *Rie v. Rie*, 34 Ark. 37; *Hayes v. Hayes*, 144 Cal. 625, 78 Pac. 19. But if the confession is made in open court the danger of collusion is lessened. So some courts have held that the petitioner's testimony is then sufficient corroboration. *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730; *Hague v. Hague*, 95 Atl. 192 (N. J.).

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — INTERPLEADING A CLAIMANT WHO IS A CITIZEN OF THE SAME STATE AS THE PLAINTIFF. — The plaintiff bank, a New York corporation, was sued for a deposit, in a federal court, by a New Jersey corporation. The plaintiff, thereupon, brought a bill in the nature of an interpleader in the same court, praying that two citizens of New York and a New York corporation, claimants for the same fund, interplead in the suit. The original claimant contended that the bill, if allowed, would deprive the court of its jurisdiction, which was based on diversity of citizenship. *Held*, that the bill be granted. *Sherman Nat. Bank v. Shubert Theatrical Co.*, 56 N. Y. L. J. 1087 (Dist. Ct., S. D., N. Y.).

Diversity of citizenship, sufficient to create federal jurisdiction, is only achieved when all parties plaintiff are citizens of different states from all parties defendant. *Strawbridge v. Curtiss*, 3 Cranch (U. S.) 267. Yet actions may be "controversies between citizens of different states," even though parties not from different states are, at various times, involved in the determination of the suit. Thus, a bill to set aside a fraudulent conveyance which would, if unhampered, defeat an original decree over which the federal court had jurisdiction has been sustained without regard to the citizenship of the parties. *Hobbs Mfg. Co. v. Gooding*, 164 Fed. 91. See 22 HARV. L. REV. 304. So any proceeding which may be truly considered ancillary to an original proceeding, in which the court has jurisdiction, has been held maintainable without reference to citizenship. *Root v. Woolworth*, 150 U. S. 401. See *New Orleans v. Fisher*, 180 U. S. 185, 196. It is true that from the point of view of the old chancery courts, any bill to enjoin a suit at law was an original bill. The federal courts, however, regard such as merely supplementary to the original suit. *Freeman v. Howe*, 24 How. (U. S.) 450, 460; *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609, 633. But an interpleader involves not alone an injunction — it involves the determination of the true owner of the claim. Can it be said that the determination of whether two strangers to the original suit are the owners of the claim, even though it involves the determination of whether the original claimant is the owner or not, is truly ancillary to the original proceeding? An early case has so held without discussion. *Stone v. Bishop*, 4 Cliff. (U. S.) 593. While the result may be desirable, the logic is not conclusive.

INJUNCTIONS — ACTS RESTRAINED — PUBLICATION OF PHOTOGRAPH WHEN EXCLUSIVE PHOTOGRAPHIC PRIVILEGES HAVE BEEN GRANTED TO ANOTHER. — The promoters of a dog show purported to assign the sole photographic rights in connection with the show to the plaintiffs. The defendants who had knowledge of the concession took photographs of the show and published them in their magazine. The plaintiffs seek an injunction restraining the further publication of the photographs. *Held*, that the injunction do not issue. *Sports & General Press Agency v. "Our Dogs" Publishing Co.*, [1916] 2 K. B. 880.

It is generally recognized that the literary or artistic producer has a property right in his creations. After publication such right may be protected only by copyright. *Pierce-Bushnell Co. v. Werckmeister*, 72 Fed. 54. But before publication, the common law will recognize and protect original literary and artistic property. So the right of a professor to restrain the publication of lectures orally delivered in his classroom, has been established. *Caird v. Sime*, L. R. 12 A. C. 326. An author has a similar property in his composition. *Millar v. Taylor*, 4 Burr. 2303, 2315; *Palmer v. De Will*, 47 N. Y. 532; *Macklin v.*



*Richardson*, Amb. 694. The same is true of an artist and his paintings. *Prince Albert v. Strange*, 2 De G. & Sm. 652, 1 Mac. & G. 25, 1 H. & T. 1; *Turner v. Robinson*, 10 Ir. Ch. 121, 510. Indeed, the publication of photographs taken of models grouped to imitate a painting has been enjoined at the petition of the artist. *Turner v. Robinson*, *supra*. Cf. *Mansell v. Valley Printing Co.*, [1908] 2 Ch. 441. It would thus seem clear that in literary and artistic lines, not only are the productions themselves protected from imitation, but also the ideas which were their inspiration. In the principal case the plaintiff desires an injunction against the use of the inspiration (the dog show), produced here by physical labor and business acumen rather than by artistic thought, which caused the creation of his photographs. That the production itself, *i. e.*, the photographs, partake rather of news than artistic achievement should not alter the rights of the parties. For the compilation of stock quotations has frequently been protected. *Exchange Telegraph Co. v. Gregory*, [1896] 1 Q. B. 147; *Kierman v. Manhattan Co.*, 50 How. Prac. (N. Y.) 194; *Exchange Telegraph Co. v. Central News*, [1897] 2 Ch. 48. It is difficult to see why a setting produced by labor should be entitled to less protection than one created in the mind. The case presents no difficulties on the problem of publication, for an exhibition like that in the principal case has not been deemed sufficiently public to deprive the promoters of their common-law right. *Turner v. Robinson*, *supra*; *Macklin v. Richardson*, *supra*. Nor is the assignability of the right contended for questioned. *Exchange Telegraph Co. v. Gregory*, *supra*.

JUDGMENTS — FOREIGN JUDGMENTS — EQUITABLE DECREE AS A CAUSE OF ACTION IN ANOTHER STATE. — The plaintiff sued for a divorce from her husband, one of the present defendants, in Illinois, where they were both domiciled. The court granted the divorce and entered a decree directing the payment of \$4000 alimony, "to be satisfied by the conveyance" of certain land in Wisconsin. He conveyed to the other defendants, who had notice. She brings this suit in Wisconsin upon the Illinois decree to set aside this conveyance and to have the land conveyed to herself. The defendants demur. *Held*, that the demurrer be overruled. *Mallette v. Carpenter*, 160 N. W. 182 (Wis.).

A decree to convey land in a foreign jurisdiction when based on a *priori* equity in the land, has been held a binding adjudication of the facts to which full faith and credit are due. *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Burnley v. Stevenson*, 24 Ohio St. 474. See *Winn v. Strickland*, 34 Fla. 610, 630, 16 So. 606, 612. The Supreme Court, however, is apparently of the opinion that no decree for the conveyance of foreign land is within the full faith and credit clause. See *Fall v. Eastin*, 215 U. S. 1. For otherwise a foreign court would determine title to domestic land. See *Bullock v. Bullock*, 52 N. J. Eq. 561, 565-67, 30 Atl. 676, 677-78; 25 HARV. L. REV. 653, 654. According to either view the decree in the principal case is ineffective, for the order to convey is not an adjudication of prior equities in the land, but only a method of satisfying an unrelated judgment. *Bullock v. Bullock*, 52 N. J. Eq. 561, 570, 30 Atl. 676, 679; *Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 75 Neb. 120, 113 N. W. 175. Nor could the Wisconsin court accept the Illinois decision, though not compelled to, on the ground that it has undoubtedly indicated the best method of satisfying the judgment for alimony. For the method of execution that follows a breach of a right is a matter to be determined by the law of the forum. Nevertheless, although the principal case is technically wrong, the result is substantially right. For, though the decree to convey Wisconsin land is ineffective in Wisconsin, the Illinois decree for the payment of \$4000 is nevertheless binding. *Sistare v. Sistare*, 218 U. S. 1, 11-17; *Bullock v. Bullock*, 57 N. J. L. 508, 31 Atl. 1024. So the conveyance to the codefendants may be set aside as in fraud of creditors. *Weeks v. Hill*, 88 Me. 111, 33 Atl. 778. See *Wolford v. Farnham*, 47 Minn. 95, 97, 49 N. W. 528, 529.

**LEGACIES — ADEPTION — EFFECT OF DISTRIBUTION OF SUBSIDIARY SHARES ON BEQUEST OF SHARES.** — The testatrix in her will left a specific legacy of thirty shares of stock of the Standard Oil Company. Between the execution of the will and the death of the testatrix, the corporation, as required by the decree of the United States Supreme Court, distributed the stock of thirty-nine subsidiary corporations, held by it, among its stockholders. The testatrix still retained the original thirty shares of stock at her death. A contest now arises between the specific legatee and the residuary legatee as to the shares of the subsidiary companies. *Held*, that the residuary legatee is entitled. *In re Brann*, 114 N. E. 404 (N. Y.).

The problem involved is not really one of ademption, for the original thirty shares still exist. Yet as the value of these shares largely depended upon the holding by the Standard Oil Company of the shares of the subsidiary companies, whose ownership is now in question, the analogy is close. Originally the ademption of a legacy depended upon the intention of the testator. It was accordingly held that a change accomplished by operation of law would not adeem a legacy. *Partridge v. Partridge*, Cas. t. Talb. 226; *Walton v. Walton*, 7 Johns. Ch. (N. Y.) 258. But it is now well settled that the intention of the testator no longer governs and that the specific thing bequeathed must still exist. *In re Bridle*, 4 C. P. D. 336; *Snowden v. Banks*, 9 Ired. (N. C.) 373; *Harrison v. Jackson*, 7 Ch. Div. 339; *Ametrano v. Downs*, 170 N. Y. 388, 63 N. E. 340. Nevertheless, a legacy is not adeemed if the alteration is purely formal. *Oakes v. Oakes*, 9 Hare 666. Such is the case where there is a mere subdivision of a company's shares. *Re Greenberry*, 55 Sol. J. 633. But the distribution of some of the property of a corporation even if that property be shares in subsidiary companies, can hardly be a mere subdivision of the original shares. *Cf. In re Slater*, [1907] 1 Ch. 665. But see *Re Clifford's Estate*, 56 Sol. J. 91; *In re Peirce*, 25 R. I. 34, 54 Atl. 588. Such distribution in fact much more closely resembles the declaration of an extraordinary dividend. *Cf. Bailey v. Railroad Co.*, 22 Wall. (U. S.) 604; *Brundage v. Brundage*, 60 N. Y. 544.

**MARRIAGE — VALIDITY — PRESUMPTION OF DIVORCE FROM FORMER SPOUSE.** — The plaintiff sued for a share in the deceased's estate as surviving widow. The defendant was the deceased's wife by a ceremonial marriage performed after deceased's separation from the plaintiff. It appeared that the marriage to the plaintiff was ceremonial, that the marriage to the defendant, also ceremonial, was followed by a long period of cohabitation with the birth of ten children, and that plaintiff had remarried after deceased left her, believing him dead. The plaintiff offered no evidence to disprove the termination of the first marriage by divorce. *Held*, that the burden was on the plaintiff to negative the dissolution of the first marriage, and that the burden had not been met. *In re Hughson's Estate: Brigham v. Hughson*, 160 Pac. 548 (Cal.).

For a discussion of this case, see NOTES, p. 500.

**MASTER AND SERVANT — WORKMEN'S COMPENSATION — EFFECT OF NATURAL DEATH OF EMPLOYEE UPON PAYMENT OF INSTALLMENTS NOT YET DUE.** — Deceased was injured while in the employ of the defendant. Compensation for one hundred and twenty-eight weeks at a weekly rate was awarded him under the Workmen's Compensation Act. CONSOL. LAWS N. Y., SUPP. 1915, 741. He died before the termination of that period, from causes having no connection with the accident. His representatives claim the value of the payments that have come due since his death. *Held*, that no more payments need be made. *Wozneak v. Buffalo Gas Co.*, 161 N. Y. Supp. 675.

No provision of the statute covers the case explicitly. The argument must then be from the general purpose of the legislation. If workmen's compensation gives damages for physical hurt suffered, the damage has accrued and the right



to compensation become vested, so that, under survival statutes, it will pass to the personal representative of the deceased. If the compensation is for wage-loss resulting from the injury, evidently the loss ceases and the payments stop when the workman dies from other causes. The common statement is that the compensation is for wage-loss, not for suffering. See P. Tecumseh Sherman, "The Consequences of Accidents under Workmen's Compensation Laws," 64 U. PA. L. REV. 417. In favor of this are the usual provisions for an amount of compensation related to the loss of wages; opposed to it are the provisions whereby permanent injury is compensated by payments for a fixed period that may be shorter than the life of the employee. In the principal case the decision was more easily reached because of a provision that if the payments were commuted to a lump sum regard should be had for "life contingencies." CONSOL. LAWS N. Y., SUPP. 1914, 1004. An analogous result has been reached under the Massachusetts statute in a case where on the death of a workman from an accident, compensation by installments for three hundred weeks was decreed to his dependent mother, and the mother died before the end of the three hundred weeks. *Murphy's Case*, 224 Mass. 592, 133 N. E. 283. *Contra*, *State ex rel. Munding v. Industrial Commission*, 92 Ohio St. 434, 111 N. E. 299. Cf. *United Collieries, Ltd. v. Simpson*, [1909] A. C. 383.

#### MORTGAGES — ASSIGNMENT — INFORMAL ASSIGNMENT OF POWER OF SALE.

— Plaintiff executed a deed of land as security for a promissory note under sections 3306 and 3310 of the Code of Georgia. These sections provide for an absolute title in the grantee in such cases with an equity of redemption in the grantor. The deed contained a power of sale. The note was transferred without recourse to defendant, and the deed was delivered to him with a written transfer on the back. The plaintiff seeks an injunction to restrain the defendant from executing the power of sale. *Decreed*, that the injunction be granted. *McCook v. Kennedy*, 90 S. E. 713 (Ga.).

The court argues that the defendant, not having the legal title, cannot execute the power of sale. "But the defendant has the equitable title, and all the benefits appurtenant to the land are his in equity. *Culler v. Haven*, 8 Pick. (Mass.) 490; *Olds v. Cummings*, 31 Ill. 188. It would seem then that equity would create some method of giving him these benefits. The problem of the assignment of *choses* in action was solved by giving the assignee an equitable right and a fictitious power of agency. Equity has already given the assignee of a mortgage as security an equitable title, and it might also give him a fictitious power of agency to execute the power of sale. Such an agency could be created without a deed. *Lyon v. Pollock*, 99 U. S. 668. Upon exercising the power for his own benefit he would put his equitable title in the purchaser, and bind the mortgagee, his principal, to make a conveyance of the legal title. The courts, however, have been hostile to these powers of sale. Thus a power of sale unless made out to the mortgagee and his "assigns" may not even be executed by a legal assignee of the mortgage. *Flower v. Elwood*, 66 Ill. 438. But even when the word "assigns" is included the policy of the law is to be so jealous of a right of redemption that "assigns" is construed as meaning legal assigns only. *Dameron v. Eskridge*, 104 N. C. 621, 10 S. E. 700; *Bradford v. King*, 18 R. I. 743, 31 Atl. 166.

MORTGAGES — RIGHTS OF MORTGAGEE — DEED OF TRUST PURPORTING TO SECURE JOINT RIGHTS AS SECURITY FOR CLAIMS HELD SEVERALLY. — The owner of property executed a deed of trust to secure promissory notes made by him to joint payees, in consideration of a parol contract. The transaction was intended to secure certain claims which were to arise in the payees severally. The payees did not negotiate the notes, deeming them, with the deed of trust, sufficient for their protection in the execution of the contract. They now seek indemnity under the deed of trust for their several claims. *Held*, that these

claims were within the security afforded. *Simms v. Ramsey*, 90 S. E. 842 (W. Va.).

A mortgage may be made to joint mortgagees to secure claims to which they are severally entitled. *Adams v. Niemann*, 46 Mich. 135, 8 N. W. 719; *Sumner v. Dalton*, 58 N. H. 295. It is frequently held, however, that they take, not as joint tenants, but as tenants in common, each getting an interest in proportion to his claim. *Brown v. Bates*, 55 Me. 520; *Farwell v. Warren*, 76 Wis. 527, 45 N. W. 217. See JONES, MORTGAGES, § 135. Such a mortgage affords adequate protection, since it may only be discharged in conformity to the rights secured. *Waterman v. Webster*, 108 N. Y. 157, 15 N. E. 380. The principal case raises a further complication in the existence of two distinct sets of rights. The trust deed purports to secure joint notes, while the ultimate claims sought to be protected are several. Now anything which extinguishes the obligation actually secured would also discharge the mortgage or trust deed, and here consequently the security for the several claims. *Atwater v. Underhill*, 22 N. J. Eq. 599. Thus either joint payee can give an effective release of the joint claim, upon payment to him alone. *Wright v. Ware*, 58 Ga. 150. Or if one died, the survivor would have a clear title to the joint claim, and so to the security. *Blake v. Sanborn*, 8 Gray (Mass.) 154. Such a situation is guarded against by considering a fiduciary relationship to have been established between the two sets of claims, the joint set substantially being security for the several. Thus the obligees in their joint capacity could be said to hold the joint claims in trust for themselves as several obligees. But see *Bates v. Coe*, 10 Conn. 280, 293.

PARTIES — AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT — JOINDER OF PRINCIPAL AND WILFUL AGENT. — The plaintiff sued a railroad and its engineer jointly, for personal injuries. The engineer was charged with wanton or wilful misconduct. The defendants demurred. *Held*, that the servant being liable in trespass, and the railroad in case, there was fatal misjoinder of parties. *Louisville & Nashville Railroad Co. v. Abernethy*, 73 So. 103 (Ala.).

Case has generally been held the proper form of action against a master for his servants' wanton acts, even though the servants' liability lay in trespass. *Mossemar v. Callendar, etc. Co.*, 24 R. I. 168, 52 Atl. 806. *Contra*, *Brokaw v. New Jersey R., etc. Co.*, 32 N. J. L. 328. *Cf. Hewitt v. Swift*, 3 Allen (Mass.) 425. Courts were formerly inclined to consider that the master's liability for the acts of his servant was original, not imputed. Therefore, they argued, case properly lay, for an original liability seemed indirect. *Cf. Sharrod v. London, etc. Ry. Co.*, 4 Exch. 580, 585; *Southern Bell Telephone, etc. Co. v. Francis*, 109 Ala. 224, 234, 19 So. 1, 4. The present tendency is to consider the liability imputed. It must therefore be of the same sort as the servant's, as if the master had acted himself. See *Schumpert v. Southern Ry. Co.*, 65 S. C. 332, 337, 43 S. E. 813, 815. Yet the courts have not changed their position. But no matter what the master's liability may be, the propriety of joining master and servant is still in question. The courts are squarely split. See *Alabama Southern Ry. v. Thompson*, 200 U. S. 206, 218. Some disallow joinder, even where both are liable in case. *Parsons v. Winchell*, 5 Cush. (Mass.) 592; *Warax v. Cincinnati, etc. R. Co.*, 72 Fed. 637. *Contra*, *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93. For it is felt that only real actors can be joint tortfeasors. On the other hand, joinder was allowed by a court conceiving the master's imputed liability to lie in trespass. *Brokaw v. New Jersey R., etc. Co.*, *supra*. Where, as in the principal decision, the respective liabilities are in case and trespass, misjoinder is more arguable. The state code allowed all actions *ex delictu* to be joined, but did not abolish forms of action. Now the diverse liability implied by the diverse forms of action has been considered fatal to joinder of parties. *Gustafson v. Chicago, etc. Ry. Co.*, 128 Fed. 85; *Southern Ry. Co. v. Hanby*, 166 Ala. 641, 52 So. 334. But where the code abolished forms of action,



joinder was held to have become proper. *Schumpert v. Southern Ry. Co.*, *supra*; *Howe v. Northern Pacific R. Co.*, 30 Wash. 569, 70 Pac. 1100. It seems highly technical to make the propriety of joinder of parties depend on forms of action. The liability of master and servant is essentially joint, even if the theory of identification be rejected. It seems more joint than that of accidentally concurring tortfeasors. And the practical convenience of joinder should override technicalities.

PROXIMATE CAUSE — INTERVENING CAUSES — INTERVENTION OF NEGLIGENT ACT OF THIRD PARTY. — The defendant, a wholesale dealer in oils, supplied a retail dealer with a mixture of gasoline and kerosene instead of pure kerosene. The retail dealer discovered that the oil was not all right, and notified the defendant, who promised to take the oil back. Relying on certain tests, however, the retailer decided that two of the cans contained all kerosene, and negligently sold them to the plaintiff, who, without contributory negligence, sustained injuries from an explosion of the oil. *Held*, that the defendant is not liable. *Callin v. Union Oil Co. of California*, 161 Pac. 9 (Cal.).

In most jurisdictions the liability of the vendor of an article is limited to the first vendee. *Winterbottom v. Wright*, 10 M. & W. 109; *Heiser v. Kingsland Co.*, 110 Mo. 605, 19 S. W. 630; *Kuelling v. Roderick Mfg. Co.*, 88 App. Div. 309, 84 N. Y. Supp. 622. *Contra*, *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. See 29 HARV. L. REV. 866. But where the article is of an intrinsically dangerous nature, an exception is made, and the vendor is held liable for negligence to sub-vendees. *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154; *Faro v. Remington Arms Co.*, 67 App. Div. 414, 73 N. Y. Supp. 788. Analogous cases justify the court's assumption in the principal case that gasoline is such a dangerous article. *Standard Oil Co. v. Wakefield*, 102 Ga. 824, 47 S. E. 830; *Riggs v. Standard Oil Co.*, 130 Fed. 199. But *cf.* *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400. The question of proximate cause, however, remains to be dealt with. The act of the retailer, which was unforeseeable, considering that he knew there was something wrong with the oil, intervened and destroyed the proximity of causation. Or, to look at it another way, the risk created by the defendant came to an end when the nature of the oil was discovered, and the risk from which the plaintiff suffered was a new risk, created by the negligent act of the retailer. *Hendrickson v. Commonwealth*, 85 Ky. 281, 3 S. W. 166; *Chaddock v. Plummer*, 88 Mich. 225, 50 N. W. 135; *Pittsburgh Reduction Co. v. Horton*, 87 Ark. 576, 113 S. W. 647.

SURETYSHIP — SURETY'S DEFENSES — EFFECT OF NOTICE BY SURETY THAT HE WILL NOT REMAIN LIABLE. — In July, 1911, the defendant became surety on a bond given by a collector to his principal. In March, 1912, the defendant notified the principal that he would no longer remain liable. Later the principal seeks to recover from the defendant for defaults of the collector. *Held*, that he may recover only for the defaults occurring before and within a reasonable time after the notice. *Ricketson v. Nizolte*, 98 Atl. 801 (Vt.).

For a discussion of the principles involved, see NOTES, p. 494.

TAXATION — FEDERAL CORPORATION TAX — INCOME OF A MINING COMPANY. — Corporations were formed to hold certain lands and distribute among the stockholders the proceeds of any disposition thereof. Part of the property, containing ore deposits, was leased, the lessees to pay royalties on all ore mined. Under the Corporation Tax Law of 1909 (36 STAT. AT L. 112) the companies were assessed upon the aggregate royalties as their gross income and no deductions for depreciation were made on account of the depletion of the ore deposits. Suit is brought to recover these taxes, paid under protest. *Held*, that no recovery should be allowed. *Von Baumbach v. Sargent Land Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 286.

The Act provides for a tax on the net income of all corporations organized for profit and engaged in business, such net income to be ascertained by deducting from the gross income all losses, expenses, etc., including a reasonable allowance for depreciation of property. See U. S. COMP. STAT., 1913, §§ 6300, 6301. It is manifestly immaterial to the character of the royalties whether the owner of a mine himself extracts and disposes of the minerals or grants to another the right to do so. So the question is whether the value of the ore as it leaves the mine is income or converted capital and hence depreciation. It is submitted that, since part of the capital of a mine is its ore, the ore subtracted represents converted capital. Hence only the market value of the product minus the value of the ore in place and the cost of mining represents income. But the decisions now run *contra*. *State v. Royal Mineral Association*, 156 N. W. 128 (Minn.); *Raynolds v. Hanna*, 55 Fed. 783; *Stratton's Independence v. Howbert*, 231 U. S. 399. See *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 114. It would follow that the ore extracted is an exhaustion of the capital and so depreciation. *United States v. Nipissing Mines Co.*, 202 Fed. 803. See MACHEN, THE FEDERAL CORPORATION TAX LAW, § 57. It seems significant that in the Income Tax section of the Tariff Act of 1916 and in the Income Tax Law, Congress specifically provided an allowance for the depletion of mines. See 38 STAT. AT L. 166, 167; 1915-1916 STAT. 756, 759. But there is no more reason to suppose that Congress did not intend the word "depreciation" in the former act to include such depletion than to conclude that the later acts seek to be more concise in expressly including what the former implied.

**TAXATION — FRANCHISE TAX ON CORPORATION INCORPORATED IN MORE THAN ONE STATE — DUE PROCESS.** — The plaintiff railroad was incorporated in and had lines running through Alabama, Tennessee, and Mississippi. Alabama levied upon corporations organized under her laws a franchise tax, based upon the total paid-up capital stock of such corporations. *Held*, the plaintiff must pay the tax. *Kansas City, M. & B. R. Co. v. Stiles*, 37 Sup. Ct. Rep. 58.

For a discussion of this case, see NOTES, p. 510.

**TORTS — DESTRUCTION OF EVIDENCE — EFFECT OF PROBATE OF WILL.** — The deceased left a will containing a legacy for the plaintiff. The defendants maliciously destroyed parts of the document with the intent to deprive the plaintiff of the legacy. As a result, a prior will was probated and the plaintiff has not enough evidence to prove the entire contents of the second will. She sues in tort alleging these facts, to which the defendants demur. *Held*, that the demurrer be overruled. *Dulin v. Bailey*, 90 S. E. 689 (N. C.).

It is a tort principle that an intentional injury without justification creates liability. So it would seem sufficient, to support the plaintiff's action, to proceed on general lines, asserting the loss of a legacy by the defendants' intentional wrongful act. But the same result may be reached on the theory of the violation of a specific right, *i. e.*, to evidence. For that there is an actionable right to evidence is established. *Davis v. Lovell*, 8 L. J. Ex. (N. S.) 152; *Lane v. Cole*, 12 Barb. (N. Y.) 680. On this theory it is not even necessary to prove the loss of the legacy — a substantial loss of evidence will itself support the action. *Cowling v. Cox*, 18 L. J. C. P. (N. S.) 100; *Lane v. Cole*, *supra*. But the desired damages will certainly be the amount of the bequest. Both theories are thus faced with the necessity of proving what the probate court has apparently denied — the right to a bequest under what is claimed to be the real will of the testator. So the question arises why the decision of the probate court is not *res judicata* of the plaintiff's present contention. To procure the probate of a will requires the proof of the entire contents of the will by clear and satisfactory evidence. See *In re Hedgepeth's Will*, 150 N. C. 245, 249, 250, 63 S. E. 1025, 1026, 1027. WIGMORE, EVIDENCE, § 2106. But a legatee may fail to



bear the burden of such proof and yet satisfy a court requiring the proof of a single legacy by a preponderance of evidence. For this reason the issues in the tort action are not made *res judicata* by the probate decree. *Hibshman v. Dulleban*, 4 Watts (Pa.) 183; *Angel v. Hollister*, 38 N. Y. 378; *Long v. Baugas*, 2 Ired. (N. C.) 290.

**TORTS — STATUTORY LIABILITY — INFANTS — WHETHER INFANT'S DECEIT BARS ACTION UNDER CHILD LABOR STATUTE.** — While employed in the defendant's plant, in violation of a child labor law, a minor sustained injuries. Neither party was negligent. The minor had represented himself as of legal age. His mother now sues in his behalf. *Held*, that she can recover. *Alexander v. Standard Oil Co.*, 72 So. 806 (La.).

It is settled that a violation of a child labor law followed by injury in the employment gives a cause of action to the minor. See 28 HARV. L. REV. 433. And courts generally disallow the plea of contributory negligence. *Pinoza v. Northern Chair Co.*, 152 Wis. 47, 140 N. W. 84. *Contra*, *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 95 N. E. 876. Nor can assumption of risk be pleaded. *Thomas Madden, etc. Co. v. Wilcox*, 174 Ind. 657, 91 N. E. 933. But the contributory fault in the principal case was of a significantly different order. An employer who knows he is hiring a minor under age can reasonably be deprived of the usual defenses, based on conduct of the minor from which the statute meant to save him. It is another thing to make an innocent employer the insurer of minors whose conscious misrepresentations are to be made the source of his absolute liability. Now it has been held that an action for deceit will lie against an infant. *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420. The misrepresentation, by causing the employment, was a proximate cause of the employer's liability. It is, therefore, submitted that the plea of deceit should be good, either by way of counterclaim or to prevent circuity of action. *Cf. Dushane v. Benedict*, 120 U. S. 630. The decisions, however, support the principal case. *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229; *Beauchamp v. Sturges, etc. Co.*, 250 Ill. 303, 95 N. E. 204; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869. *Contra*, *Koester v. Rochester Candy Works*, 194 N. Y. 92, 87 N. E. 77.

**TRADE MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — FAILURE TO COMPLY WITH STATE STATUTE AS BAR TO RELIEF AGAINST UNFAIR COMPETITION.** — The defendant, a foreign corporation, engaged in business in Missouri without taking out a license. Thereupon, for the purpose of pirating the business, the complainant corporation organized under the same name, receiving a certificate of incorporation from the Secretary of State. The complainant filed a bill to enjoin the defendant from doing business in the state under its corporate name. The defendant filed a cross bill. *Held*, that the defendant was entitled to judgment on its cross bill. *General Film Co. of Missouri v. General Film Co. of Maine*, 237 Fed. 64.

Trade names are acquired by adoption and user and belong to the one who first used them and gave them value. See *Nesne v. Sundel*, 93 Minn. 299, 101 N. W. 490. A corporation may choose any name, subject to the rule that it may not choose the name of a corporation already existing, or one that is to be used to deceive the public. See *Van Houten v. Hooton Cocoa Co.*, 130 Fed. 600. See NIMS, UNFAIR BUSINESS COMPETITION, § 102. Nor does the issuance of a charter to a corporation under a certain name give it a right to use that name if it was deliberately chosen or used for the purpose of deceiving the public and thereby appropriating the business of another. *Peck Bros. v. Peck Bros.*, 113 Fed. 291; *Bender v. Bender*, 178 Ill. App. 203. Clearly, then, the defendant had a right to the trade name. Such right is enforceable in equity. For the failure of a foreign corporation to comply with the terms of a licensing statute

is not a bar. The maxim of "unclean hands" applies only when the wrongdoing has some association with the right on which the complainant depends. See 1 POMEROY, EQUITY JUR., 3 ed., § 399; 25 HARV. L. REV. 481. The furthest the courts have gone is to disqualify a complainant in case there is deceit associated with the trade name or mark. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Worden v. Cal. Fig Syrup Co.*, 187 U. S. 516. The principal case arose in the federal courts. Now, being a foreign corporation, the defendant had the right to its name regardless of its Missouri business. And the federal courts conceive that the right of property in a trade name is incapable of being curtailed or limited territorially by statutes like that in the principal case. *U. S. Light & Heating Co. of Maine v. U. S. Light & Heating Co. of New York*, 181 Fed. 182. See *Consolidated Ice Co. v. Hygeia Co.*, 151 Fed. 10, 11. Even if the violation of the statute were by its terms to exclude corporations from state courts, the federal tribunals would still be left open to them, since the penal part of a statute does not apply to the federal courts. *New York Breweries Co. v. Johnson*, 171 Fed. 582. See *U. S. Light & Heating Co. v. U. S. Light & Heating Co.*, *supra*, 186.

WAR — CONFISCATION OF NEUTRAL SHIPS FOR CARRYING CONTRABAND CARGOES — CHANGE IN INTERNATIONAL LAW. — A Swedish vessel carrying a full cargo of conditional contraband to a German port was captured by a British man-of-war. There was no evidence that the owner of the ship knew of the character of the cargo. *Held*, that the ship is subject to condemnation. *The Hakan*, [1916] P. 266.

A Danish ship carrying a full cargo of conditional contraband between two neutral ports was captured by a British man-of-war. There was evidence that this carriage was part of a continuous voyage which was to end in German territory. There was a dispute as to whether the shipowner knew of the ultimate destination of the cargo. *Held*, that the ship is subject to condemnation. *The Maricaibo*, [1916] P. 266, 286.

For a discussion of these cases, see NOTES, p. 497.

WITNESSES — COMPETENCY IN GENERAL — EFFECT IN CRIMINAL TRIAL IN FEDERAL COURTS OF FORMER CONVICTION OF CRIME IN STATE COURTS. — In a criminal trial in a federal court in New York, a witness was offered, who at the age of eighteen had been convicted of forgery in a New York state court and had been given an indeterminate sentence at a reformatory. *Held*, that he was a competent witness. *Rosen v. United States*, 56 N. Y. L. J. 771 (C. C. A., 2nd Circ.).

The court rests its decision on a supposed distinction between reform and punishment. In criminal trials in the federal courts, the competency of witnesses is determined by the law of the state as it was at the time of the Judicature Act of 1789, or at the time the state was admitted to the Union. *United States v. Reid*, 12 How. (U. S.) 361; *Logan v. United States*, 144 U. S. 263; *Maxey v. United States*, 207 Fed. 327. In the absence of state decisions of that time, the common law controls, according to which conviction of forgery brings infamy. *Rex v. Davis*, 5 Mod. 75. Cf. *Poage v. State*, 3 Ohio St. 229. Therefore a subsequent substitution of reform for punishment is immaterial. Further, it is well settled that it is the infamous nature of the crime and not the character of the punishment which determines the qualification of a witness. *People v. Park*, 41 N. Y. 21; *The King v. Priddle*, 1 Leach C. C., 4 ed., 442. See *Bartholomew v. People*, 104 Ill. 601, 607. See also GREENLEAF, EVIDENCE, 15 ed., § 372, n. 1. However, the result might be supported on another ground. A witness is ordinarily disqualified only in the jurisdiction where he was convicted. *Commonwealth v. Green*, 17 Mass. 514; *Sims v. Sims*, 75 N. Y. 466. *Contra*, *State v. Candler*, 3 Hawks (N. C.) 393. See STORY, CONFLICT OF LAWS, 7 ed., § 92; 21 HARV. L. REV. 547. Since the state and federal courts



are the agents of different sovereigns, conviction in one would not disqualify a witness in the other. *Brown v. United States*, 233 Fed. 353. On account of present uncertainty it might be advisable to extend to criminal cases the federal statute which now provides that in civil cases the courts shall be governed by the law of the state in which the trial is held. See 34 STAT. AT L. 618; U. S. COMP. STAT. 1916, § 1464.

## BOOK REVIEWS

A TREATISE ON THE AMERICAN AND ENGLISH WORKMEN'S COMPENSATION LAWS. By Arthur B. Honnold. Two volumes. Kansas City: Vernon Law Book Co. 1917.

The first volume of this treatise contains a comprehensive and well-arranged compendium of the decisions and opinions of the courts, industrial commissions, accident boards, attorneys-general, etc., construing the various workmen's compensation and compensation-insurance laws in the United States and Great Britain. To the legal profession and the legislator this part of the work will be invaluable, a large proportion of the decisions, etc., to be found therein being inaccessible in any except the largest libraries, and being even there difficult to find because unindexed in the common digests. The second volume contains a complete edition of the text of all such laws. It is regrettable that this part of the work could not have been omitted and its place partially supplied by references to the statutes, where appropriate, in the text of the first volume. Not only do some of the decisions cited in the first volume relate to earlier texts of statutes which in this compilation appear in amended forms (*e. g.*, *McWeeny v. Standard Boiler Co.*, 210 Fed. Rep. 507, cited under § 204), but also in many of the states the legislatures are even now busily engaged in adding to the list of compensation statutes and amending existing statutes, with the consequence that within a few months this compilation will in all probability be out of date. And whatever value it would otherwise have for the time being has been largely sacrificed by the lack of an adequate index. In the index provided — to illustrate — reference is made under the heading "Diseases" to provisions in the statutes of Iowa, Kentucky, New York, Wisconsin, and Great Britain; but a cursory examination reveals special provisions relative to disease also in the statutes of Colorado, Indiana, Louisiana, Maryland, Nebraska, Pennsylvania, Vermont, and Wyoming.

The fact that many of the thirty-four systems of law covered by this treatise are in a state of evolution and rapidly changing has made time the essence of the author's task, with the consequence that in his haste to publish his material he has allowed many minor errors and inaccuracies to remain uncorrected in his text. For examples: In § 20, the New York Compensation Act is referred to as "elective only with the employer," whereas, in ordinary sense, that act is altogether compulsory. In § 103, *De Voe v. N. Y. State Railways*, 169 App. Div. 472, is cited in the course of a presentation of the distinction between hazardous and non-hazardous employments, whereas that case was decided on the ground that at the time of the accident the injured workman was not engaged in any employment whatsoever. In § 121, *De Filippis v. Falkenburg*, 170 App. Div. 153, is cited as deciding that an injury due to "horseplay" by a coemployee arises out of the employment, whereas the decision was to the contrary. In § 138, ptomaine poisoning and typhoid fever are mentioned as diseases "commonly known as occupational diseases," whereas commonly they are regarded as the very opposite of "occupational diseases," though under some circumstances they may be "accidents." And in a footnote to § 204 it is stated that the Ohio

statute contains no definition of "wilful act," whereas that statute was amended in 1914 expressly to define that phrase.

Because the industrial commissions and accident boards in a number of our states not only exercise quasi-judicial functions but also provide insurance, some of their pronouncements are neither judicial nor administrative, but are rather in the nature of advertising "puffs" for their insurance schemes. Obviously pronouncements of the last-mentioned kind have no place in a legal textbook. Nevertheless some of them are to be found in the work under review. For instance, in § 5 are presented claims for the stability of protection afforded by the Washington State Insurance Fund. The weight to be given to such claims may be deduced from the fact that within the last few months the auditor of the state of Washington, after an examination and audit, has reported that the Washington State Fund is unsound in principle, insolvent in fact, and mismanaged in practice.

To the student of "the law of compensation" it may be disappointing that the author has refrained from any personal discussions of the principles underlying the statutes under consideration or of the grounds for choice between alternative principles and practices. For illustration, though he points out in § 138 that the tendency has been to deal with industrial accidents distinct from industrial diseases, he does not attempt to explain why compensation has generally been granted only for "injuries by accident" to the exclusion of "injuries by disease." But consideration of the vastness of the field that would have been opened up by any other course makes it plain that for immediate usefulness the author has chosen the better part in limiting himself to a bald presentation of the British and American authorities. Moreover our American compensation laws are highly and hurriedly empirical and imitative; and an authoritative commentary upon principles would require a more thorough exploration of European sources than American commentators have yet had time and opportunity to make.

The foregoing criticisms simply indicate some limitations to the usefulness of this work and some qualifications to its reliability. The author has aimed to produce a treatise of immediate helpfulness, and, in spite of the unusual difficulties of his task, has eminently succeeded.

P. TECUMSEH SHERMAN.

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BELGIUM AND THE GREAT POWERS: HER NEUTRALITY EXPLAINED AND VINDICATED. By Emile Waxweiler. New York and London: G. P. Putnam's Sons, 1916. pp. xi, 186.

BELGIUM'S CASE: A JURIDICAL ENQUIRY. By Charles de Visscher. Translated from the French by E. F. Jourdain. London, New York, and Toronto: Hodder and Stoughton. 1916. pp. xxiv, 164.

These are two of the recent additions to the crop of controversial books dealing with the German invasion of Belgium in 1914. The first, that of the late M. Waxweiler, is, from a legal point of view at least, of scant importance. It really is fervid patriotic pamphleteering, designed to meet the equally patriotic and insignificant books of various Germans; and the war of the professors at times becomes quite violent. The first section of the book, dealing with the policy of Belgian resistance, is certainly of no importance to a student of international law. The part (pp. 44-117) given over to a denial of any Belgian-English *ante-bellum* arrangement would be of little value even if the evidence were presented more clearly and more frankly. And Belgium's innocence can hardly be proved by the fact that even ten Belgian diplomatists believed in it (*cf.* p. 86). In discussing Belgium's duty to resist passage by a belligerent, the Treaty of 1831 alone is mentioned; M. Waxweiler is either ignorant of, or attaches no importance to, the provisions



of the Treaty of 1839. For the student of the international law question raised by the invasion of Belgium, this volume is negligible.

Professor de Visscher's is a book of a very different sort. The ablest book on the subject that has yet appeared (with perhaps the exception of Dr. Dernburg's), it is obviously the work of a trained lawyer and a skilled logician. The basis of Belgium's neutralization, the treaties of 1831 and 1839, is explained lucidly and accurately enough, with the very important exception that the author does not state, indeed inferentially denies (p. 70), that the Treaty of 1839 failed to "textually insert" the "garantissent" articles of 1831. The neutrality of Greece is treated with perhaps not absolute fairness. The German arguments of necessity (*notrecht*) and self-defense against France (*notwehr*) are effectually disposed of upon the facts; but the author is discreetly silent as to similar theories held by English writers at least as late as 1914. Professor de Visscher disposes of the Belgian-British-French intrigues as skilfully as is possible. As he accurately states, Germany was bound by the Hague Convention (5) of 1907 on the morning of August 4, 1914, when Belgium was invaded, since it was not at war with a non-contracting power until 11 P. M. of the same day. A narrow gap of time, but a sufficient one. There can be no question that the Germany of to-day is a party to the treaties of 1831 and 1839; the question is, did these treaties, coupled with subsequent events, deprive Germany of the power to declare war against Belgium (as she did), and hence make the invasion of Belgium an invasion, not of a belligerent, but of a neutral? Only in that event can there have been a violation of the Hague Convention. This fact Professor de Visscher fails to realize adequately (see pp. 146 *et seq.*).

These are the defects most apparent in M. de Visscher's work. Frequent citations of American authorities are pleasant, as perhaps they were designed to be. The book is a reasonably fair as well as an able one, restrained throughout. It is a pity that some American writers upon the invasion of Belgium, ex-assistant attorneys-general and men of even higher ex-official rank, cannot learn both international law and moderation from this professor of Ghent.

RAEBURN GREEN.

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HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS. By William L. Clark, Jr. Third Edition by I. Maurice Wormser. St. Paul: West Publishing Co. 1916. (Hornbook series.) pp. xiii-803.

In 1897 Clark on Corporations was made part of the Hornbook series. The HARVARD LAW REVIEW (10 HARV. L. REV. 530) called Mr. Clark's work "above the average" in the student text field.

So great has been the development in Corporation Law since the work of Mr. Clark, that a new edition of the text became essential. Mr. Wormser of the New York Bar, and professor of law in Fordham University Law School (also author of Wormser's Cases on Corporations), undertook the task of revision and reconstruction. In fact he has had to completely revise the text throughout in order to bring it up to date — abreast with the authorities.

The "Hornbook" idea has been preserved in the topical arrangement of the subject matter. Ample notes, replete with authorities (including those reported in 1916), add greatly to the weight of the text.

Two chapters are distinctly valuable — VIII, The Corporation and the State; and XV, Foreign Corporations — showing the relation between Corporation Law and Constitutional Law and Conflicts respectively. The chapters on Membership, Liability on Contracts by Promoters, and Powers are praiseworthy.

Throughout Mr. Wormser is sound and accurate, possessing two virtues not too often attained by "handbook" authors. It is particularly pleasing to find a clear and accurate definition of the well-worn phrase *Ultra Vires*. Quot-

ing from the opinion of Depue, J., in *Camden & A. R. Co. v. May's Landing, etc. Co.*, 48 N. J. L. 530, 7 Atl. 523, he says of *Ultra Vires*: "In its legitimate use, the expression should be applied only to such acts as are beyond the powers of the corporation itself," and not loosely applied, as many courts often do, to mere excessive use of authority by the members, directors, or officers, or to acts which do not conform to charter requirements (pp. 202-04). It is such preciseness of thought and language that makes this work valuable to the student.

DALE M. PARKER.

INTERNATIONAL REALITIES. By Philip Marshall Brown. New York: Charles Scribner's Sons. 1917. pp. xvi, 233.

Says Professor Brown: "Since the Great War began I have been conscious with many others, of the urgent necessity of a thorough reconstruction of the law of nations in accordance with the big facts of international life. I have set myself the task of endeavoring to ascertain the fundamental values in international relations." What these big facts, these fundamental values, are, we never learn.

The function of international law, the author insists, is not to regulate war — such a conception is "essentially paradoxical and unsound." He then proceeds to explain (p. 3) that wars must be waged "with due respect to the rights of humanity," and that neutral interests must be protected. After spending several pages wondering whether international law is law, he finally decides that it is, apart from its status as municipal law, because the Supreme Court of the United States has said so (p. 20). This conception of the Supreme Court's power is most interesting. There is one great principle, ruled our first Chief Justice in a case too famous to be unknown to Professor Brown, "that all the members of a civil community are bound to each other by compact. The compact between the community and its members is, that the community will protect its members . . ." <sup>1</sup> Here is *Contrat Social* pure and simple, and by the Chief Justice of the United States; yet Professor Brown, in his chapter entitled "Nationalism," dismisses the Social Compact with a scant line, as the speculation of a theorist. Apparently he believes that a United States court can make one star to shine, but not another. The truth is, that no court of the United States has, or ever has had, jurisdiction to adjudicate any question of international law as such, much less to declare international law's validity as law.<sup>2</sup>

This chapter "Nationalism" contains elaboration at length of such profound truths as that "geographical location frequently has much to do with the formation of States." So also, "the existence of a common enemy has served . . . to foster a national community of interest." Professor Brown wholly fails to understand criticisms of nationalism; indeed, he makes no attempt to comprehend, but unhesitatingly distorts and condemns.

Arbitration Professor Brown would restrict to causes too trivial to quarrel over; every question of importance should be settled by diplomacy or by war. Arbitration, even by a super-national court, can settle nothing finally; while war, he says, can and does so settle. To Mr. Norman Angell is here (p. 75) attributed the curious statement that "there never was a good war or an honorable peace." Whenever Professor Brown desires to clinch his arguments against pacifism, he knocks down Mr. Angell for a "materialist," and quotes a new form of this statement — always inclosed in quotation marks, which Professor Brown apparently intends as a warning of more than usual inaccuracy.

<sup>1</sup> Trial of Isaac Williams, 2 Cranch \*83 a; WHARTON, STATE TRIALS OF THE UNITED STATES, 652, 653.

<sup>2</sup> Cf. 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 317, 318.



Democracy should not supplant diplomacy, the author holds, since diplomacy is far more competent. This superior competency is proved, first, by the fact that America has in the past possessed some able diplomats. Professor Brown would no doubt be astonished at the idea that the more efficient its agents are, the more dangerous may diplomacy be as a means of transacting international business. The second proof is, that American democracy, by showing restraint and by reposing confidence in the President in times of international stress, has "confessed its own sense of incapacity to handle foreign affairs." The third proof is that democracy's feeling would run so high, at critical times, that unnecessary wars would be precipitated.

Professor Brown opposes the establishment of a super-national court, as has been intimated. He likewise severely criticises the work of the newly formed American Institute of International Law, which has endeavored to formulate the rights of states, and, more recently, has produced the Code of Maritime Neutrality.<sup>3</sup> Opposing as he does both the rational codification and the super-national interpretation of international law, it is natural that Professor Brown should likewise oppose any proposition (such as that of the League to Enforce Peace) to enforce it. His faith is placed in the trinity of war, diplomacy, and the somewhat vague "complete, just understanding between the nations."

The book impels one to a belief in some relentless law of diminishing deserts, that operates upon the reputations of American writers upon international law. The present preponderance of shallow thinking concerning international relations is the most dangerous phase of national unpreparedness.

RAEBURN GREEN.

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- HANDBOOK OF THE LAW OF TORTS. By H. Gerald Chapin. St. Paul: West Publishing Co. 1917. pp. xiv, 695.
- DIGEST OF WORKMEN'S COMPENSATION LAWS IN THE UNITED STATES AND TERRITORIES, with annotations. 1916 Supplement, revised to November 1, 1916. New York: Workmen's Compensation Publicity Bureau.
- THE PUBLIC DEFENDER, a Necessary Factor in the Administration of Justice. By Mayer C. Goldman. New York and London: G. P. Putnam's Sons. 1917.
- THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland. Twelfth Edition. New York and London: Oxford University Press. 1917. pp. xxv, 454.
- BLOCKADE AND CONTRABAND. By A. Maurice Low. Washington. pp. 16.
- MANUALS OF EMERGENCY LEGISLATION: DEFENCE OF THE REALM MANUAL. Edited by Alexander Pulling. Second Enlarged Edition. London: H. M. Stationery Office. 1916. pp. vii, 282.
- BETTER CITY PLANNING FOR BRIDGEPORT. By John Nolen. With a Report on Legal Methods of Carrying out the Changes Proposed. By Frank Backus Williams. 1916. pp. xx, 159.
- CASES AND READINGS ON THE JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS. By George W. Rightmire. Cincinnati: W. H. Anderson Company. 1917. pp. xvi, 892.
- STATUTE LAW-MAKING IN IOWA. Edited by Benjamin F. Shambaugh. Applied History, Volume III. Iowa City: The State Historical Society of Iowa. 1916. pp. xvii, 718.
- CASES IN QUASI-CONTRACT SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS. By Edward S. Thurston. American Case-Book Series. St. Paul: West Publishing Co. 1916. pp. xv, 622.

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<sup>3</sup> Published in full in THE CHRISTIAN SCIENCE MONITOR, January 25, 1917.

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## INSANITY AND CRIMINAL RESPONSIBILITY

A TREATISE on the Criminal Responsibility of Lunatics published in England in 1909 begins with this statement:

"The feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing. More than one authority on either side has tried to bring about a reconciliation between the contending parties. But their endeavours have been crowned with very little success. For though it cannot be denied that the strife and warfare has of late lost much of its former bitterness, a *modus vivendi* satisfactory to both parties has not been found."<sup>1</sup>

A year after this statement was made Professor John H. Wigmore, then president of the American Institute of Criminal Law and Criminology, believing that some agreement might result from the combined and coöperative labors of members of the two professions and that the difficult problem of determining the relation of insanity to criminal responsibility might be thereby to some extent solved, appointed a committee composed of four physicians and five lawyers.<sup>2</sup> This committee, which has had a continuous existence since its original appointment, published yearly reports,

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<sup>1</sup> OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, Preface.

<sup>2</sup> Two members of the original committee resigned, and one vacancy thus created was later filled. Otherwise the committee has remained unchanged since its original appointment. It now consists of the following members:

Albert C. Barnes, Judge of the Superior Court, Chicago.

Orrin N. Carter, Justice of the Illinois Supreme Court.

Edwin R. Keedy, *Chairman*, Professor of Law in the University of Pennsylvania.

Adolf Meyer, Professor of Psychiatry in Johns Hopkins Medical School.

William E. Mikell, Dean of the Law School, University of Pennsylvania.

Harold N. Moyer, Physician, Chicago.



one of them being a compilation of the laws of all the states of this country relative to insanity and criminal responsibility. It also at various times suggested for discussion tentative proposals, some of which were finally recommended for adoption. In 1915 the committee presented a bill for the regulation of expert testimony in cases where insanity is set up as a defense to a criminal charge. This bill was approved by the Institute of Criminal Law and Criminology, and by the Conference on Medical Legislation of the American Medical Association. Last year the committee, having reached a unanimous agreement, presented to the Institute a bill providing a test for determining criminal responsibility when the defense of insanity is raised, and a method of procedure to be employed in such a case. This bill was approved by the Institute, which also at the request of the committee approved several sections of the expert testimony bill independently of the others. The two bills as finally approved are as follows:

#### CRIMINAL RESPONSIBILITY BILL

Sec. 1. *When Mental Disease a Defense.* No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged.

Sec. 2. *Form of Verdict.* When in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was mentally diseased at the time when he did the act or made the omission charged, then if the jury before whom such person is tried concludes that he did the act or made the omission charged, but by reason of his mental disease was not responsible according to the preceding section, then the jury shall return a special verdict that the accused did the act or made the omission charged against him but was not at the time legally responsible by reason of his mental disease.

Sec. 3. *Inquisition.* When such special verdict is found, the court shall remand the prisoner to the custody of [the proper officer<sup>3</sup>] and shall immediately order an inquisition by [the proper persons<sup>3</sup>] to determine

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Morton Prince, Physician, Boston.

William A. White, Superintendent Government Hospital for the Insane, Washington, D. C.

<sup>3</sup> When this bill is introduced in the legislature of any state, the titles of the persons

whether the prisoner is at that time suffering from a mental disease so as to be a menace to the public safety. If the members of the inquisition find that such person is mentally diseased as aforesaid, then the judge shall order that such person be committed to the state hospital for the insane, to be confined there until he shall have so far recovered from such mental disease as to be no longer a menace to the public safety. If they find that the prisoner is not suffering from mental disease as aforesaid, then he shall be immediately discharged from custody.

#### EXPERT TESTIMONY BILL

Sec. 1. *Summoning of Witnesses by Court.* Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the judge does so, he shall notify counsel of the witnesses so called, giving their names and addresses. Upon the trial of the case, the witnesses called by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

Sec. 2. *Written Report by Witnesses.* When the issue of insanity has been raised in a criminal case, each expert witness, who has examined or observed the defendant, may prepare a written report regarding the mental condition of the defendant based upon such examination or observation, and such report may be read by the witness at the trial after being duly sworn. The written report prepared by the witness shall be submitted by him to counsel for either party before being read to the jury, if request for this is made to the court by counsel. If the witness presenting the report was called by the prosecution or defense, he may be cross-examined regarding his report by counsel for the other party. If the witness was called by the court, he may be examined regarding his report by counsel for the prosecution and defense.

Sec. 3. *Commitment to Hospital for Observation.* Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission

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whose duty it is, according to the existing law of the state, to conduct such an inquisition, shall be inserted here. It is not proposed to change the prevailing practice in this respect.



of the alleged wrongful act, becomes an issue in the case, the judge of the court before whom the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides.

These bills were discussed editorially in a recent number of the HARVARD LAW REVIEW.<sup>4</sup> The editor expressed approval of them with the exception of the first section of the bill relating to criminal responsibility, which he adversely criticized. At the request of the present writer, the editor-in-chief of the REVIEW kindly gave him this opportunity to reply to these criticisms.

The section criticized reads as follows:

"No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged."

This section was objected to on the following grounds:

I. "It neglects entirely the important and steadily growing class of crimes in which a specific intent is unnecessary." II. "It fails to cover the case of irresistible impulse, where the power of choice is negated by the mental disorder." III. "The statute, according to its authors, will introduce the doctrine of partial responsibility, *i. e.* the holding of lunatics for part of their crimes." IV. "It is difficult to see wherein the proposed legislation would materially change the existing legal situation." V. "The previous rules, though less precise, were more complete."

I. The question presented by the first objection is whether the proposed test is limited to crimes which require a specific intent.

It is a fundamental principle of the criminal law that every crime, either common law or statutory, with the exception of public nuisances and breaches of what are commonly described as police

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<sup>4</sup> Vol. 30, p. 179 (December, 1916).

regulations, includes a mental element. This necessary mental element has been variously named. In the familiar maxim it is "*mens rea*."<sup>5</sup> Bracton calls it "*voluntas nocendi*."<sup>6</sup> Lord Hale speaks of the "will to commit an offense."<sup>7</sup> Blackstone calls it "vicious will."<sup>8</sup> Austin uses "criminal knowledge."<sup>9</sup> The terms usually employed are "guilty mind"<sup>10</sup> and "criminal intent,"<sup>11</sup> the latter being divided into general intent and specific intent. All of these terms are open to objection. "*Mens rea*" was said by Stephen, J., in *Regina v. Tolson*,<sup>12</sup> to be confusing and contradictory, because it is used to include so many dissimilar states of mind. On the other hand a recent English writer narrowly defines *mens*

<sup>5</sup> *Actus non facit reum, nisi mens sit rea*. Pollock and Maitland state that the original source of this maxim is to be found in the sermons of St. Augustine, where the wording is "*Ream linguam non facit nisi mens rea*." The maxim later appears in the *Leges Henrici* as "*Reum non facit nisi mens rea*." Coke states it "*Et actus non facit reum nisi mens rea sit*." 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 474, note.

<sup>6</sup> "*Crimen non contrahitur, nisi nocendi voluntas intercedat*." 2 DE LEGIBUS ANGLIÆ (Twiss ed.), 126.

<sup>7</sup> "Where there is no will to commit an offence, there can be no transgression." HALE, P. C., ch. 2.

<sup>8</sup> "An unwarrantable act without a vicious will is no crime at all." 4 BL. COMM. 21.

<sup>9</sup> "Every crime, therefore, supposes, on the part of the criminal, criminal knowledge or negligence." 3 AUSTIN, JURISPRUDENCE, 326.

<sup>10</sup> "The general rule of law is that a person cannot be convicted and punished in a proceeding of a criminal nature, unless it can be shown that he had a guilty mind." Field, J., in *Chisholm v. Doulton*, 22 Q. B. D. 736, 739 (1889).

"The second element which is essential to constitute a crime is what is called the *mens rea*: a 'guilty mind'." CHERRY, OUTLINE OF CRIMINAL LAW, 8.

"An act cannot amount to a crime when it is not accompanied by a guilty mind." SHIRLEY, CRIMINAL LAW, 4.

<sup>11</sup> "Criminal intent is always essential to the commission of crime." Werner, J., in *People v. Molineux*, 168 N. Y. 264, 297, 61 N. E. 286 (1901).

"It is, therefore, a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist." BISHOP, NEW CRIMINAL LAW, § 287. Bishop in the same section uses "evil mind."

"It is a sacred principle of criminal jurisprudence that the intention to commit the crime is of the essence of the crime." Turley, J., in *Duncan v. State*, 7 Humph. (Tenn.) 148, 150 (1846).

"To constitute a criminal act, there must, as a general rule, be a criminal intent." Hoar, J., in *Commonwealth v. Presby*, 14 Gray (Mass.) 65, 66 (1859).

<sup>12</sup> 23 Q. B. D. 168, 185 (1889). "The maxim is recognized as a principle of English Law by all authorities, but the real difficulty arises, not as to the universality of its application, but as to its meaning. The '*mens rea*' generally means some actively guilty intention. It may, however, be mere negligence, if of a very gross description." CHERRY, OUTLINE OF CRIMINAL LAW, 8.



*rea* as "knowledge or neglect of available means of knowledge that one's act is, or may be, in contravention of the law of England."<sup>13</sup> "Will," as used by Hale and Blackstone, was probably a translation of the "*voluntas*" of Bracton and was equivalent to "intention."<sup>14</sup> "Guilty mind" is objectionable because it suggests moral turpitude. "Criminal intent" is not a satisfactory term to describe the mental element involved in every crime, (1) because, under the classification into general and special, "intent" has different meanings,<sup>15</sup> and (2) because the mental element in some crimes is negligence, which is inconsistent with the idea of "intent." All these terms have a common fault in seeming to imply that the mental state involved in crimes is a constant quantity, whereas, as is well known, it varies in different crimes. The malice aforethought of murder is different from the *animus furandi* of larceny, and this differs from the negligence required for involuntary manslaughter and the intent to burn necessary for arson. Some writers avoid the difficulty of giving a definite name to the mental element of crimes by saying that a certain state of mind is involved in the definition of every crime.<sup>16</sup> If then the section under discussion had simply said "state of mind" instead of "particular state of mind" no question as to its scope could possibly be raised—it would clearly cover every offense which includes any mental element. The question then is, whether the addition of the word "particular" has a narrowing effect. The word was used in its ordinary meaning of "pertaining

<sup>13</sup> STROUD, *MENS REA*, 20. Another definition is the following: "The *mens rea*, or guilty mind, of which the law speaks, is that mental state in which the actor, voluntarily doing an act, is conscious of the existence of facts, from which it follows as a matter of law that the thing done by him is an infraction of a duty or prohibition." G. A. Endlich, "The Doctrine of Mens Rea," 13 *CRIMINAL LAW MAGAZINE*, 831, 834.

<sup>14</sup> "It is not, however, a 'will' in Austin's sense of that word; but is closely akin to, and includes, his 'Intention.'" KENNY, *OUTLINES OF CRIMINAL LAW*, 37.

<sup>15</sup> "The general intent . . . is an intention to do the act done. . . . The specific intent is some independent mental element which must accompany the physical act in order that the crime in question may be committed." BEALE, *CRIMINAL PLEADING AND PRACTICE*, § 136.

"Intent [to kill] is defined as a steady resolve and deep-rooted purpose or design formed after carefully considering the consequences." Clark, J., in *State v. Conly*, 130 N. C. 683, 687, 41 S. E. 534 (1902).

<sup>16</sup> "The full definition of every crime contains expressly or by implication a proposition as to a state of mind." Stephen, J., in *Reg. v. Tolson*, 23 Q. B. D. 168, 187 (1889). "The state of mind which accompanies an act is often of legal consequence as forming an ingredient necessary for the attachment of certain consequences." 1 WIGMORE, *EVIDENCE*, § 242.

to a single thing," the idea being to limit the inquiry to the mental element involved in the crime charged and no other. This is no unusual use of the word in this connection. Russell discusses the "particular mental elements necessary to constitute particular crimes,"<sup>17</sup> and Kenny states that "every crime involves (1) a particular physical condition, . . . and (2) a particular mental condition causing this physical condition."<sup>18</sup> The phrase "the particular state of mind which must accompany such act or omission in order to constitute the crime charged" as used in the proposed section was meant to cover the mental element, whatever it may be and whatever it may be called, of the crime charged; and the foregoing discussion would seem to establish that this result was accomplished without in any way straining the accepted meaning of the words employed.

As examples of offenses in which no specific intent is necessary, and which according to his view are consequently not covered by the section, the editor mentions purchasing lottery tickets, dispensing liquor to minors, frequenting gambling dens and brothels, and statutory rape. He states that under the statute one who has a mania for committing these acts "would be unable to plead insanity and would apparently be sent to prison instead of to an insane asylum." So far as the writer knows, there is no reported case in which insanity has been set up as a defense to a charge of having committed any of these offenses. Even if some such cases have been overlooked, they are so few that the question whether they are covered by the proposed section is not of great practical importance. However, the question is of sufficient interest to deserve a serious discussion. Since the statute, as shown above, covers every offense, common law and statutory, which includes a mental element, the question whether it covers the offenses mentioned depends on whether any state of mind is included in their definition.

There are two classes of statutory prohibition which do not involve a specific intent. They are (1) those which require so-called general intent, as distinguished from specific intent, and (2) those in which the state of the mind of the doer is altogether immaterial. In a leading English case the latter group is divided

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<sup>17</sup> 1 RUSSELL, *CRIMES*, 7 ed., 102.

<sup>18</sup> KENNY, *OUTLINES OF CRIMINAL LAW*, 37.



into three classes: (1) "Acts which are not criminal in any real sense, but which in the public interest are prohibited under a penalty," such as the innocent sale of adulterated food; (2) "public nuisances"; (3) "cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right."<sup>19</sup> The first class corresponds to what are generally called police regulations.<sup>20</sup>

Various reasons are given why no wrongful state of mind need be shown in such cases. Some of these reasons are: (1) that it would be difficult to secure convictions otherwise;<sup>21</sup> (2) that the purpose of such prohibitions is simply to protect the public from the doing of certain acts;<sup>22</sup> (3) that the legislature in enacting the statute has done away with the necessity for showing any state of mind on the part of the doer of the prohibited act.<sup>23</sup> The last of

<sup>19</sup> Wright, J., in *Sherras v. De Rutzen*, [1895] 1 Q. B. 918, 922.

<sup>20</sup> In *State v. Rippeth*, 71 Ohio St. 85, 87, 72 N. E. 298 (1904), a statute made it an offense to sell oleomargarine with coloring matter in it. Regarding this statute the court said: "This is a police regulation imposing a penalty irrespective of criminal intent."

"In statutory offenses created in the exercise of the police power, unless a wrongful intent or guilty knowledge, commonly designated by the use of the words 'willfully' or 'maliciously,' is made an essential element of the prohibited act, the violator may be convicted and punished, even if he has no design to disobey the law. . . . It is because of this familiar doctrine, inherent in the construction of statutes, which prohibit under a penalty acts and conduct which otherwise are not generally deemed immoral or criminal, that convictions for the sale of liquor, where the seller had no just ground to believe it was intoxicating, or of imitation butter by the defendant's agent without a descriptive wrapper, which, though furnished, he failed from mere carelessness to use, or an inadvertent sale by the defendant's servant of milk not of standard quality, and the admission of a minor to a pool room where the defendant neither knew nor had any reason to believe that he was under age, have been sustained." *Commonwealth v. N. Y. Cen. & H. R. R. Co.*, 202 Mass. 394, 396, 88 N. E. 764 (1909).

<sup>21</sup> "Laws forbidding the sale of intoxicating liquor and impure foods would be of little use, if convictions for their violations were to depend on showing guilty knowledge." *People v. Hatinger*, 174 Mich. 333, 335, 140 N. W. 648 (1913). A similar statement occurs in *In re Carlson's License*, 127 Pa. St. 330, 332, 18 Atl. 8 (1880).

<sup>22</sup> "The history of the milk legislation in this Commonwealth shows conclusively the determination of the lawmaking power to protect the community from adulterated or impure milk. The ultimate purpose is to have pure milk and to impose upon milk dealers the duty of seeing that the milk be such." *Commonwealth v. Graustein*, 209 Mass. 38, 42, 95 N. E. 97 (1911).

To the same effect see *People v. D'Antonio*, 134 N. Y. Supp. 657, 661 (1912).

<sup>23</sup> Lord Russell of Killowen said of a statute prohibiting the sale of adulterated milk: "This is one of the class of cases in which the Legislature has, in effect, determined that mens rea is not necessary to constitute the offence." *Parker v. Alder*,

these is the view usually taken. It must be carefully noted, however, that such legislative intent is rarely expressed in the statute. This fact was clearly pointed out by Wills, J., in *Regina v. Tolson*,<sup>24</sup> who said that the construction of the statute depends upon the nature and extent of the penalty attached, the subject matter of the enactment and the various circumstances which may make the one construction or the other reasonable or unreasonable. These are the tests usually employed in determining whether a mental element is involved in a statutory prohibition. If the penalty imposed is simply a fine and if the statute merely regulates for the public interest activities that apart from the statute are lawful and proper, then the penalty follows from the mere doing of the prohibited act<sup>25</sup> without regard to the state of mind of the doer.

The truth is that the statutory prohibitions under consideration, where the penalty is a fine, more nearly resemble torts than they do crimes.

"The mere fact of a *fine* no more shows that an indictment is a criminal proceeding than the ancient fine in trespass. The proceeding is substantially of a civil and not a criminal character, the distinction taken in the most ancient and approved authorities being, not whether the Crown is a party . . . but whether the real end or object of the proceeding is punishment or reparation."<sup>26</sup>

Where acts prohibited in the public interest are done, it may be well said that the fine imposed is less for the purpose of punishment than for reparation to the public for the harm done.

In deciding then whether insanity would be a defense, according to the provisions of the proposed section, to a prosecution for the statutory offenses mentioned by the editor, it is necessary to deter-

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[1899] 1 Q. B. 20, 25 (1898). See also *People v. Roby*, 52 Mich. 577, 579, 18 N. W. 365 (1884).

<sup>24</sup> 23 Q. B. D. 168, 174.

<sup>25</sup> "As regards the subject matter, it is generally where acts which in themselves are not morally wrong are forbidden, that the statute is interpreted so as to render an act which is done without any unlawful intention punishable. As regards the nature of the penalty, the question depends upon whether a fine only is imposed as a punishment, or whether an offender may also be liable to imprisonment. In the former case the statute is more likely to be interpreted strictly than in the latter." CHERRY, OUTLINE OF CRIMINAL LAW, 11.

"Most of the cases where ignorance or innocence of intention is no defense are cases punishable by fines." 9 HALSBURY, LAWS OF ENGLAND, 237, note c.

<sup>26</sup> Note to *Reg. v. Paget*, 3 F. & F. 29, 30 (1862).



mine in each case, by applying the usual tests, whether a mental element is involved.

One of the statutory prohibitions mentioned by the editor is selling liquor to minors. The penalties imposed in the different states for violation of such a statute vary greatly. In Massachusetts it is provided that the seller "shall forfeit one hundred dollars for each offence to be recovered by the parent or guardian of such minor in an action of tort."<sup>27</sup> The New York and California statutes prescribe a fine or imprisonment;<sup>28</sup> the Kansas statute, fine *and* imprisonment.<sup>29</sup> The usual penalty is simply a fine.<sup>30</sup>

According to the principles laid down, no guilty mind need accompany the doing of the prohibited act to make the defendant liable to the payment of a money penalty. Under a statute requiring imprisonment a punishable state of mind should be shown. Some few courts require this in all cases.<sup>31</sup> If a state of mind, such as "knowingly," is specified in the statute, this of course must be proved.<sup>32</sup> Where either fine or imprisonment may be imposed, the circumstances under which the act was done would very probably be taken into consideration by the judge in deciding between the two penalties, and it is most unlikely that one who violated the law while insane would be sent to prison.<sup>33</sup> It is, of course, true that if a statute imposing imprisonment as a penalty has been

<sup>27</sup> REV. LAWS, 1902, 851.

<sup>28</sup> N. Y. PENAL CODE, § 484, (3); CAL. PENAL CODE, § 397 b.

<sup>29</sup> 2 GEN. STAT. 1897, 392, §§ 59, 60.

<sup>30</sup> ALA. CRIM. CODE, 1907, § 7354; COLO. REV. STAT. 1908, § 1812; CONN. GEN. STAT. 1902, §§ 2696, 2712; DEL. REV. CODE, 1852 as amended 1893, 414; KY. STAT. (CARROLL) 1915, § 1306; LA. ACTS, 1906, 154.

<sup>31</sup> *Kreamer v. State*, 106 Ind. 192, 6 N. E. 341 (1885); *People v. Welch*, 71 Mich. 548, 39 N. W. 747 (1888); *State v. Sanford*, 15 S. D. 153, 87 N. W. 592 (1901).

<sup>32</sup> *Loeffler v. D. C.*, 15 App. D. C. 329 (1899).

<sup>33</sup> Though a few courts, notably Massachusetts, have held that a person may be convicted of bigamy (*Commonwealth v. Mash*, 7 Met. 472 (1844)) or adultery (*Commonwealth v. Thompson*, 11 Allen 23 (1865)) where the second marriage occurred under the mistaken belief that a former spouse was dead, this result probably would not have been reached if the defense had been insanity. The reasoning of Hoar, J., in *Commonwealth v. Presby*, 14 Gray 65 (1859), would seem to indicate this. The Mash and Thompson cases have been very severely criticized [1 BISHOP, NEW CRIMINAL LAW, 8 ed., § 303 a, note] and are opposed by the weight of authority. Apart from this, however, they do not present any difficulty in this connection, for under the proposed section insanity could be set up as a defense. The court recognizes that a punishable state of mind is necessary under the statutes, but holds that this was not negatived by the mistake.

construed, because of what is conceived to be the legislative intent, as not requiring any punishable state of mind, insanity would be no defense under the proposed section. The impropriety, if such it is deemed, of this result is due, not to any defect in the proposed section, but to the holding of the court that imprisonment may be imposed, in any case, upon a person who innocently violated the statute.

When, therefore, it has been determined that a punishable state of mind is required by the prohibitory statute, then under the section of the proposed bill insanity could be set up as a defense, and if by reason thereof the necessary state of mind is negatived the defendant should be acquitted. If, on the other hand, no state of mind is involved, the defendant would be convicted and would be required to pay the fine which the statute imposes. And why should not an insane person pay a pecuniary penalty in such cases just as he must pay damages for his private torts?<sup>34</sup> The language of Wills, J., in *Regina v. Tolson* is appropriate here:

"There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest."<sup>35</sup>

There is practically no difference except that of procedure between the prohibiting statutes which provide a fine and those which provide for recovery of a penalty in a civil action, and the grounds upon which an insane person is held liable for his torts would seem to apply to both these cases.<sup>36</sup>

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<sup>34</sup> The liability of an insane person for torts is well settled. 1 HALE, P. C., 15; HAWK. P. C., ch. 1, § 5; BAC. ABR., Idiots and Lunatics, § E; Weaver v. Ward, Hobart 134; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239 (1887); Cross v. Kent, 32 Md. 581 (1870); Morain v. Devlin, 132 Mass. 87 (1882); Feld v. Borodofski, 87 Miss. 727, 40 So. 816 (1905); Jewell v. Colby, 66 N. H. 399, 24 Atl. 902 (1890); Williams v. Hays, 143 N. Y. 442, 38 N. E. 449 (1894); Ward v. Conatser, 4 Bax. (Tenn.) 64 (1874); Morse v. Crawford, 17 Vt. 499 (1845).

It has been held that evidence of insanity is admissible in an action of slander in order to show the exact amount of the damage done to the reputation of the plaintiff. Dickinson v. Barber, 9 Mass. 225 (1812); Yeates v. Reed, 4 Blackf. (Ind.) 463 (1838). A recent case in Kentucky holds that insanity may excuse a defendant from liability in such case. Irvine v. Gibson, 117 Ky. 306, 77 S. W. 1106 (1904). The court quotes from COOLEY, TORTS, 103.

<sup>35</sup> 23 Q. B. D. 168, 177 (1889).

<sup>36</sup> "If an insane person is not held liable for his torts, those interested in his estate, as relatives or otherwise, might not have a sufficient motive to so take care of him



The reasoning applicable to statutes prohibiting the sale of liquor to minors would also apply to those prohibiting the purchase of lottery tickets and the frequenting of brothels and gambling houses, for all of these are police regulations. Statutory rape, however, differs from these, for it is an offense which involves moral turpitude, and is punished by imprisonment. Consequently a punishable state of mind is required.<sup>37</sup> Apart from the intent to use force, if necessary, the same state of mind is necessary for statutory as for common-law rape. Both offenses are covered by the proposed section.

II. Is irresistible impulse a defense under the proposed section? Yes.

It is a fundamental principle of the criminal law that volition is a necessary element of every crime.<sup>38</sup> Stephen forcibly states this principle thus: "No involuntary action, whatever effects it may produce, amounts to a crime by the law of England."<sup>39</sup> Two

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as to deprive him of opportunities for inflicting injuries upon others. . . . The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons." *McIntyre v. Sholty*, 121 Ill. 660, 664, 13 N. E. 239 (1887).

<sup>37</sup> Some confusion on this point has arisen because a mistaken belief as to the girl's age has been held to be no defense. (*People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (1896); *Holton v. State*, 28 Fla. 303, 9 So. 716 (1891); *State v. Newton*, 44 Iowa 45 (1876); *State v. Houx*, 109 Mo. 654, 19 S. W. 35 (1891).) The reason for this is the fact that, notwithstanding the mistaken belief, there was a guilty state of mind. "His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case where he supposes he shall escape punishment, satisfies the demands of the law and he must take the consequences." BISHOP, STATUTORY CRIMES, § 490.

"It is unlawful *per se* to carry on such practices with any female not the lawful wife of the malefactor, and we think that the offense here, so far as intent is involved, comes within the rule, that a man shall be held responsible for all the consequences of his wrongdoing. By having illicit intercourse with any female he violates the law; should it turn out that the partner in his crime is within the prohibited age, he will not be allowed to excuse himself by asserting ignorance as to her age." *Holton v. State*, 28 Fla. 303, 308, 9 So. 716 (1891). The same reasoning has been applied to the similar case of abduction. (*Reg. v. Prince*, L. R. 2 C. C. 154 (1875); *Brown v. State*, 7 Pen. (Del.) 159, 74 Atl. 836 (1909).) The proposition is well stated in an early Iowa case: "If defendant enticed the female away for the purpose of defilement or prostitution, there existed a criminal or wrongful intent, even though she was over the age of fifteen." *State v. Ruhl*, 8 Iowa 447, 450 (1859).

<sup>38</sup> "Where it [volition] is absent, an immunity from criminal punishment will consequently arise." KENNY, OUTLINES OF CRIMINAL LAW, 40. "It is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise." HOLMES, COMMON LAW, 54.

<sup>39</sup> 2 HISTORY OF THE CRIMINAL LAW, 100.

different reasons for this well-accepted proposition are found in the books. The first is that without volition there is no act.<sup>40</sup> The second is that volition is a mental element that must accompany an act in order to constitute a crime.<sup>41</sup> It is sometimes said that

<sup>40</sup> "External acts are such motions of the body as are *consequent upon determinations of the will.*" 2 AUSTIN, JURISPRUDENCE, 28.

"That is a man's act which he wills to do, exercising a choice between acting and forbearing, and the strongest moral compulsion still leaves freedom of such choice." CLERK & LINDSELL, TORTS, 2 ed., 7.

"An act is the result of an exercise of the will." Gray, J., in *Duncan v. Landis*, 106 Fed. 839, 848 (1901).

"For all legal purposes an act presupposes a human being. It assumes that he is practically free to do such act or leave it undone. It implies that he desires a particular end, and that for the purpose of attaining that end he makes certain muscular movements. These motions thus willed, and their immediate and direct consequences are called, without any minute analysis, an act." HEARN, LEGAL DUTIES AND RIGHTS, 90.

"Jurisprudence is concerned only with outward acts. An 'Act' may therefore be defined, for the purposes of the science, as a 'determination of will, producing an effect in the sensible world.'" HOLLAND, JURISPRUDENCE, 9 ed., 100.

"An act is always a voluntary muscular contraction, and nothing else." HOLMES, COMMON LAW, 91.

"An act is the bodily movement which follows immediately upon a volition." MARKBY, ELEMENTS OF LAW, 6 ed., § 215.

"The movements of a man's limbs when he gesticulates in a troubled dream, or walks in his sleep, are manifest but not voluntary. Perhaps these last are not properly to be called acts at all; in any case they are not on the footing of normal acts." POLLOCK, FIRST BOOK OF JURISPRUDENCE, 137.

"Acts are exertions of the will manifested in the external world." POUND, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 453.

"An act is an event subject to the control of the will." SALMOND, JURISPRUDENCE, 4 ed., 324.

"Suppose B takes A's hand and with it strikes C, this is clearly not A's act. Suppose B strikes A below the knee, as a result of which A's leg flies up and strikes C. This is not A's act. Suppose A is suffering from locomotor ataxia, and as a symptom of the disease his foot flies out and strikes C. This again is not A's act. Suppose A, while tossing in the delirium of typhoid fever, flings his arm against C. I do not think any judge would have difficulty in saying that this was not A's act and that he was, therefore, not guilty of a crime. Now, suppose A's hand strikes C because of an uncontrollable impulse, the symptom of mental disease. No distinction can be drawn between these cases, and yet many courts would not allow A a defense in the last case. Others would allow the defense without a consideration of the legal principle involved. When, therefore, it can be shown that the defendant's physical movement which caused the injury in question was due to an uncontrollable impulse he should not be convicted, which conclusion is based upon the most fundamental principle of criminal jurisprudence." From my paper on Tests of Criminal Responsibility of the Insane, 1 J. CRIM. LAW AND CRIMINOLOGY, 394, 400.

<sup>41</sup> "In order that an act may by the law of England be criminal . . . it must be voluntary." 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, 97.



volition is an element of criminal intent.<sup>42</sup> Under both these views a lack of volition due to mental disease is a defense to a charge of crime.

Whenever an impulse is irresistible, there is *ex vi termini* a clear lack of volition, or, as stated by the editor, "the power of choice is negated by the mental disorder." It follows, then, that the proposed section covers the case of irresistible impulse. So certainly is this so, that there seems no basis for the following statement of the editor in explanation of his contention to the contrary: "If this is not a true analysis of the meaning of the statute, the fact that it is a reasonably possible analysis makes the proposal unsatisfactory as model legislation."

It may possibly be argued at this point that, although an analysis of the section shows that it clearly includes irresistible impulse, this fact is not so obvious and apparent as to prevent some courts from overlooking it. To answer such an argument it is necessary to investigate the reason why courts refused to accept irresistible impulse as a defense when it was first offered, and why some of them continue to do so. It is difficult to see, from an abstract consideration of the question, why courts should have refused to recognize irresistible impulse as a defense, when it so clearly negatives a necessary element of crime, and when they without hesitation recognized other manifestations of lack of volition.<sup>43</sup> A study of the cases,

<sup>42</sup> "Will is as necessary an element of intent as are reason and judgment." Simmons, C. J., in *Flanagan v. State*, 103 Ga. 619, 626, 30 S. E. 550 (1898).

"This distinct element in criminal Intent consists not alone in the voluntary movement of the muscles (*i.e.* in action), nor yet in a knowledge of the nature of an act, but in a combination of the two, — *the specific will to act, i.e.* the volition exercised with conscious reference to *whatever knowledge the actor has* on the subject of the act." WIGMORE, EVIDENCE, § 242.

<sup>43</sup> See Anonymous Case, Lib. Assis. 287, pl. 17 (1369).

"If there be an actual forcing of a man, as if *A* by force take the arm of *B* and the weapon in his hand, and therewith stabs *C*, whereof he dies, this is murder in *A*, but *B* is not guilty." 1 HALE, P. C., 434.

"If a Man's Arm be drawn by Compulsion, and the Weapon in his Hand kills another, it shall not be felony." Pollard, Serjeant, in *Reniger v. Fogossa*, 1 Plowd. 1, 19 (1550).

"If *A* takes the hand of *B*, and with it strikes *C*, *A* is the trespasser and not *B*." *Gibbons v. Pepper*, 1 Ld. Raym. (1695) 38, 39.

"A man may throw himself into a river under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or the mind." *Erschine, J.*, to jury in *Reg. v. Pitts*, C. & M. 285 (1842).

"I do not know indeed that it has ever been suggested that a person who in his sleep

however, discloses the reasons for such refusal. The most important of these were: 1. It was not believed that the impulse was really irresistible.<sup>44</sup> 2. Impulse, the result of mental disease, was confused with an ordinary outbreak of passion. It was thought that the difficulties of proof were so great that to permit such a defense would be opening the door to impulses not really irresistible.<sup>45</sup>

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set fire to a house or caused the death of another would be guilty of arson or murder." 2 STEPHEN, HISTORY OF CRIMINAL LAW, 100.

<sup>44</sup> "But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence — the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint — that forbidding and punishing its perpetration." Bramwell, B., in *Reg. v. Haynes*, 1 F. & F. 666, 667 (1859).

"It is true that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds?" Rolfe, B., in *Reg. v. Stokes*, 3 C. & K. 185, 188 (1848).

"For myself I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse." Brannon, J., in *State v. Harrison*, 36 W. Va. 729, 751, 15 S. E. 982 (1892).

"But, if, from the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true, that there is an unsound condition of the mind, — that is, a diseased condition of the mind, in which, though a person abstractly knows that a given act is wrong, he is yet, by an insane impulse, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it, — the law must modify its ancient doctrines and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect." Dillon, Ch. J., in *State v. Felter*, 25 Iowa 67, 83.

To the same effect see *Spencer v. State*, 69 Md. 28, 40, 13 Atl. 809 (1888); *Cunningham v. State*, 56 Miss. 270, 279 (1879); *People v. Waltz*, 50 How. Pr. (N. Y.) 204, 214 (1874).

<sup>45</sup> "If this were not the law, every thief, to establish his irresponsibility, could assert an irresistible impulse to steal, which he had not mental or moral force sufficient to resist, though knowing the wrongful nature of the act; and in every homicide it would only be necessary, in order to escape punishment, to assert that anger or hatred or revenge or an overwhelming desire to redress an injury, or a belief that the killing is for some private or public good, has produced an irresistible impulse to do a known illegal and wrongful act. So that really there could never be a conviction if the guilty party should assert and maintain an irresistible impulse, produced by some pressure which he could not resist, as a reason for committing a crime. To restrain such impulses is the legal and moral duty of all men, and the protection of society demands that he who yields to them must take the consequences of his acts." Davis, J., in *People v. Coleman*, 1 N. Y. Crim. R. 1, 3 (1881).



3. It was believed that recognition of this defense would be dangerous to society.<sup>46</sup> 4. At the time irresistible impulse was first offered as a defense, the law relative to insanity had become crystallized by prescribing certain mental symptoms as tests of irresponsibility, so that the new symptom, not being included in the tests, was not allowed.<sup>47</sup>

Today the fact that an insane impulse may be truly irresistible is so well established,<sup>48</sup> that no court could gainsay it nor refuse to recognize a distinction between such an impulse and an ordinary outburst of passion. Likewise medical diagnosis of mental disease is so much more accurate and precise that the difficulties of proof are much lessened. Further, the adoption of the proposed statute would do away with all the symptomatic tests for determining the criminal responsibility of the insane, so that the courts would be free to apply the ordinary principles of law to the situation. It is submitted that, in the situation just described, it is almost incon-

"It seems to us, however, that in the view suggested the difficulty would be great, if not insuperable, of establishing by satisfactory proof whether an impulse was or was not 'uncontrollable.'" Wallace, J., in *State v. Bundy*, 24 S. C. 439, 445 (1885).

<sup>46</sup> "Indeed, it would seem dangerous to society to say that a man who knows what is right and wrong may nevertheless, for any reason, do what he knows to be wrong without any legal responsibility therefor. The law will hardly recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and a crime, and thereby relieve him from all criminal responsibility." Valentine, J., in *State v. Nixon*, 32 Kan. 205, 212, 4 Pac. 159 (1884).

"It will be a sad day for this state, when uncontrollable impulse shall dictate 'a rule of action' to our courts." Sherwood, J., in *State v. Pagels*, 92 Mo. 300, 317, 4 S. W. 931 (1887).

"If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order, as well as personal safety." Henderson, J., in *Boswell v. State*, 63 Ala. 307, 321 (1879).

<sup>47</sup> "The medical man called for the defense defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind, under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This would appear to be a most dangerous doctrine, and fatal to the interests of society and security of life. The question is, whether such a theory is in accordance with law? The rule, as laid down by the Judges, is quite inconsistent with such a view; for it was that a man was responsible for his actions if he knew the difference between right and wrong." Wightman, J., in *Reg. v. Burton*, 3 F. & F. 772, 780 (1863).

<sup>48</sup> "An impulse is an action committed consciously, but without motive or forethought, and sometimes directly opposed by the will power of the individual." L. C. BRUCE, *STUDIES IN CLINICAL PSYCHIATRY*, 27.

Krafft-Ebing states that impulsive movements may be due to irritation of the psychomotor centers. *TEXT BOOK OF INSANITY*, 321.

ceivable that any court of last resort in this country would refuse to allow as a defense a clearly established case of insane impulse.

III. The report of the committee, that drafted the bill under discussion, contained the following statement relative to the scope of section one:

"Under our present law on the subject of insanity the question is whether the defendant by reason of his mental disease shall be held not responsible to the law for the injury he has done. There is another question which is almost equally important, and that is, whether a mental disease, although not of sufficient degree to relieve entirely from responsibility, may not be held to lessen the degree of the crime. For instance, may not a person charged with murder escape conviction for that offense because by reason of his mental disease he did not have the malice aforethought, but be found to have enough *mens rea* to be guilty of manslaughter? This doctrine of partial responsibility has been adopted by some continental countries and has earnest advocates here. The Supreme Court of Utah in a decision rendered last year applied this doctrine. If the proposal of the committee be accepted, partial responsibility follows as a logical conclusion."

The editor states that this will be "holding lunatics for part of their crimes," and objects to the suggestion on the grounds: 1. "It would lead to the result that the law would establish a barometric scale of states of responsibility divided into as many grades as there are degrees of insanity." 2. "To admit such partial responsibility is to make concessions to a science of the past where partial insanity was recognized." 3. "When conflicting evidence of alienists is introduced there will be danger of a compromise by the jury and either a prisoner who is responsible will receive too light a punishment or one who ought to escape altogether will be condemned." The suggestion of the committee does not involve holding a lunatic for part of his crime, as stated by the editor, but for the exact crime committed by him where he has been charged with a severer crime than he committed. Under the present practice a defendant charged with first-degree murder, who sets up insanity as a defense, must be either convicted of the crime charged or entirely acquitted, although the evidence shows that the crime actually committed was murder in the second degree or manslaughter. The first section of the proposed bill would remedy this illogical situation, and under it a defendant charged with murder



in the first degree, whose mental condition was such that all the elements of first-degree murder were present except, for instance, premeditation, when this is required, would be convicted of murder in the second degree, the crime he actually committed.

The idea that a derangement of the defendant's mental processes may be material in determining whether he shall be convicted of a lesser crime than that charged is not a new one in the law. It is constantly being applied when the defense is intoxication.<sup>49</sup> The proposition has been well stated by the Supreme Court of Connecticut:

"Intoxication is admissible in such cases [prosecutions for first-degree murder] not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offense was in fact committed."<sup>50</sup>

Is there any logical or practical reason why this doctrine is not as applicable to the defense of insanity as to that of intoxication? Mr. Justice Gray of the United States Supreme Court stated the doctrine broadly enough to cover insanity as well as intoxication:

"When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness *or otherwise*,<sup>51</sup> as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."<sup>52</sup>

This doctrine is also applied in cases where a person kills another at a time when his mental processes have been temporarily affected

<sup>49</sup> *Jenkins v. State*, 58 Fla. 62, 50 So. 582 (1909); *Aszman v. State*, 123 Ind. 347, 24 N. E. 123 (1889); *State v. Sparegrove*, 134 Iowa 599, 112 N. W. 83 (1907); *Terhune v. Commonwealth*, 144 Ky. 370, 138 S. W. 274 (1911); *Cline v. State*, 43 Ohio St. 332, 1 N. E. 22 (1885); *Keenan v. Commonwealth*, 44 Pa. 55 (1862); *People v. Peterson*, 166 Mich. 10, 131 N. W. 153 (1911).

"Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." COOK, CRIM. CODE OF N. Y., 1220. Several courts employ the familiar insanity test — inability to distinguish between right and wrong — as a guide in determining whether a necessary intent is negated by intoxication. *Ryan v. U. S.*, 26 App. D. C. 74 (1905); *State v. Ford*, 16 S. D. 228, 92 N. W. 18 (1902).

<sup>50</sup> *Carpenter, J.*, in *State v. Johnson*, 40 Conn. 136, 143 (1873).

<sup>51</sup> The italics are the present writer's.

<sup>52</sup> *Hopt v. People*, 104 U. S. 631, 634 (1881).

by provocation of certain kinds. In such cases his state of mind, though not amounting to a complete defense, reduces the degree of the offense from murder to manslaughter.<sup>53</sup> The difficulty has been that the courts in dealing with the defense of insanity have been concerned to such a degree in describing psychological phenomena, that they inhibited themselves from seeing the application of general principles of law to the problem before them.

A recent case in Utah<sup>54</sup> adopted the doctrine of partial responsibility contended for here. In this case the defendant was indicted for first-degree murder under a statute requiring that the killing be premeditated. The medical evidence was conflicting, but tended to indicate that the defendant was somewhat unsound mentally, with some symptoms of epilepsy. The defendant was convicted of murder in the first degree. The Supreme Court reversed the conviction on the ground *inter alia* that the jury should have been instructed that the mental condition of the defendant might negative the required deliberation. Regarding this point the court said:

"While the jury found that his condition in that respect was not such as to affect his mental capacity to relieve him from responsibility, yet it may have been such as to affect his mental capacity to coolly deliberate and premeditate on his acts. The jury, therefore, as hereinafter suggested, should have been instructed to consider all of the foregoing

<sup>53</sup> "But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of the reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition; then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." Christiancy, J., in *Maher v. People*, 10 Mich. 212, 219 (1862). To the same effect are the following: *Collins v. State*, 102 Ark. 180, 143 S. W. 1075 (1912); *State v. Creste*, 27 Del. 118, 86 Atl. 214 (1913); *State v. Hoyt*, 13 Minn. 132 (1868); *State v. Grugin*, 147 Mo. 39, 47 S. W. 1058 (1898); *State v. Kennedy*, 169 N. C. 288, 84 S. E. 515 (1915); *Commonwealth v. Colandro*, 231 Pa. St. 343, 80 Atl. 571 (1911); *Mitchell v. State*, 179 S. W. 116 (Tex. 1915).

<sup>54</sup> *State v. Anselmo*, 46 Utah 137, 148 Pac. 1071 (1915). An early Illinois case is to the same effect. *Fisher v. People*, 23 Ill. 283 (1860). In the following cases the doctrine is repudiated: *Commonwealth v. Wireback*, 190 Pa. St. 138, 42 Atl. 542 (1899); *Commonwealth v. Cooper*, 219 Mass. 1, 106 N. E. 545 (1914); *Witty v. State*, 75 Tex. Crim. R. 440, 171 S. W. 229 (1914).



evidence in determining appellant's mental capacity to deliberate and premeditate the homicide. While one's mental condition may not excuse his act, it may nevertheless affect the degree of guilt."

The English Court of Criminal Appeal has gone so far as to hold that an unsound mental condition, which is insufficient to relieve from responsibility, may be ground for reducing the penalty.<sup>55</sup>

The editor states that the proposition now being contended for, which is generally called partial responsibility, involves the theory of partial insanity. If he is using "partial insanity" to describe the condition of one who is not entirely deprived of reason and understanding, then undoubtedly his statement is correct. This is a condition which the science of today, as well as that of the past, recognizes, for it is that of most persons mentally diseased. If, however, he is using the term "partial insanity," as it is often used, to describe a condition such as that set forth by the judges in *McNaughton's Case*, viz., that of a person insane in one particular and sane as to all others, a condition which probably never existed in fact, then "partial responsibility" as used in this connection in no way involves "partial insanity."

The editor suggested that the adoption of the doctrine of partial responsibility would lead to compromise verdicts when the evidence is conflicting. It is submitted that this result is not nearly so likely to happen as is the acquittal, under the present rules, of a defendant who is shown to have lacked some of the mental element necessary for the full crime charged.<sup>56</sup> Illogical verdicts are more likely to result from illogical than from logical rules.

IV. and V. The fourth and fifth objections of the editor raise the question as to the scope of the proposed section in comparison with the present law on the subject.

In attempting to answer this question, it is first necessary to

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<sup>55</sup> Appeal of Holder, 7 Crim. App. R. 59 (1911); Appeal of McQueen, 8 Crim. App. R. 89 (1912).

<sup>56</sup> "The law, as I shall have again more fully to point out, will remain a dead letter, or will be continually ignored by the sympathies of judges, juries, and, I may add, of medical witnesses, unless some practical distinction can be arranged which may enable the responsible insane to undergo some lower degree of punishment than that inflicted on similar delinquents being of sound mind." MAYO, MEDICAL TESTIMONY IN LUNACY, 50.

"Until some middle way is devised by which offenders neither altogether innocent, nor altogether guilty, can have their proper meed of conviction, juries in cases of murder will continue to find verdicts of not guilty on the false plea of insanity." BUCKNILL, UNSOUNDNESS OF MIND, 117.

point out certain fundamental differences between the test of irresponsibility prescribed by the proposed section and the tests now employed. The latter were framed from the medical standpoint, and consist simply of a statement of certain mental symptoms, *viz.*, inability to distinguish between right and wrong, irresistible impulse, and delusion, the existence of one or more of which is treated by the law as a defense. These symptoms represent but a small portion of the phenomena of mental disease, and they bear no necessary relation to the ordinary legal rules for determining responsibility. They are simply obsolete medical theories crystallized into rules of law. In contrast to this situation, the test of the proposed section is based upon one of the most fundamental principles of criminal law, the application of which to the problem of insanity the courts simply lost sight of as a result of their dependence upon the medical profession for all knowledge of mental disease, and the misconceptions entertained by physicians as to the character of this disease. The test of the proposed section is limited to no particular symptoms and embodies no medical theories. The question under the section is whether the symptoms of mental disease, whatever they may be, negative the state of mind required for the crime charged. The proposed test will remain unaffected by divergent views and changing theories regarding the nature and character of mental disease.

The practical method for determining the effect of the enactment of this section into law is to compare it with the existing law in individual states, and this the writer proposes to do. Such a comparison will, however, be facilitated by first discussing the general state of the law regarding "insane delusion." This course is particularly indicated since the editor states that insane delusion "is a species of the genus mistake of fact and excuses on that ground."

No feature of the problem of determining the relation between criminal responsibility and mental disease has caused more trouble than the proper test for insane delusion. From obscurity, so far as the law is concerned, this symptom was brought into the limelight by Erskine in *Hadfield's Case*<sup>57</sup> and as a result of his oratory

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<sup>57</sup> "Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted." Speech of Erskine to jury, *Hadfield's Case*, 27 How. St. Tr. 1281, 1314 (1800).



became for a time the sole test of insanity for the courts.<sup>58</sup> In *McNaughton's Case*, where the defense was delusion, Tindal, Ch. J., instructed the jury:

"If he was not sensible at the time he committed that act, that it was in violation of the law of God and of man, undoubtedly he was not responsible for that act."<sup>59</sup>

When, however, the King's Bench judges, following *McNaughton's Case*, gave their famous answers to the questions of the Lords, they first narrowed their consideration of delusion to those who "suffer from partial delusions only and are not in other respects insane," and they laid down, without appearing to note any inconsistency, two distinct tests relative to such delusions: 1. The victim of delusion is responsible "if he knew at the time of committing such crime that he was acting contrary to law." 2. "He must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."<sup>60</sup> This second rule here appears for the first time in the law and is the direct result of the premise laid down, that apart from the delusion the person is perfectly sane.

The same confusion characterizes the present law on the subject of delusions. There are at least five different tests for determining when delusion shall be a defense: 1. When the facts of the delusion, if true, would be a defense.<sup>61</sup> This is the ordinary test of mistake of fact, and is the second rule laid down by the judges in *McNaughton's Case*. 2. When the delusion destroys ability to distinguish between right and wrong.<sup>62</sup> 3. When irresistible impulse

<sup>58</sup> "To say a man was irresponsible, without positive proof of any act to show that he was labouring under some delusion, seemed . . . to be a presumption of knowledge which none but the great Creator Himself could possess." Lord Denman to jury in *Reg. v. Smith* (1849), quoted in WILLIAMS, UNSOUNDNESS OF MIND, 5.

"The test of delusion was thus (by Erskine in *Hadfield's Case*) for the first time laid down, and though in itself delusive from its want of comprehensiveness, its temporary establishment did good service by overthrowing and replacing the unfortunate dogma of Hale." BUCKNILL, CRIMINAL LUNACY, 41.

<sup>59</sup> 4 Rep. St. Tr. (N. S.) 925.

<sup>60</sup> *Ibid.*, 930, 932.

<sup>61</sup> *Smith v. State*, 55 Ark. 259, 18 S. W. 237 (1891); *People v. Hubert*, 119 Cal. 216, 51 Pac. 329 (1897); *State v. Merwerther*, 46 Iowa 88 (1877); *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500 (1844); *Thurman v. State*, 32 Neb. 224, 49 N. W. 338 (1891); *State v. Lewis*, 20 Nev. 333, 22 Pac. 241 (1889); *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275 (1893); *Taylor v. Commonwealth*, 109 Pa. St. 262 (1885).

<sup>62</sup> *People v. Willard*, 150 Cal. 543, 89 Pac. 124 (1907); *Smith v. Commonwealth*, 1 Duv. (Ky.) 224, 230 (1864); *Grissom v. State*, 62 Miss. 167 (1884).

or inability to distinguish between right and wrong results from the delusion.<sup>63</sup> 4. When irresistible impulse results from delusion.<sup>64</sup> 5. When the wrong done is the product of the delusion.<sup>65</sup>

The first test, involving as it does the proposition that a person suffering from an insane delusion is capable of the same power of reasoning and control as a perfectly sane person, has been many times criticized both by medical<sup>66</sup> and legal writers,<sup>67</sup> the former stating that no such person ever existed.<sup>68</sup> The doctrine was vigorously repudiated in the well-reasoned cases of *Parsons v. State*<sup>69</sup> and *State v. Jones*,<sup>70</sup> Ladd, J., saying in the latter case: "It is probable no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity."<sup>71</sup> A recent case in Colorado also refuses to follow the doctrine. The court says:

"A simple illustration discloses its vice. Suppose a man labors under a delusion that a countryman is involved in a traitorous scheme in the capacity of a foreign spy, such delusion so completely possessing his mind that it becomes a foremost and constant thought and actually renders him insane, and under it he kills the other in his belief that it was an act of civic duty."<sup>72</sup>

<sup>63</sup> "In such a case [insane delusion] . . . there must exist either one of two conditions: (1) Such mental defect as to render the defendant unable to distinguish between right and wrong in relation to the particular case; or (2) the overmastering of defendant's will in consequence of the insane delusion under the influence of which he acts, produced by disease of the mind or brain." Somerville, J., in *Parsons v. State*, 81 Ala. 577, 596, 2 So. 854 (1886).

<sup>64</sup> *Flanagan v. State*, 103 Ga. 619, 30 S. E. 550 (1898); *Fouts v. State*, 4 Greene (Ia.) 500, 508 (1854); *Commonwealth v. Mosler*, 4 Barr (Pa.) 265, 266 (1846).

<sup>65</sup> *State v. Jones*, 50 N. H. 369 (1871); LEWIS, A DRAFT CODE OF CRIMINAL LAW, 246.

<sup>66</sup> RAY, MEDICAL JURISPRUDENCE OF INSANITY, 283; MERCIER, CRIMINAL RESPONSIBILITY, 174; OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, 216; Article by Morton Prince, M.D., 49 J. AM. MEDICAL ASS'N 1643, 1645.

<sup>67</sup> "If the being or essence, which we term the mind, is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound on other subjects." Lord Brougham in *Waring v. Waring*, 6 Moore P. C. 341, 350 (1848).

See also 2 STEPHEN, HISTORY OF CRIMINAL LAW, 160-163; STROUD, MENS REA, 78.

<sup>68</sup> "There is not, and there never has been, a person who labours under partial delusion only, and is not in other respects insane." MERCIER, CRIMINAL RESPONSIBILITY, 174.

<sup>69</sup> 81 Ala. 577, 2 So. 854 (1886).

<sup>70</sup> 50 N. H. 369 (1871).

<sup>71</sup> P. 387.

<sup>72</sup> *Ryan v. People*, 60 Colo. 425, 428, 153 Pac. 756 (1915).



The second test is limited to a case where the symptom "delusion" produces the symptom "inability to distinguish between right and wrong." As most persons suffering from delusions know when they do wrong, this test has a very narrow application. It involves the further difficulty of establishing a direct relation between the two symptoms.

Under the fourth test inability to control one's actions is the basis of the defense, and this applies, of course, to one alternative of the third test. Such lack of control or volition is also involved in the fifth, the premise being that the action is the reflexive result of the delusion. Since volition is, as has been shown, a mental element of every crime, the cases included in the third, fourth, and fifth tests are covered by the proposed section.

The facts of *McNaughton's Case*<sup>73</sup> are helpful in comparing the various tests for delusion. In this case the defendant had a delusion that he was being continually followed by certain persons, who spied upon him, pointed at him, and spoke about him. According to the medical testimony in that case the act of shooting Sir Robert Peel was the direct result of the delusion, the defendant believing Sir Robert was one of the persons who were following him.

It was also testified that "the delusion deprived the prisoner of all restraint over his action,"<sup>74</sup> and that "a person may labor under a morbid delusion, and yet know right from wrong."<sup>75</sup> There was no evidence that the defendant was unable to distinguish between right and wrong.

Under the first test of delusion the defendant should have been convicted, since, if he had in fact been followed as he believed, this would not justify the killing. The second test would offer no defense, as there was no evidence he did not know right from wrong. Since the killing was the direct result of the delusion, and, as testified, the defendant had no restraint over his actions, his case is covered by the third, fourth, and fifth tests and also by the proposed section.

In discussing delusion, writers on insanity point out that lack of will power is often involved. One of the characteristics of an insane delusion is the fact that the will is powerless to dismiss it, and this same lack of control may characterize resulting muscular

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<sup>73</sup> 4 Rep. St. Tr. (N. S.) 847.

<sup>74</sup> *Ibid.*, 922.

<sup>75</sup> *Ibid.*, 921.

activity.<sup>76</sup> Another feature of insane delusion is lack of reasoning power so far as the delusion is concerned, which persists notwithstanding every proof to the contrary, and in spite even of the impossibility of the thing believed.<sup>77</sup> Thus, for instance, if a person is suffering from an insane delusion that he is made of glass, no amount of proof or demonstration to the contrary will have any effect upon the delusion. If he has a delusion that some one in the room is pinching him, he likewise cannot be convinced of the contrary, and if he should strike the object of his delusion, such striking might be more a reflexive movement than the result of a reasoned decision.

The defect of the legal tests regarding delusion, which have been discussed, is that they fail to include all the other symptoms which may accompany it. Delusion is a symptom of different varieties of mental disease and should be considered in connection with the general symptomatology. Thus, for instance, one suffering from acute alcoholic insanity frequently has delusions which may be accompanied by frenzy or delirium. In such a case there may be unconsciousness or complete lack of control.<sup>78</sup> In the persecutory stage of paranoia, where the patient has a delusion that persons are trying to injure or annoy him, a homicidal impulse frequently develops.<sup>79</sup> McNaughton was such a paranoiac, and, as already stated, the medical testimony was to the effect that at the time of the shooting he had no self-control. Delirium and frenzy may also accompany delusions in advanced stages of paranoia.<sup>80</sup>

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<sup>76</sup> "In a more advanced stage of the disease (paranoia), the delusion, whatever it may be, so overpowers the patient that he loses all self-control." TAYLOR, *MEDICAL JURISPRUDENCE*, 5 ed., 804.

<sup>77</sup> "Insane Delusion is a belief in something that would be incredible to people of the same class, age, education, or race, as the person who expresses it; those beliefs being persisted in, in spite of proof to the contrary, and resulting from a diseased or defective brain action." CLOUSTON, *UNSOUNDNESS OF MIND*, 185.

"But the fact that these ideas become delusions and acquire a power which even the senses cannot destroy, can only be explained by an inadequate functioning of judgment, dependent on impassioned emotional excitement, clouding of consciousness, and weakness of the reasoning power." KRAEPELIN, *CLINICAL PSYCHIATRY*, 51. To the same effect see KRAFFT-EBING *TEXT BOOK OF INSANITY*, 75.

<sup>78</sup> BERKLEY, *MENTAL DISEASE*, 117, 268.

<sup>79</sup> DERCUM, *CLINICAL MANUAL OF MENTAL DISEASES*, 142; CHURCH-PETERSON, *NERVOUS AND MENTAL DISEASES*, 8 ed., 751; MERCIER, *TEXT BOOK OF INSANITY*, 290.

<sup>80</sup> Chas. K. Mills, *Paranoia*, *PROC. AM. MEDICO-PSYCHOLOGICAL ASS'N*, May, 1904.



Under the test of the proposed section all the mental symptoms which accompany delusion would be considered as well as the delusion itself, and if, as a result of these, any necessary mental element of the crime charged is lacking there would be a defense.

*(To be continued.)*

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## THE EARLY HISTORY OF THE CORPORATION IN ENGLAND

### I

OURS is a time of deep question about the state.<sup>1</sup> Theories of corporate personality have challenged in decisive fashion its proud claim to preëminence.<sup>2</sup> Its character of uniqueness seems hardly to have survived the acid test of skeptical inquiry. The groups it has claimed to control seem, often enough, to lead a life no less full and splendid than its own. The loyalty they can command, the fear they may inspire, are near enough to its own to seek comparison with it. Yet dogmas that are none the less fundamental because they are hardly old still haunt our speculations. It is barely a century and a half since Blackstone asserted in his emphatic fashion the right of the state to condition and control all corporate existence.<sup>3</sup> Less than three centuries have elapsed since a civil war shocked the timid Hobbes<sup>4</sup> into a repetition of Richard of Devizes' anger at the danger of group-persons.<sup>5</sup> We perhaps too little realize that a long history lies behind Blackstone's incisive sentences; nor is the contemptuous phrasing of Hobbes an accurate index to the English attitude. For, as Maitland has pointed out,<sup>6</sup> few countries have enjoyed a richer variety of group-life. Yet we have hardly come to ask the fundamental questions that richness suggests. A history of English state theory has still to be written.<sup>7</sup> We have still to work out in detail the

<sup>1</sup> Cf. BARKER, ENGLISH POLITICAL THOUGHT FROM HERBERT SPENCER TO TO-DAY, 175 ff., and BURNS, THE MORALITY OF NATIONS, *passim*.

<sup>2</sup> Cf. E. Barker in the POLITICAL QUARTERLY for February, 1915; FIGGIS, CHURCHES IN THE MODERN STATE, and SALEILLES, DE LA PERSONNALITÉ JURIDIQUE, 41, 356, 364, 463-64, 533, 619.

<sup>3</sup> 1 COMM. 472.

<sup>4</sup> LEVIATHAN, Bk. II, c. 29. For his timidity, cf. CROOM ROBERTSON'S LIFE, 52.

<sup>5</sup> RICHARD OF DEVIZES' CHRONICLE, 416. Cf. 1 STUBBS, CONSTIT. HIST., 6 ed., 455.

<sup>6</sup> Cf. Maitland's Introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, xxxvi.

<sup>7</sup> Though Maitland has indicated the lines on which such a history should be written. 3 COLL. PAPERS, 210-70.



lines of their thought as to its juridical nature and of its relation to those groups of which they were so dramatically prodigal. Englishmen are a practical race, and they had discovered the benefits of fellowship long before they speculated upon their nature. Orcy of Dorsetshire had built for his brethren a gild-house long before the stern hand of the Norman conqueror had begun to effect the centralization of law;<sup>8</sup> and the benefits of meat and drink in goodly fellowship were not unknown in Anglo-Saxon Cambridge.<sup>9</sup>

But where men meet to eat and drink and, mayhap, to pray, the subtleties involved in corporate existence hardly seem to emerge. *Communitas*, it is true enough, is the key to early English history; but it is a dangerous and ambiguous word. "It swallows up," as Maitland has happily remarked,<sup>10</sup> "both the corporation and the group of coöwners." That, indeed, is intelligible enough; for in the nineteenth century a great Lord Chancellor could still be puzzled about the nature of corporate ownership.<sup>11</sup> The abstractions of early jurisprudence are post-conquestual in origin; and we may even doubt whether the early communalism which has so much affected the economic speculation of our time is not in fact more truly individualist than we care to admit.<sup>12</sup> We dare not base our speculations upon the evidence anterior to the time when the iron hand of Norman William fashioned a conquered kingdom to his own desire. Of corporateness we shall speak with some skepticism, though we shall recognize that its roots are there. For the court rolls from which our main knowledge of internal organization is drawn date only from the end of the thirteenth century; the records of the King's Court are continuous only after the twelfth. Our earlier knowledge is rather of fields and farming methods, of taxation and military service, than of judicial or political unification. And where there is so dangerous an economy of words, our footsteps must needs go slowly.

<sup>8</sup> CODEX DIP. (ed. Kemble), No. DCCCXLII.

<sup>9</sup> I KEMBLE, SAXONS IN ENG., 513. On the Anglo-Saxon gilds generally, see I GROSS, GILD MERCHANT, 174-91. Gneist has warned us against overestimating their importance. I VERWALT. 139.

<sup>10</sup> TOWNSHIP AND BOROUGH, 12.

<sup>11</sup> Cf. Eldon, L. C., in *Lloyd v. Loaring*, 6 Ves. 773, 776-77 (1802).

<sup>12</sup> Cf. MAITLAND, DOMESDAY BOOK AND BEYOND, 342 ff. On the other hand Professor Vinogradoff stands by the older conception. GROWTH OF THE MANOR, 18 ff., 150.

## II

Yet some sort of guesswork we may adventure. If corporateness be held in the balance the basis of it may at any rate be discovered. The theory of possession — the later turning point in corporate history — here helps us but little. It is to men that the land belongs. Our Anglo-Saxon village is full of freeholders.<sup>13</sup> The men who drew up Domesday Book were not very certain whether St. Peter owns his church, or the priest who cares for it.<sup>14</sup> The church will indeed hold land; and we may perhaps see therein a significant effort after a natural personification. Yet we shall put our trust in the mysticism of a superstitious time rather than the advanced ideas of an inquiring jurisprudence.<sup>15</sup> The land of England, of a certainty, is the king's, for William knew too well the dangers of continental feudalism to submit himself to its conflicts of allegiance.<sup>16</sup> It is evidence enough that a corporate kingdom is not yet attained, for William at least is stout flesh and blood, and what he calls his own he uses for his purposes.<sup>17</sup>

Yet a certain attempt at noteworthy unification we deem not wanting. England is divided into townships; and we shall exaggerate the automatism of medieval life if we believe that its affairs went of themselves. A township court it seems clear that we must have.<sup>18</sup> That court will pass by-laws,<sup>19</sup> and, if need be, enforce them.<sup>20</sup> There was joint liability in taxation,<sup>21</sup> for the separate collection of geld from each individual was a task no administration could then have undertaken.<sup>22</sup> The village will grow and divide

<sup>13</sup> This is of course the whole point of the second essay in MAITLAND, *DOMESDAY BOOK AND BEYOND*. Cf. especially pp. 318 ff. It is interesting to note the kindred ideas of continental historians. Cf. especially 2 FLACH, *LES ORIGINES DE L'ANCIENNE FRANCE*, 45, and Dargun, "Ursprung des Eigenthums," 5 *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT*, 55.

<sup>14</sup> 1 POLLOCK & MAITLAND, 2 ed., 498-500.

<sup>15</sup> Cf. 3 GIERKE, *DEUTSCHE GENOSSENSCHAFTSRECHT*, 195.

<sup>16</sup> 1 STUBBS, *CONSTIT. HIST.*, 6 ed., 290.

<sup>17</sup> Cf. 3 MAITLAND, *COLL. PAPERS*, 246. "All lands were his lands, and we must be careful not to read a trusteeship for the nation into our medieval documents."

<sup>18</sup> Cf. VINOGRADOFF, *GROWTH OF THE MANOR*, 194.

<sup>19</sup> Cf. *NORTHUMBERLAND ASSIZE ROLL* (Surtees Soc., vol. 88), 45.

<sup>20</sup> Cf. MASSINGBERD, *COURT ROLLS OF INGOLDMELLS*, 44; 1 P. & M., 2 ed., 613.

<sup>21</sup> Cf. *ROT. HUND.*, I, 6; II, 8, etc.

<sup>22</sup> Hence Maitland's brilliant but untenable theory of the manor. *DOMESDAY BOOK AND BEYOND*, 107-28.



into parts;<sup>23</sup> surely the fact of division connotes the recognition of significant difference. The village is a police unit, and it will sometimes struggle against a forcible extinction.<sup>24</sup> It is of real importance that our great geld-book should write of local duties and local privileges in township terms.<sup>25</sup> The vill that farms its own dues has a healthy sense of its own individuality;<sup>26</sup> and the men who could hold and sell their land "*communiter*" we may not easily pass by.<sup>27</sup> Nor dare we minimize a waste land which, however vaguely, is yet the possession of the community.<sup>28</sup>

Admittedly this is no proof of formal corporateness; it is doubtful if your Anglo-Saxon peasant, even if he be lettered monk, would have grasped the transition from *communa* to *universitas*. But no one who looks at this evidence of an action which, whatever it is, is yet not individual, can fail to discern a soil which seems to promise fairly for the growth of abstract ideas. Land that is somebody's land may soon, and easily, become the land of some body. Men who act in union will come rapidly to regard themselves as an unit. Local delimitation will make for the growth of separatism. The men of Trumpington will somehow partake of its character. What that character is they may not as yet speculate; but the basis of speculation lies ready to their hand.

Whatever skepticism we may cherish as to townships, some vague sort of corporate character we may not take from hundreds and from counties. "The 'county,'" wrote Maitland,<sup>29</sup> "is not a mere stretch of land . . . it is an organized body of men; it is a *communitas*." In truth that organized character is little short of an amazing thing. Devonshire boasted a common seal at the time of the first Edward;<sup>30</sup> and comital grants seem to fall no less trippingly from the pen of needy John Lackland than when boroughs

<sup>23</sup> DOMESDAY BOOK AND BEYOND, 14 ff. For a different view, cf. 2 MAITLAND, COLL. PAPERS, 84-86.

<sup>24</sup> MAITLAND, PLEAS OF GLOUCESTER, Pl. 157. VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY, 216.

<sup>25</sup> Cf. 1 DOMESDAY BOOK 181 d (Frome), 275 b (Wyaston).

<sup>26</sup> Cf. 1 SELECT PLEAS IN MANORIAL COURTS (Selden Soc.), 172 (Brightwaltham).

<sup>27</sup> 1 DOMESDAY BOOK 213 d (Goldington). On the self-governing character of the medieval township the tenth appendix of Professor Vinogradoff's "English Society in the Eleventh Century" is an interesting balance to Maitland's skepticism.

<sup>28</sup> 2 GROSS, *op. cit.*, 122.

<sup>29</sup> 1 P. & M., 2 ed., 534.

<sup>30</sup> *Ibid.*, 535.

were the subject of his corrupt donations.<sup>31</sup> The county can be fined; and it seems like enough that it kept a common purse against such misfortune.<sup>32</sup> It will defend itself and hire a champion to the purpose.<sup>33</sup> It has a court which is thoroughly representative in character. It seems to make by-laws;<sup>34</sup> and it is a natural unit of parliamentary representation. And if the hundred has failed to advance so far, the fine for *murdrum* denotes an early unification; and a clause in the Statute of Winchester shows us that the recognition of its value remains at least to the close of the early middle ages.<sup>35</sup> The hundred has its court; nor does it evade the financial censure so beloved of the Angevin kings.<sup>36</sup> There is even some prospect that a property in land may not have been lacking to it.<sup>37</sup> So near, in truth, to corporateness are these units of administration that within a century and a half its absence gave deep cause for reflection to a chief justice of England.<sup>38</sup>

Most striking of all we find those villis which have gone beyond the stage of villadom and attained burghality. Wherein lay the secret of that transition we may not now speculate; nor dare we venture a guess as to the time of its beginning.<sup>39</sup> For us the important point is rather what was in the minds of those who administered the king's law when they spoke of boroughs. It is unquestionable that to the scribes of Domesday Book the borough is a piece of land like shire and manor and hundred;<sup>40</sup> yet in one curious passage the writer seems to draw a vivid distinction between the power of personality the county may have and that of the town. He will allow the shire to speak for itself; but the men in Huntingdon he seems to conceive of as in no sense organically one.<sup>41</sup> The borough

<sup>31</sup> ROT. CHART. 122, 132. Maitland has noted that as late as 17 EDW. II an attempt was made to indict the county. 1 *loc. cit.*, 535.

<sup>32</sup> MADOX, HIST. OF EXCHEQUER (ed. of 1711), 386.

<sup>33</sup> 1 P. & M., 2 ed., 537.

<sup>34</sup> *Ibid.*, 555, n. 2.

<sup>35</sup> STUBBS, SELECT CHARTERS (ed. Davis), 467.

<sup>36</sup> 1 STUBBS, CONSTIT. HIST., 6 ed., 430.

<sup>37</sup> MAITLAND, DOMESDAY BOOK AND BEYOND, 355, n. 2.

<sup>38</sup> See the opinion of Kenyon, C. J., in *Russell v. Men of Devon*, 2 T. R. 667, 672 (1788).

<sup>39</sup> All discussion of this problem must now start with Maitland's famous chapter in DOMESDAY BOOK AND BEYOND, 172-219, as checked by Professor Tait in 12 ENG. HIST. REV. 776. Mr. Ballard has fortified Maitland's theory, perhaps a little too emphatically, in his DOMESDAY BOROUGHES.

<sup>40</sup> Cf. 1 DOMESDAY BOOK 132 a (Hertford), 3 a (Sandwich).

<sup>41</sup> 1 DOMESDAY BOOK 208 a.



is a piece of land and to its corporateness, before the Conquest at least, seems lacking. There are men there, it is true enough; and Henry I will grant to the men of English Cambridge that the barges shall be nowhere loaded save at their port.<sup>42</sup> It is in a similar sense that his grandson speaks.<sup>43</sup> They talk of living men, and the borough seems not yet to have attained the abstract character implied in corporateness. Yet soon a different language will be spoken. When the good burgesses of Okehampton sell their land they will pay to lord and reeve, but to the borough as well;<sup>44</sup> and the drinking that the friendly men of Whitby demanded implies the possession of a common purse.<sup>45</sup> We can see clearly enough how men's thoughts move toward the idea of the borough as an entity. Bristol in 1188 had already an interest distinct from that of its citizens;<sup>46</sup> but such nice metaphysical differences puzzled the good draftsman of Dublin when he copied the Bristol charter, and he hesitated to make the bridge from an intelligible plurality of citizens to the difficulty of a singular city.<sup>47</sup> Bit by bit what it was at first natural to attribute to the men of the borough the borough itself will come to possess; so that by the reign of King John it has become natural for that reckless prodigal to cast about his free boroughs and their rights.<sup>48</sup> Magna Carta itself personifies a city of London to which rights have been annexed.<sup>49</sup> Loshwithiel may allow a stranger to keep its tavern.<sup>50</sup> Northampton will elect its reeve and coroner;<sup>51</sup> Shrewsbury,<sup>52</sup> Ipswich,<sup>53</sup> and Gloucester<sup>54</sup> will follow that fascinating example. A town from which its citizens may take "common counsel" has a suggestive group-quality about it. The city of Worcester paid forty marks to the aid Henry II collected in 1177;<sup>55</sup> and when Lion-hearted

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<sup>42</sup> MAITLAND, CAMBRIDGE BOROUGH CHARTERS, 2.

<sup>43</sup> 1 RECORDS OF NOTTINGHAM (Stevenson), 2.

<sup>44</sup> 1 FRASER, CONTESTED ELECTIONS, 82.

<sup>45</sup> 1 WHITBY, CART. (Surtees Soc., vol. 69), 211.

<sup>46</sup> See BICKLEY, LITTLE RED BOOK, where the charter is reproduced.

<sup>47</sup> HIST. & MUN. DOC. IRELAND (Rolls Ser.), 2.

<sup>48</sup> See his charter to Lynn in ROT. CHART. 118; to Dunwich in *ibid.*, 159; to Stafford in 1 CAL. CHARTER ROLLS 71.

<sup>49</sup> MAGNA CARTA, c. 9.

<sup>50</sup> REP. HIST. MSS. COM., 1901, pt. i, 328.

<sup>51</sup> 1 RECORDS, 25, 31.

<sup>52</sup> ROT. CHART. 46.

<sup>54</sup> ROT. CHART. 56.

<sup>53</sup> ROT. CHART. 153.

<sup>55</sup> PIPE ROLL 23 HEN. II, 67.

William grants to his "burgh and burgesses" of Ayr five pennyworth of land, the reality of the distinction seems incapable of disproof.<sup>56</sup> What was that *communa* of the city of Oxford which in 1214 had a common purse wherewith it could pay penance for the murder of poor scholars?<sup>57</sup>

We must not overstress this communalism, for in truth it is ambiguous enough. What we shall recognize is the undoubted fact that the draftsman of the twelfth century see here, however vaguely, the terms of corporate liability and are striving forward to express it. It is an effort made unconsciously and it is an effort rarely sustained. The transition from "borough" to "burgesses" is too easy for the clerk not to make it with great ease. But the materials of change are there. A mercantile center the borough is to become with its gilds and fraternities. It will send twelve men to the assize and two men to the parliament.<sup>58</sup> It has a power of self-direction which is earlier and more real than that of all other communities in England. But in these early days it is an administrative area rather than a corporate personality.<sup>59</sup> It retains much of its old rural character. Its heterogeneous tenure reminds it that a sense of corporate ownership is not yet at hand. It has still to fight its way to independence, and it will find that the road thereto lies through the coffers of the king. The time when it will become a new type of community dates rather from the age when kings will sell somewhat easily their liberties that they may establish their sovereignty with the profits so gained. The *liber burgus* in a full and corporate sense is perhaps the offspring of parliamentary representation.<sup>60</sup> What is at this time significant is the fact that the desire for unity and the privileges that give it form come from below. There is no imposition from above. The purchase price stands for a common aim. The men of London who took the county of Middlesex to farm<sup>61</sup> had a fine sense of collective effort. The oath they would take within sixty years may derive from foreign models;<sup>62</sup> but it stands for the growth of a spirit which will not find

<sup>56</sup> See CHARTERS OF AYR, I.

<sup>57</sup> WOOD, HIST. AND ANTIQ. OF THE UNIV. OF OXFORD, s. a. 1214.

<sup>58</sup> Cf. 1 P. & M., 2 ed., 634.

<sup>59</sup> *Ibid.*, 636.

<sup>60</sup> Cf. *Ibid.*, 640-41.

<sup>61</sup> STUBBS, SELECT CHARTERS (ed. Davis), 129.

<sup>62</sup> STUBBS, SELECT CHARTERS (ed. Davis), 245; 1 STUBBS, CONSTIT. HIST., 6 ed., 704-07; ROUND, COMMUNE OF LONDON, 235.



it difficult to take corporate form. That of which the early history of the English boroughs will leave a firm impression is the fact that not even the pressure of medieval centralization can hinder their growth. They will remain the centers of commerce. Their fairs, their markets, the protection they can offer to merchants, the immunities they have purchased — all these foster in them that precious spirit of localism which gives to each borough its own unique history. They broke the hard cake of feudal custom. They were to cast off the control of their lord. There was in them the potentiality of spontaneous development which is the fundamental basis of corporate life. That which they are no royal grant nor lordly privilege has made. But what they are to become depends on the powers of other men. The problem of their future is bound up with those powers.

### III

Yet what is striking is the failure — the borough and the church apart — of these groups of men to pass from collectivism to a corporate character. The one step which seems to lie most readily before them is the one step they do not take. Manors and vills, counties and hundreds, these lose bit by bit the fine sense of unified separatism which had distinguished them. Soon after the Angevin dynasty has established itself we cease to expect such development. Individuals become the controlling factors in their history. As early as the twelfth century suit of service at the county court has become a resented burden.<sup>63</sup> Its direction passes to the sheriff; immunities deprive it of its representative character;<sup>64</sup> the possessory assizes made its jurisdiction comparatively unimportant. If it remains as an administrative area its control is exercised, at least from the time of Richard I,<sup>65</sup> by the conservators of the peace; and when under Edward III that office was established in something like its modern form,<sup>66</sup> it proves so successful as gradually to supersede the shire court as the unit of local administration. It remained, indeed, an electoral center; but its communal character is entirely lost. Even more tragic is hundredal history. They had begun

<sup>63</sup> Maitland in 3 *ENG. HIST. REV.* 418.

<sup>64</sup> 1 *P. & M.*, 2 ed., 548.

<sup>65</sup> STUBBS, *SELECT CHARTERS* (ed. Davis), 237. Cf. 1 STUBBS, *CONSTIT. HIST.*, 6 ed., 570.

<sup>66</sup> Cf. 1 *EDW. III, St. II*, § 16; 18 *EDW. III, St. II*, § 2; 34 *EDW. III, c. 1*.

quite early to pass into private hands. Offa of Mercia, so at least the Bishop of Salisbury claimed,<sup>67</sup> had granted to his predecessor the hundred of Ramsbury in Wiltshire. Three of the hundreds of Worcestershire belonged in the eleventh century to the church of the cathedral city.<sup>68</sup> In 1255 more than half the hundreds of Wiltshire were in private hands; nor is the tale of Devon, some seventy years later, less complete.<sup>69</sup> Communal control becomes individual control. The units of local government cease to be bodies that may hope for corporateness and become living men. The hundred becomes an object of property, and as such its internal development ceases to burden or to influence the history of corporations.

Of manor and vill the history is a similar one. Seignorial jurisdiction sweeps them into its sway. The kings are fairly generous in their grants; and even if the immunity may conveniently be limited by the skill of royalist lawyers, still the great inquiry of Edward I shows that immunization has gone far.<sup>70</sup> But perhaps more serious still is the jurisdictional element implicit in the character of feudalism. The lord has tenants; he holds a court for those tenants.<sup>71</sup> That right will be exercised so far as royal claims will allow. Feudal justice was a potent weapon in the subjection of the free men.<sup>72</sup> Even if all feudal power be in its origin — as post-conquestual theory makes it — a royal power, still the significant fact remains that the primary nature of this legal machinery is its personal character. The courts are men's courts. The justice in them will be lord's justice; and however firmly the little community may cling to its pathetic antiquarianism it is many centuries before royal justice will begin once more to protect the force of custom. It is a steady tale of oppression that we read. The communities of these villages are feeble enough; and they become the easy prey of the king and his lords. That process of conquest and subjection seems steadily to have deprived these groups of what pretensions they had before possessed to corporateness. The land is reorganized on a personal basis. If the freeholder retains vague rights of common, a period of inclosures will

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<sup>67</sup> ROT. HUND. II, 231.

<sup>68</sup> 1 DOMESDAY BOOK 172 b.

<sup>69</sup> 1 P. & M., 2 ed., 558.

<sup>70</sup> 1 P. & M., 2 ed., 572-73.

<sup>71</sup> Cf. DOMESDAY BOOK AND BEYOND, 80 ff.

<sup>72</sup> *Ibid.*, 318 ff.



teach us for just how little that vagueness really stands;<sup>73</sup> and even Bracton seems to think of them in terms which suggest a personal origin.<sup>74</sup> The Statute of Merton is a weapon in the lord's hand of which he will not fail to make good use. That "sufficient pasture" which he is to leave for the use of freeholders seems on the whole a serious invasion of the manorial community.<sup>75</sup> What is the criterion of sufficiency save custom? And who shall give custom the binding force of law?

These communities, in fact, become but little more than quasi-geographical expressions. The power they had once possessed of a suggestive self-government passes to the hands of natural persons. There is little enough need in such a result to speculate deeply about the nature of their personality. The rules of law will fit lord and king and freeholder easily enough. The need for their expansion, in this context at least, loses its force. "The figure of the ideal person vanishes," says Maitland,<sup>76</sup> "or rather at times it seems to become a mere mass of natural persons." Certainly this is true of all medieval groups save those of the borough and the church. Their collectivism crumbles into dust at the approach of men.

Nor does it appear that the lawyers of this age had very different notions. The word *communitas* is a large and ambiguous one. Neither the writers of textbooks nor chronicles use it with any precision. The *communitas bacheleriee Angliae*<sup>77</sup> can have been in no legal sense a corporation. What Bracton will say of the *universitas* will, indeed, show some continental influence; but at best he is troubled and confused by what he has thereof to say.<sup>78</sup> Exactly those things of which we should in this context expect some speech — the things which on the continent at least were troubling vastly the Italian lawyers — are absent from his survey.<sup>79</sup> The relation of the corporate body to the crown — the fundamental problem

<sup>73</sup> Mr. Tawney's "Agrarian Problem in the Sixteenth Century" has recently told most brilliantly that pitiful story.

<sup>74</sup> BRACTON, f. 230, 230 b.

<sup>75</sup> See the weighty remarks of PROFESSOR VINOGRADOFF, *VILLEINAGE IN ENGLAND*, 272-74. He thinks that the Statute of Merton actually changed the common law.

<sup>76</sup> 1 P. & M., 2 ed., 492.

<sup>77</sup> STUBBS, *SELECT CHARTERS* (ed. Davis), 331. Cf. 2 STUBBS, *CONSTIT. HIST.*, 6 ed., 87.

<sup>78</sup> Cf. MAITLAND, *BRACTON AND AZO* (Selden Soc.), 87, 90.

<sup>79</sup> Maitland has pointed out that Bracton has nowhere realized that the ecclesiastical body is an *universitas*. 1 P. & M., 2 ed., 496.

in the theory that was to be evolved — he will not even discuss. Surely the cause of such conspicuous absence can but be apparent on the surface. If there is lacking a theory of corporations it is because that which men later deem a corporation is not to be found.

The borough, admittedly, is different; but the borough will not, at any rate before the fourteenth century, assist us to evolve a corporate theory. It will not aid us because the theory which governs its relations to the state is one which denies the necessity of speculation as to its character. Every borough is some person's borough. Every borough derives its privileges and immunities from a grant to be produced at will. Spontaneous it may be their growth is; and that spontaneity will preserve their communalism for a day more receptive to the approach of theory. But act they must not without royal warranty. That which they will obtain is a matter of gold and silver. The king drives a hard and fisty bargain. The most famous definition of a corporation which the new world has given to the old seems best to fit the matter. It is with franchises, financial, juristic, economic, that we are concerned. We seem to have a scale of values from the vast freedom of London to the emulant anxiety of a tiny township. But no immunity can be obtained by any process of self-institution. The rights are the rights of the lord or of the king, and it is very clear that they are for sale. And if they are for sale they are revocable, for the will of kings is arbitrary, and each burst of temper will beget repurchase.

Sufficiently late, indeed, this concession theory remains. The stout-hearted Tudors recked little of group-corporateness in their effort after unity; and the making and unmaking of boroughs was a weapon they brought not seldom into use.<sup>80</sup> Those cities which forfeited their charters under the *quo warranto* of Charles II illustrated no different theory.<sup>81</sup> The "spoils of towns" with which, as North tells us,<sup>82</sup> Jeffreys returned from his Bloody Assize is a significant response to Monmouth's appeal against the "Court Parasites and Instruments of Tyranny" who had urged the right of forfeiture.<sup>83</sup> But it is in the beginnings of our history that we

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<sup>80</sup> 1 HALLAM, *CONSTIT. HIST.* (Everyman's ed.), 47.

<sup>81</sup> 2 *Ibid.*, 411.

<sup>82</sup> NORTH'S *EXAMEN*, 626.

<sup>83</sup> See the interesting citation in CARR, *CORPORATIONS*, 170-71. The Commons ordered it to be burned by the common hangman.



must search for the origin of these ideas. All goes back to the king. When Archbishop Thurstan wished his men of Beverley to have the privileges of the citizens of York he must have the royal permission to that end.<sup>84</sup> Henry II's clerks had quickly some questions to ask (also some fines to levy) when the butchers and pilgrims of London sought to set up their gilds.<sup>85</sup> Aylwin of Gloucester, who was perhaps somewhat Frenchified by travel, was soon brought to see the advantage of an English model when the exchequer fined him one hundred pounds for his Gloucester experiment;<sup>86</sup> and, six years later, if Thomas from beyond the Ouse escaped more lightly, the fine of twenty marks is proof of royal control.<sup>87</sup> As late as 1305 the townsmen of Salisbury could only escape the burden of an episcopal tallage which had grown ruthless by placing themselves on the royal hands.<sup>88</sup> Even London is not sufficiently powerful to withstand the royal anger. The part it played in the historic crisis of Henry III's reign was sufficient to entail the temporary abolition of its mayoralty.<sup>89</sup> Edward I (who treated York in similar fashion) <sup>90</sup> kept the liberties of the city in his hands for twelve years when the mayor sought to restrain the justices in eyre from entering it.<sup>91</sup> When London chafed at the exactions of Richard II, he seized the occasion of a chance riot to revoke its rights <sup>92</sup> and to remove the Common Pleas to York;<sup>93</sup> and only the compassion of the queen secured their restitution.<sup>94</sup> Edward I held London liable for the trespass of its officers;<sup>95</sup> and Dunwich suffered in a similar fashion.<sup>96</sup> Nor did the fact of incorporation matter. When the citizens of Wainflete took toll unjustly the fact that they had no charter served in no way to protect them,<sup>97</sup>

<sup>84</sup> STUBBS, *SELECT CHARTERS* (ed. Davis), 131.

<sup>85</sup> MADOX, *HIST. OF EXCHEQUER* (ed. of 1711), 390.

<sup>86</sup> *Ibid.*, 391.

<sup>87</sup> MADOX, *FIRMA BURGI*, 35.

<sup>88</sup> 1 ROT. PARL. 175-76.

<sup>89</sup> 1 STUBBS, *CONSTIT. HIST.*, 6 ed., 588.

<sup>90</sup> 1 ROT. PARL. 202.

<sup>91</sup> 1 STUBBS, *CONSTIT. HIST.*, 6 ed., 590.

<sup>92</sup> HIGDEN, *POLYCHRONICON*, IX, 268.

<sup>93</sup> 7 RYMER, *FOEDERA*, 213.

<sup>94</sup> HIGDEN, *POLYCHRONICON*, IX, 274.

<sup>95</sup> MADOX, *HIST. OF EXCHEQUER*, 698.

<sup>96</sup> MADOX, *FIRMA BURGI*, 154. For a similar instance of Dover, see RYLEY, *PLAC. PARL.*, 287.

<sup>97</sup> MADOX, *FIRMA BURGI*, 64, and other instances there cited.

for such towns can sue or be sued as the men of the king.<sup>98</sup> Even an amorphous body like the "Knights of the bishopric of Durham" can lie in the royal mercy.<sup>99</sup> The mere enumeration of the towns vested in the king is evidence of his substantial power;<sup>100</sup> and when he grants out his powers for money — as the venality of Richard I did with unceasing hand<sup>101</sup> — he draws a firm distinction between possession and ownership.<sup>102</sup>

Corporateness — we do not say the fact of incorporation — is clearly here preserved; and it is preserved because it is profitable to the crown. Where men act in group-unity you can fine them, if the single assumption be made of an action which derives from royal kindness. The king concedes powers: he is real enough. And so long as the relation of a borough is for the most part with him, a speculation as to the nature of burghality is here as elsewhere unneeded. But with the borough a new day will presently dawn. The England of the fourteenth century will begin to untie the jealous knot of separatism. It will begin a hundred-years' struggle with France and find a sense of unity in that suffering, while the horrors of the Black Death will spell consolidation.<sup>103</sup> There were new needs to satisfy; and new ideas are required for their satisfaction.

#### IV

Let us go back to our churches. Of ecclesiastical communities medieval England has in truth a plethora, for our ancestors were pious men, willing enough, as the charters bear witness, to buy their salvation at the expense of their property. And these communities are voluntary in character with a definite purpose behind them; it is not difficult to feel that their wills are to serve those purposes.<sup>104</sup> Who owns their possessions? That is a more troublesome question. Lands from the earliest times are church lands; and the opening words of English law ascribe a special sanctity to the property of

<sup>98</sup> MADOX, *FIRMA BURGI*, 65.

<sup>99</sup> *Ibid.*, 85.

<sup>100</sup> See the striking statistics in MADOX, *FIRMA BURGI*, 4 ff.

<sup>101</sup> STUBBS, *SELECT CHARTERS* (ed. Davis), 258.

<sup>102</sup> Cf. Madox's phrase, "He had a compleat seisin of it [the town] with all its parts and adjuncts," *loc. cit.*, 14.

<sup>103</sup> Cf. 1 CUNNINGHAM, *GROWTH OF ENGLISH INDUSTRY*, 378 ff.

<sup>104</sup> Cf. 1 P. & M., 2 ed., 510.



God and of the church.<sup>105</sup> But what is the church that owns them and what is the nature of their possession? The early rules of law are rather fitted to deal with the problems of natural or of immortal men than of a group which raises a metaphysical inquiry.<sup>106</sup> It is simple enough when the property of the diocese is at the disposal of the bishop;<sup>107</sup> but for a cellular and separatist England it is too simple by far. If the church is owned, it will also own; and Bracton has noted the difference between the ownership and the right of presentation to its control.<sup>108</sup> If the church owns land, some speculation there must be about the nature of that church; and there are lawyers enough (canonist at that) anxious to weave theories that will give the ecclesiastical community the full benefit of its powers. Mysticism, of course, we shall have early, for St. Paul had given to Christians the picture of an ecclesiastical organism,<sup>109</sup> and men like John of Salisbury and the great Cardinal of Cusa will push the comparison to the point of nausea.<sup>110</sup> Crude as is this anthropomorphic conception, it is not without its influence on law. If the body ecclesiastic is to be given substantiality, a head must control its action; and the abbatial church will be so much the possession of its abbot that Domesday Book can indifferently equate him with church and convent.<sup>111</sup> That is perhaps the more natural when it is remembered that the monks are legally dead and thus no longer the subjects of rights. Certainly as late as Edward IV that need of a head for corporate activity will give much trouble.<sup>112</sup> But restrictions must be laid on that power since, after all, the rights and purposes of founders must be protected. Maitland has printed a Register of Writs from the reign of Henry III which contains the royal writ protecting the convent against the forcible alienation of a former abbot — a protection of canonical law;<sup>113</sup> and the Statute of Marlborough in obviating the limitation of personal actions by the death of the wronged abbot in some sort

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<sup>105</sup> Laws of Ethelbert, c. I, STUBBS, SELECT CHARTERS (ed. Davis), 66.

<sup>106</sup> Cf. 3 HOLDSWORTH, HIST. ENG. LAW, 363.

<sup>107</sup> 1 P. & M., 2 ed., 497.

<sup>108</sup> BRACTON, f. 53.

<sup>109</sup> Epist. Rom., XII, 4, 5; Epist. Cor., XII, 12, 14; Epist. Col., I, 18, 24.

<sup>110</sup> Cf. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, 132.

<sup>111</sup> 1 P. & M., 2 ed., 504.

<sup>112</sup> Y. B. 18 HEN. VI, f. 16. Y. B. 1 EDW. IV, f. 15, 31, etc.

<sup>113</sup> 2 COLL. PAPERS, 144, no. 43. Cf. CORPUS JURIS, 3, X, 3, 10.

emphasizes conventual rights.<sup>114</sup> As the years go by these convents will bring their actions in a name which betokens incorporate aggregation;<sup>115</sup> the "dean and chapter of St. Paul's" is neither dean nor chapter. It has a connecting link about it — shall we say a seal?<sup>116</sup> — which perhaps we may best term its corporate personality. And when Bracton talks of a body that endures forever, even though death may thin its ranks, though the language is vague and hesitant it is clearly reflective of new ideas.<sup>117</sup>

And what is perhaps of fundamental import is the thought to which Innocent IV gave decisive expression.<sup>118</sup> Whether he in fact perceived the vast significance which lay behind his attribution of fictitious personality to communities may perhaps be doubted.<sup>119</sup> But the phrase, whatever its author meant it to imply, gave exactly the impulse to the current of men's thoughts for which they had long been waiting. For immediately we have the acts of a person, the nature of that person may be matter of debate. Inevitably the phrase of a Pope begets discussion.<sup>120</sup> What is more important is the means it gives us of passing from anthropomorphic terms (though retaining the memory of them) to representative action. If the group-person is to act, it will prove no small convenience to designate those through whom its action may be effective. It is difficult to persuade all men that you are right. Yet it seems clear enough that in the early church, as at Elvira,<sup>121</sup> for instance, and at Nicæa,<sup>122</sup> unanimity was essential; nor is there any suggestion of ought save unanimity at the fifth and sixth œcumenical councils.<sup>123</sup> It seems plausible, indeed, to urge that not until the Council of Ferrara did the majority principle obtain its full sway in the corporate church.<sup>124</sup> But long before this time the concept of

<sup>114</sup> STAT. OF MARLBOROUGH, c. 28 (52 HEN. III).

<sup>115</sup> Cf. BRACTON, NOTE-BOOK, Pl. 482, 654, etc.

<sup>116</sup> Cf. Y. B. 20 EDW. III, 96, 98 (Rolls Series).

<sup>117</sup> BRACTON, f. 374 b. The comparison is to a flock of sheep which remains the same though the individual sheep die.

<sup>118</sup> 3 GIERKE, GENOSSENSCHAFTSRECHT, 279 ff.

<sup>119</sup> Cf. on this Mr. H. A. Smith's pertinent criticisms, LAW OF ASSOCIATIONS, 152-57. He seems to me to have shown good ground for doubting Dr. Gierke's picture of Innocent as a great speculative lawyer.

<sup>120</sup> 3 GIERKE, GENOSSENSCHAFTSRECHT, 227-85.

<sup>121</sup> I HEFELE, HIST. DES CONCILES, 131.

<sup>122</sup> *Ibid.*, 320.

<sup>123</sup> 4 *Ibid.*, 164.

<sup>124</sup> 11 *Ibid.*, 399, 402. Even then it is a two-thirds majority; and the attitude to



representative action had been clearly understood. The Glossators had begun, if with hesitation, to call the delict of a majority of a church the delict of the church itself.<sup>125</sup> Roffredus in the middle of the thirteenth century was discussing corporate personality with the comfort which comes from understanding;<sup>126</sup> and Johannes Andreæ found little difficulty in emulating that significant example.<sup>127</sup> It becomes evident to men that what is important is not so much unanimous opinion as corporate opinion; and they begin to realize that corporate opinion is largely a matter of form to which the verdict of a majority will give substance.<sup>128</sup> And by the time of the post-Glossators — and very notably in the great Bartolus<sup>129</sup> — the idea of the group as a corporation is fully and strikingly developed.<sup>130</sup>

Nor was it difficult to apply these new doctrines to the great orders which were springing up at the behest of Francis and of Dominic. Dominic especially is one of the greatest of federalist statesmen. Almost from the outset the order was cognizant of representation as the basis of corporate action.<sup>131</sup> It does not seem unnatural to suppose that the idea passed from the Black Friars to the convocation of the English church.<sup>132</sup> But one of the primary objects of convocation is fiscal; and the kings must have soon discovered that representation is an admirable method of countering such absential recalcitrance as that of Geoffrey of York.<sup>133</sup> Certainly little by little the idea seems to follow a secular path. But majority action did not come lightly into parliamentary affairs. As late as 1290 the barons could bind their absent peers only *quantum in ipsis est* — and we do not know the extent of that power.<sup>134</sup> Contumacy, of course, merited and met with punishment; but the

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the dissent of a single archbishop to the resolutions on the *Filioque* clause is very striking. 11 HEFELE, HIST. DES CONCILES, 461.

<sup>125</sup> E. g., the gloss to L. 160, § 1, D. 50, 17, 10 C. 1, 2, *Verbo Corrigimus*.

<sup>126</sup> Cf. his *Quaestiones Sabbathinae*, 23, 27.

<sup>127</sup> JOH. ANDR. NOV. S. C. 16, in VI, 3, 4, n. 4.

<sup>128</sup> Gloss. to c. 56, C. 12, q. 2, *Verbo Accusandi*. Cf. 3 GIERKE, GENOSSENSCHAFTS-RECHT, 345, for a striking example.

<sup>129</sup> Cf. C. N. SIDNEY WOOLF, BARTOLUS, 123-24, 160-61.

<sup>130</sup> 3 GIERKE, GENOSSENSCHAFTSRECHT, 354.

<sup>131</sup> BARKER, THE DOMINICAN ORDER AND CONVOCATION, 4 ff., 18.

<sup>132</sup> *Ibid.*, 49, 51.

<sup>133</sup> 1 STUBBS, CONSTIT. HIST., 6 ed., 562.

<sup>134</sup> 2 *Ibid.*, 253.

medieval idea that each group in the realm may bargain separately about its ratability struggled long and hardily before it died. What slew it was the creation, in 1295, of a fully representative parliament.<sup>135</sup> The "Common assent of the realm" of which the *Confirmatio Cartarum* makes such impressive mention,<sup>136</sup> means finally that, for fiscal purposes at least, the kingdom has become incorporate. "It was no longer," says Stubbs,<sup>137</sup> "in the power of the individual, the community, or the estate, to withhold its obedience with impunity." Somewhere or other the men of the kingdom, great and humble alike, are present in Parliament. That *commune consilium regni* which henceforward figures so largely in the preamble of statutes is the sign of a change drawn from ecclesiastical example. The administrators of the thirteenth century are learning the lessons of the canon law. Surely in this aspect we are to read the statute of Mortmain as the result of a growing acquaintance of the common lawyers with the nature of groups which the canonists have already long envisaged as immortal.<sup>138</sup>

The ecclesiastical community, moreover, comes with increasing frequency to court. It thus compels men to speculate upon its nature. They will learn why the new abbot will set aside an irregular conveyance of his predecessor.<sup>139</sup> They will theorize as to why monastic tort is at bottom conventual tort.<sup>140</sup> Even the conception of the church as a perpetual minor will at any rate make them see that the church lands are not the possession of its incumbent.<sup>141</sup> The canons of Hereford may be sued where its particular canon has done wrong.<sup>142</sup> Even if, as Maitland has pointed out,<sup>143</sup> our lawyers will learn less than might be hoped from examples that derive from quasi-despotism, the mere fact of meeting is important. It is important because it prevents the knowledge of new ideas as to corporateness from perishing at birth. The clergy are a litigious race; and the rules of their legal governance must have compelled

<sup>135</sup> STUBBS, *CONSTIT. HIST.*, 6 ed., 256.

<sup>136</sup> STUBBS, *SELECT CHARTERS* (ed. Davis), 490.

<sup>137</sup> 2 STUBBS, *CONSTIT. HIST.*, 6 ed., 257.

<sup>138</sup> 3 HOLDSWORTH, *HIST. ENG. LAW*, 367.

<sup>139</sup> 1 P. & M., 2 ed., 504.

<sup>140</sup> Y. B. 49 EDW. III, Mich. Pl. 5.

<sup>141</sup> 1 P. & M., 2 ed., 503. BRACTON, f. 226 b is the fundamental passage.

<sup>142</sup> *PLACIT. ABBREV.* 53.

<sup>143</sup> 1 P. & M., 2 ed., 508.



a frequent resort to the *Corpus Juris* from which their inspiration was derived. There our English lawyers will learn how majority action is corporate action and how the corporation is a person. And if they are slow to see the significance of so much abstractness, there will yet come a time when the movement from church affairs to the problems of the lay world may be made.

## V

That Bracton could call the town an *universitas* is perhaps accident rather than design.<sup>144</sup> Yet it is the borough which compels our lawyers to recognize the significance of theory. At what day the *liber burgus* becomes in a full sense corporate we may not with any precision speculate; but, of a certainty, the older authorities were wrong who ascribed that change to the middle fifteenth century.<sup>145</sup> The *communitas* of the borough is gaining abstractness as the years of the first Edward draw near their end.<sup>146</sup> In the reign of his successor the courts are talking freely of the bodiliness of towns.<sup>147</sup> The good citizens of Great Yarmouth betray a healthy anger when the townsmen of their smaller brother "who are not of any community and have no common seal" pretend to burghal rights.<sup>148</sup> The *Liber Assisarum* has not a little to say of the physical substantiality of a city which is not its citizens.<sup>149</sup> Richard II takes compassion upon the good men of Basingstoke who have suffered the scourge of fire, and incorporation is the form his pity takes — with a common seal thereto annexed.<sup>150</sup> Nor, assuredly, may we belittle in this context the meaning of his extension to cities and to boroughs of the provisions of Mortmain.<sup>151</sup> It is made thereby very clear that the nature of corporateness is becoming known to men. The citizens of Plymouth were not less clear about its nature when they petitioned Parliament that for the purchase of free tenements for life they might become *un corps corporat*.<sup>152</sup>

<sup>144</sup> BRACTON, f. 228 b.

<sup>145</sup> As Merewether and Stephens did. Cf. 1 GROSS, GILD MERCHANT, 93 ff.

<sup>146</sup> 2 GROSS, *op. cit.*, 18.

<sup>147</sup> 1 *Ibid.*, 94.

<sup>148</sup> 4 CLOSE ROLLS, 19 EDW. II, 457-61.

<sup>149</sup> Liber Ass. 62, 100, 321.

<sup>150</sup> 5 CHARTER ROLLS 336.

<sup>151</sup> 2 STUBBS, CONSTIT. HIST., 6 ed., 509.

<sup>152</sup> 3 ROT. PARL. 663.

The union of the two Droghedas into a single county — a corporate county the record will make it<sup>153</sup> — suggests that we have passed to the language of a new jurisprudence. We have synthesized men into the abstraction of a new being. What has happened is less the acquisition of new rights than the formulation of a means whereby collective action may be taken by that which is not the body of citizens even while it is still the citizen body.<sup>154</sup> The later use of the corporate term to mean that oligarchic body which will with such difficulty be reformed in the nineteenth century, is evidence of how easily the towns absorbed the possibilities laid open by representative action.<sup>155</sup>

The point to which such evidence must drive us is surely the admission that by the time of Edward III the concept of burghality has undergone a change. Not, indeed, that the meaning of that change has been grasped in any sense that is full and complete. If the courts cannot separate John de Denton from the Mayor of Newcastle, the ghost of anthropomorphism can still trouble the joys of corporate life.<sup>156</sup> Yet within less than a century the meaning of such confusion is clearly understood.<sup>157</sup> But the attribution of property to a corporation as distinct from its members is already made at the earlier time;<sup>158</sup> and the great Fortescue will be willing to protect the corporator's property against seizure for the debts of the corporation.<sup>159</sup> The lawyers, moreover, begin to wander from the realm of fact to that in which the delights of fancy may be given full rein. The judges can sit back in their chairs and speculate about its torts and treasons,<sup>160</sup> while Mr. Justice Choke — surely with some memory of the canon law in his mind — will inform us that it lies beyond the scope of excommunication.<sup>161</sup> And since a corporate person must needs have a voice, the seal will be given to it whereby it may in due form have speech.<sup>162</sup> Trespass

<sup>153</sup> 1 GROSS, *op. cit.*, 94, n.

<sup>154</sup> Cf. MEREWETHER & STEPHENS, *HIST. OF BOROUGHES*, 242.

<sup>155</sup> 2 MAY, *CONSTIT. HIST.*, 494 ff.; MAITLAND, *TOWNSHIP AND BOROUGH*, 12.

<sup>156</sup> Y. B. 17, 18 EDW. III, 70 (ed. Pike).

<sup>157</sup> Y. B. 8 HEN. VI, Mich. Pl. 2, 34, and cf. 1 P. & M., 2 ed., 493.

<sup>158</sup> 17 Ass. Pl. 29. Cf. also Y. B. 8 HEN. VI, Mich. Pl. 2.

<sup>159</sup> Y. B. 20 HEN. VI, Pl. 18.

<sup>160</sup> Y. B. 21 EDW. IV, Pl. 13, 14.

<sup>161</sup> *Ibid.*, Pl. 14.

<sup>162</sup> Y. B. 21 EDW. IV, Hil. Pl. 9. I need not say how much this analysis owes to Maitland. See especially 1 P. & M., 2 ed., 488-93, and 678 ff.



against its property the courts will not hesitate to admit<sup>163</sup> if they still shrink somewhat from admitting its sufferance of certain grave forms of wrong.<sup>164</sup> Surely the "gladsome light" of this jurisprudence is a new and a refreshing thing.

A new commerce, moreover, is beginning, and it casts its shadows across the pathway of our history. The Black Death and the Hundred Years' War brought with them distress in their trail. The social movements which are their consequence are too vast for a local authority to control, and from separatism we pass to the national consolidation which reached its zenith under the Tudors.<sup>165</sup> What is perhaps above all important is its resultant emphasis on the class structure of industrial society.<sup>166</sup> The emergence of the capitalist seems to synchronize with the emergence of new forms of business organization. As early as 1391 Richard II, whose reign seems generally to have marked the onset of a new time, was granting a charter to what is at least the *communitas* of the English merchants in Prussia,<sup>167</sup> and Henry IV was not slow to emulate the novelties of his predecessor.<sup>168</sup> The organization of foreign merchants in England will be encouraged, since a unit permits with satisfactory ease of the assessment the kings hold dear.<sup>169</sup> The very phrases which suggest the corporate idea begin everywhere to make their appearance. Henry VII made the Englishmen of Pisa a corporation in 1490.<sup>170</sup> The great trading companies which are in some sort the parents of empire begin to buy their charters. Henry VII provided the Merchant Adventurers with what protection the written privilege of an English king might afford;<sup>171</sup> and it has been significantly pointed out by Dr. Cunningham that the object of the grant was rather the encouragement of commercial speculation than the governmental regulation of commerce. These companies seem to arise with all the spontaneity that marks the communalism of our earliest history. Their appearance is very

<sup>163</sup> Y. B. 21 EDW. IV, Pl. 13.

<sup>164</sup> *Ibid.*; and cf. 22 Ass. Pl. 67.

<sup>165</sup> Cf. I CUNNINGHAM, GROWTH OF ENGLISH INDUSTRY, 375 ff.

<sup>166</sup> Cf. Mr. Unwin's pregnant remarks. INDUSTRIAL ORGANIZATION IN THE XVTH AND XVIIITH CENTURIES, 16-19, 85-93.

<sup>167</sup> 7 RYMER, FœDERA, 693.

<sup>168</sup> *Ibid.*, 360, 464.

<sup>169</sup> I CUNNINGHAM, *op. cit.*, 420-22.

<sup>170</sup> 12 RYMER, FœDERA, 389-93.

<sup>171</sup> I CUNNINGHAM, 416.

striking, since the simpler forms of such business organization as the partnership were already well known.<sup>172</sup> But the partnership seems too narrow in its scope for the larger ideas of fellowship these fifteenth century Englishmen have inherited from their ancestors. Why they should have chosen the corporate form of life is perhaps not wholly clear. But the step is taken, and from the time of Elizabeth it is in them rather than in the municipal corporation that the historian of corporate theory must be interested. Moreover, after 1515 they could not escape from the king's hands even if they remained a voluntary society; the ministers of Henry VIII recked but little of formal matters.<sup>173</sup> The companies, for the most part, deal with a foreign trade in their earlier history. They want privileges because they are journeying into far, strange lands; and it is surely one of the happiest thoughts of Philip and Mary (whose grandparents had tasted the rich fruits of maritime adventure) which led them to incorporate a company of which the great Sebastian Cabot was the governor.<sup>174</sup>

We may not surely deny that this corporateness is inherited from burghal organization. These merchants have learned the value of their fellowships from the guilds of the towns; and not seldom they strive, in all the bitterness of a novel rivalry, with the older crafts and mysteries of the towns.<sup>175</sup> It is perhaps from the analogy of the medieval staple towns that we shall find the connection.<sup>176</sup> Its whole point lies in the organization of a group of men into something like an unity; and once the charters are forthcoming, the incidents of corporateness are not wanting. The sense of exclusiveness must have been fostered by the stress of the keen foreign competition they had from the outset to face. Englishmen have had pride in their isolation, and they did not find it difficult to combine against alien rivals.<sup>177</sup> We can imagine that a medieval government which understood the difficulties of evolving a foreign policy would welcome the spontaneous development of groups of

<sup>172</sup> ASHLEY, *ECONOMIC HISTORY*, pt. ii, 414.

<sup>173</sup> See 6 HEN. VIII, c. 26. This succession of acts seems to have ended in Edward Sixth's reign.

<sup>174</sup> 2 HAKLUYT, *VOYAGES* (Maclehose ed.), 304.

<sup>175</sup> LAMBERT, *TWO THOUSAND YEARS OF GILD LIFE*, 158, for Hull; LATIMER, *HIST. OF THE MERCHANT VENTURERS OF BRISTOL*, 26.

<sup>176</sup> ASHLEY, *op. cit.*, pt. ii, 217.

<sup>177</sup> 1 CUNNINGHAM, *op. cit.*, 417-20.



men who for the royal protection we term incorporation would call a new world into being.<sup>178</sup>

These companies are, at the outset, at least, devoted for the most part to external trade; so John Cabot and his sons, in return for no more than an exclusive right to traffic (whereof the fifth part of the capital gain will fill the coffers of the avaricious Tudor), will engage to plant the English flags in lands "which have hitherto been unknown to Christians."<sup>179</sup> That Master Hore of London whose "goodly stature and great courage" perhaps inclined him to the "study of cosmography" planned his establishment of the Newfoundland fisheries in return for a similar monopoly.<sup>180</sup> But gradually the expedient becomes of obvious advantage in internal commerce. When burghal monopoly of trade begins to break down, it became clear that the crafts were no longer able to cope with the scale of national development. It was obvious that the essential need was either a fully developed national control or no control at all. And it is perhaps singularly fortunate that this industrial expansion should have synchronized with the accession of so able and vigorous a sovereign as Elizabeth.<sup>181</sup>

The patents of monopoly which she granted with so royal a hand were a definite and systematic attempt after industrial unity. They continued in a new fashion the regulation which had made the crown the center of the economic system. Granted at first rather to individuals than to groups of men, the opportunities of profit they opened up soon and naturally attracted the courtiers into the race for wealth. So that if [Elizabeth was somewhat hard in her dealings with inventors,<sup>182</sup> she was apparently woman enough to make the road that led to her favorites' hearts a gilded one. Little by little the recipient of her bounty becomes a group rather than an individual, until, under the Stuarts, the collective monopoly is the more typical form.<sup>183</sup> In the mining monopoly of Master Thurland of the Savoy, Pembroke and Cecil and Leicester are all most willing to share.<sup>184</sup> Corporations, indeed, we shall hesitate

<sup>178</sup> 2 CUNNINGHAM, *op. cit.*, 214.

<sup>179</sup> 12 RYMER, *Fœdera*, 595.

<sup>180</sup> 1 CUNNINGHAM, *op. cit.*, 505.

<sup>181</sup> 2 *Ibid.*, 25.

<sup>182</sup> PRICE, *ENGLISH PATENTS OF MONOPOLY*, 16.

<sup>183</sup> *Ibid.*, 35.

<sup>184</sup> *Ibid.*, 50.

to call groups that are often no more than amorphous partnerships. But that form of organization is far from wanting, and its meaning is very clearly conceived. When Sir Thomas Smith, who toyed with chemistry in the intervals, doubtless, of his political and legal studies, claimed to have found at length the philosopher's stone, a corporation was founded to do him honor for so signal a triumph.<sup>185</sup> Drake seems fully to have realized the meaning of such organization;<sup>186</sup> and we may be sure that the great Sir Humphrey Gilbert when he incorporated "The Colleagues of the Fellowship for the Discovery of the Northwest Passage"<sup>187</sup> was by no means sacrificing the practical to his sense of stateliness. The list of monopolists which Sir Robert Cecil communicated to the House of Commons in 1601 contained not a few groups of men.<sup>188</sup> That "Fellowship of English Merchants for the Discovery of New Trades" wherein, mayhap, the Muscovy Company concealed its commercial cousinship with barbarians in dignified phrasing,<sup>189</sup> shows us in what direction men's minds are tending. The relation, in fact, between monopolies and joint-stock enterprise is the dominant note of the time.<sup>190</sup> The resuscitation of local companies is giving new vigor to the collective efforts of men.<sup>191</sup> It is suggestive of the recognition of value in such effort that a definite encouragement of their creation should meet with the approval of the crown.<sup>192</sup>

All this we take to mean that the significance of corporateness has been firmly grasped. And when men tell us of the causes of their desire for it, they speak with a definite perception of its character far different from the misty conceptions of medieval time. The East India Company becomes "a body corporate and politic" because only in such fashion can it cope with problems so vast as that of an eastern civilization.<sup>193</sup> The immortality of a corporation

<sup>185</sup> *The Society of the New Art*. See the amusing account of its adventures in STRYPE, *LIFE OF SIR T. SMITH*, 100 ff.

<sup>186</sup> S. P. Dom. Eliz., XCV, 63.

<sup>187</sup> S. P. Dom. Eliz., CLV, 86.

<sup>188</sup> PRICE, *op. cit.*, 148 ff.

<sup>189</sup> 3 HAKLUYT, *op. cit.*, 83.

<sup>190</sup> UNWIN, *op. cit.*, 164.

<sup>191</sup> LAMBERT, *op. cit.*, 236, 273, 316; HIBBERT, *GILDS*, 77. The Statute of Artificers had, of course, much the same purpose.

<sup>192</sup> Winchester, in LAMBERT, *op. cit.*, 382; and cf. 2 CUNNINGHAM, *op. cit.*, 36.

<sup>193</sup> The charter of 1600 in PROTHERO, *STATUTES AND CONSTITUTIONAL DOCUMENTS*, 448 ff.



was what tickled the palates of the Miners Royal.<sup>194</sup> Unity of assent and need of better government led Henry VIII to give the merchants of Andalusia the rights a moment of friendship with the emperor led the latter to confirm.<sup>195</sup> Thomas Thurland, whom much mining had made somewhat impoverished, turned his holdings into a company in admirable anticipation of modern methods.<sup>196</sup> When in 1605 the "free traders" of the time sought means of hindering this corporate growth, the merchants who favored it were very ready with their answer. They insisted that only with such an organization could they have the adequate protection of the law. The trade needed regulation, and its corporate character provided the simplest means to that end. Competition, moreover, would prevent the maintenance of quality and would be subversive of all good order. The Privy Council accepted their statement and the charter was renewed.<sup>197</sup> The arguments seem to come with a familiar note to a generation not less puzzled by a similar question. But even more striking, perhaps, were the words of one who mirrored in himself the resplendent qualities of that spacious time. When the House of Commons, on the 20th of November, 1601, debated the merits of monopolies as an economic system, there were not a few who strove to distinguish between grants made to persons and grants made to the corporate groups of men. Francis Bacon, at any rate, saw clearly the illogic of such distinction. "If her Majesty," he said,<sup>198</sup> "make patent or a monopoly into any of her servants, that we must go and cry out against; but if she grant it to a number of burgesses, or a corporation, that must stand, and that, forsooth, is no monopoly." The history of half a thousand years is in that significant equation.

## VI

If it was thus a new world that had developed, traces of the old still linger about its confines. If the corporation becomes a fully developed legal person, it is still dependent upon royal caprice. The king concedes it privileges; it is from his bounty that it takes

<sup>194</sup> STOW, *SURVEY* (ed. Strype), 246.

<sup>195</sup> LETTERS AND PAPERS OF HEN. VIII, No. 6640.

<sup>196</sup> PRICE, *op. cit.*, 50.

<sup>197</sup> S. P. DOM. JAC., I, XII, 59, 64.

<sup>198</sup> PROTHERO, *op. cit.*, 112. Cf. also p. 115.

its origin. In the last years of Edward III two judges did not shrink from holding that only the crown could erect a corporation.<sup>199</sup> When the citizens of Norwich pleaded their crimes to Sir John Fortescue, their liberties *de alto et basso* were seised into the royal hands.<sup>200</sup> Madox has pointed out<sup>201</sup> that in the Tudor age gildation and incorporation are used transferably by the statutes; but from the Conquest the lawfulness of gilds depended upon royal permission. We cannot avoid the conclusion that the power to incorporate is no more than part of the general prerogative by which vast powers of regulation inhered in the king. The chartered companies demanded their charters because without them life would have been less than tolerable. While their members may have had a common law right to pass freely without the realm for any cause,<sup>202</sup> yet the king could prohibit any emigration on grounds of public safety;<sup>203</sup> and the wisdom of Richard II chose to ordain, as the wisdom of James I chose to repeal, that none should pass out of the kingdom without royal license,<sup>204</sup> while it was understood — men soothe themselves a little easily with phrases — that his power was not to be abused in the depression of commerce.<sup>205</sup> Who is there who can call the crown to answer? Your medieval merchant has sufficient experience of the ills he might not remedy. He will prefer to purchase his charter — the equivalent of a continuous passport — and avoid the costliness of legal controversy. The East India Company, in a later reign, was to have some hard experience of what that purchase meant.<sup>206</sup>

Nor was this theory of concession in any way diminished by such powers as those possessed by pope and palatine. If the popes did set up their religious corporations,<sup>207</sup> the marital difficulties of Henry VIII soon drew a clear distinction between right and courtesy. The power of the Bishop of Durham<sup>208</sup> was clearly derived from the *jura regalia* bestowed on him by the Conqueror

<sup>199</sup> Y. B. 49 EDW. III, f. 4, *per* Candish and Knivet, JJ.

<sup>200</sup> MADOX, *FIRMA BURGI*, 291.

<sup>201</sup> *Ibid.*, 29.

<sup>202</sup> FITZHERBERT, *NEW NATURA BREVITUM*, f. 85.

<sup>203</sup> Dyer, 165.

<sup>204</sup> 5 R. II, repealed by 4 JAC. I, c. I, § 22.

<sup>205</sup> HARGRAVE, *LAW TRACTS*, 91-92 (HALE, *DE PORTIBUS MARIS*, pt. 2, VIII).

<sup>206</sup> 3 MACAULAY, *HISTORY OF ENGLAND* (Everyman's ed.), 241.

<sup>207</sup> Y. B. 14 HEN. VIII, 2.

<sup>208</sup> GRANT, *CORPORATIONS*, II.



in return for an inconvenient proximity to Scotch marauders. Even more striking was the Elizabethan delegation of this power to any person or persons who should erect a hospital,<sup>209</sup> whereof Coke significantly remarked that "these words do extend to anybody politic or corporate"<sup>210</sup> — an interpretation to which an earlier Tudor had already given utterance.<sup>211</sup> The corporation by prescription — which seems to originate in this time, and thereby to prove the general acceptance of this concession-theory<sup>212</sup> — takes for granted the written fact of royal approval. That which exists by implication surely does no more than define with firmness what hitherto has been vaguely deemed the royal will.<sup>213</sup> And since the Courts hold firmly that, if they exist without royal authority, attack on these corporate privileges is a valuable procedural plea,<sup>214</sup> it is surely plain that the early prerogative of the crown suffers no derogation.<sup>215</sup> The legal construction of charters seems to make evident the same tendency of thought. The charter, as Coke tells us,<sup>216</sup> is no less effective than an act of Parliament. It may not be interpreted in a manner other than that most favorable to the crown.<sup>217</sup> It limits by its very circumstances. These, surely, are the thoughts of men who deal with the rights of property. They are the thoughts of men who do not dream of questioning a royal prerogative which lies at the basis of the state.

But it is perhaps the extent of regulation and of confiscation which marks most clearly the character of this attitude. Everyone knows of that famous Ipswich procedure when the right to form a merchant-gild was granted to its burgesses.<sup>218</sup> When the merchant-gild passes from our view and the crafts take their place, we find

<sup>209</sup> 39 ELIZ. c. 5.

<sup>210</sup> 2 CO. INST. 722.

<sup>211</sup> 32 HEN. VIII, c. 7. Cf. Dyer, 83 b. The reaction from this view does not seem to come until 9 GEO. II, c. 36. Cf. 2 M. & W. 890.

<sup>212</sup> Y. B. 2 HEN. VII, 13. Cf. Anon. dofft. 556, and Jenkins v. Harvey, 2 C. M. & R. 339; 10 COKE REP. 27.

<sup>213</sup> Y. B. 12 HEN. VII, 29.

<sup>214</sup> Anon. Dyer, 100. Cf. Pl. Q. W. 618.

<sup>215</sup> Y. B. 20 EDW. IV, 2; *Ibid.* 22 EDW. IV, 34; 12 HEN. VII, 27. Cf. BROKE, ABR. CORP., No. 33.

<sup>216</sup> 8 COKE REP. 8. Cf. HALE, JURISDICTION OF LORDS HOUSE (ed. Hargrave), 20 ff.; Plowden 214.

<sup>217</sup> Priddle v. Napper, 11 COKE REP. 8 (1612); Knight's Case, 5 COKE REP. 56 (1688); Willion v. Berkley, Plowden 243 (1662).

<sup>218</sup> 2 GROSS, *op. cit.*, 114 ff.

that the crown has supplanted the earlier autonomy by the conference of municipal regulation.<sup>219</sup> The history of their relations may well suggest the thought that town and craft struggled mightily together in an age when civil war prevented too close an attention to their rivalries. But with the advent of the Tudor, there came significant innovation. The king has heard with displeasure that the "companies corporate" have used their rule and governance to make "among themselves many unlawful and unreasonable ordinances . . . for their own singular profit and to the common hurt and damage of the people." It is therefore rendered unlawful for any fellowship to make its by-laws without the approval of certain great judicial functionaries.<sup>220</sup> The act was no mere threat. Discontented members could drag their officers before the court;<sup>221</sup> and many of the companies thought it valorous to be discreet and seek the ratification of what rules they had already.<sup>222</sup> Nor is it unimportant in this connection to note that the great Statute of Artificers took from the crafts their control over their servants.<sup>223</sup> No man, surely, can have mistaken the implications of this policy. Were he so blind the dissolution of monasteries and chantries would have stricken him with sight.<sup>224</sup>

It is the strident voice of Coke which raps out an elegy on this early history.<sup>225</sup> "A corporation aggregate of many," he said, "is invisible, immortal, and rests only in intendment and consideration of the law." From treason and outlaw and excommunication he deemed its nature to exclude it. Loyalty was a virtue of the mind to which it could make no pretension. It exists but *in abstracto*, so that it lies ready to the king's hands. They are precise words. "The King giveth and the King taketh away" is no inapt summary of their purport, though we who know the history of their future may well shrink from the addition of the wonted blessing. Two centuries were to elapse before the charge of high treason gave Thomas Kyd the leisure which he turned to service of corporate realism.<sup>226</sup> Seventy years later England discovered a road more

<sup>219</sup> 15 HEN. VI, c. 6.

<sup>220</sup> 19 HEN. VII, c. 7.

<sup>221</sup> WILLIAMS, HISTORY OF THE FOUNDERS' COMPANY, 13, 16.

<sup>222</sup> MILBOURNE, HIST. OF VINTNERS' COMPANY, 39.

<sup>223</sup> 5 ELIZ. C. 4, §§ 4, 11, 14, 28.

<sup>224</sup> 2 ASHLEY, *op. cit.*, 135.

<sup>225</sup> The Case of Sutton's Hospital, 10 Coke Rep. 1 (1612).

<sup>226</sup> The second volume of Kyd's work (1794) is actually dated from the Tower.



fitted to corporate travel.<sup>227</sup> Within forty years, the greatest of English historians wrote large the epitaph of corporate fictions. The new theory of the state his words are making may yet prove his truest memorial.<sup>228</sup>

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<sup>227</sup> COMPANIES' ACT, 25 & 26 VICT. c. 89.

<sup>228</sup> Maitland's translation of, and introduction to, Gierke was published in 1900. Cf. Saleilles' impressive remarks in 23 L. QUART. REV. 139. I ought here to say that I have not discussed the relation of fictions to the concession theory because I am convinced that in order to do so at all adequately it is necessary to consider the history of the corporation to the end of the seventeenth century. I hope to deal with this subject in a later paper. Sir F. Pollock's essay in the GIERKE FESTSCHRIFT is, of course, our main authority on this head.

## FEDERAL INCORPORATION OF RAILWAY COMPANIES

**I**N a country of an area so vast as the United States, with such variations of soil and climate, efficient transportation is a paramount necessity; transportation to satisfy both the needs of commerce and the requirements of preparedness for war and the public defense. The means of transportation have fallen behind the needs of commerce in peace and would more strikingly fail to fill the requirements of war. Railroad construction has come almost to a stop.

Whether this be caused in whole or part by unwise regulation does not concern this inquiry. At least the opinion is widely held by students of the subject that any system of regulation of railways by many governments, by the nation and by each state acting in discord, is doomed to failure and is destructive of the railways. Their regulation by the national government to the greater exclusion of the states, and to that end their incorporation as national railways, is being considered by a joint committee of the two houses of Congress.

I purpose to inquire into the power of Congress in the premises.

The subject may be dealt with by Congress under any or all of its pertinent powers (a) to regulate commerce with foreign nations and among the several states and with the Indian tribes, (b) to establish post offices and post roads, and (c) to provide for the common defense and general welfare and make war.

The power to form corporations is not mentioned in the Constitution, but Congress is given power to enact all laws necessary and proper for carrying into execution the granted powers. The incorporation of a national bank was justified by Hamilton as a proper means of executing the power of Congress over money, and Hamilton's opinion was sustained in *McCulloch v. State of Maryland*<sup>1</sup> and *Osborn v. U. S. Bank*.<sup>2</sup> It was held in these decisions that Congress might confer on the bank power to do a private

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<sup>1</sup> 4 Wheat. 316 (1819).

<sup>2</sup> 9 Wheat. 738, 859 (1824).



banking business, because it might be that the private business would enable the bank more efficiently and economically to perform its governmental functions. On the same principle the court sustained the constitutionality of the acts of Congress incorporating the Pacific Railroad companies which conferred on them the general right to do business for others in addition to government transportation.<sup>3</sup> And the power of Congress is well established to provide for condemnation of lands within any state as a means of executing any of the granted federal powers.<sup>4</sup>

The foregoing decisions fully settle (1) that Congress has power without the consent of the state to build railroads and condemn land and do other things proper and necessary, (2) that it has power to delegate this authority to corporations.

In *Monongahela Navigation Co. v. United States* and *Railroad Company v. Maryland*<sup>5</sup> it was held that Congress has the same power over railways and other artificial highways which it has over navigable waters. The application of this principle will be referred to later.

Power in Congress to pass a national incorporation law implies power to give corporations formed under the law the franchise and right to act in corporate capacity throughout the United States without regard to state lines, to prescribe their method of organization, to regulate their stocks and indebtedness and their internal affairs, including the rights and obligations of shareholders, to the minutest detail.

Should it be suggested that Congress could not exclude, or at least ought not, under the guise of creating federal incorporations, to exclude the states from regulation of their internal affairs, it may be conceded that Congress could not exceed its just powers by the mere device of federal incorporation.

But this leads to the inquiry how far Congress in the exercise of either its power over commerce, its power to establish post roads,

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<sup>3</sup> *California v. Pacific R. Co.*, 127 U. S. 1 (1887); *Luxton v. North River Bridge Co.*, 153 U. S. 525, 533 (1893).

<sup>4</sup> *Kohl v. United States*, 91 U. S. 367 (1875); *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525 (1884); *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641 (1889); *Stockton v. Baltimore, etc. R. Co.*, 32 Fed. 9 (1887); *Chappell v. United States*, 160 U. S. 499 (1895); *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1892).

<sup>5</sup> 21 Wall. 456 (1874).

or its power to make war and provide for the public defense, or all of these powers, may take over the regulation of railways to the exclusion of the states.

The more essential things in respect of which Congress would probably or possibly legislate are (*a*) regulation of the stock and indebtedness of railways, (*b*) regulation of their appliances and operations — for example, the character of their cars and locomotives, their train crews and other employees — and (*c*) regulation of their tariffs and charges, including those for transportation wholly within the limits of a state.

Efficient transportation being of the first importance and having the most direct relation to commerce with foreign nations and among the states, to the carriage of the mails, government troops, and military supplies, it would seem self-evident that Congress must have the power to adopt and make effective all means proper in its judgment to secure efficient transportation.

It may well be that to secure efficiency of transportation, to induce capital into construction of added railways and new improvements and facilities, a certain attractiveness of profit must be offered, or even certain guaranties made. Congress has therefore the right to determine a policy with respect to railways, to determine what profits capital invested in them must be offered. But to settle and carry out such a policy requires, or may require, regulation of the stock and indebtedness of railways, determination of the amount of each, the purposes for which each may be issued, the prices at which each may be offered to the public, and the rights and liabilities of the holders of stock and debts.

It may well be that Congress will also find it necessary in order to secure prosperity and improvement of the railways, in order, in other words, to secure efficient transportation of interstate commerce and of government mails and supplies, to regulate completely the character of railway locomotives and their equipment, to say, for example, whether the locomotives shall carry electric headlights or other headlights and of what power, and what crews shall man the trains. Should Congress determine to enter into this field, no doubt can be entertained of its power.

Similarly, should Congress decide it necessary, in order to secure efficient transportation of foreign commerce and commerce among the states, and efficient transportation of mail and government sup-



plies, to regulate the earnings of the railways from traffic moved wholly within a state, it has the power to take over regulation of such local earnings. It has power to do the same thing should it find exercise of that power necessary to prevent discriminations as between transportation local to a state and transportation with foreign nations and among the states; in other words, to prevent the government scheme of rates from being broken down by inconsistent local state rates.

It is thought that these propositions are settled by the decisions of the Supreme Court.

This flows necessarily from what the court decided in *Brown v. Maryland*,<sup>6</sup> where it was said:

"It has been observed, that the powers remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation."

Recurring to the doctrine held in *Monongahela Navigation Co. v. United States*,<sup>7</sup> that the power of Congress is as far-reaching over the railways as over the natural highways by water, let us see what the court has decided with respect to the power of Congress over waters.

In *The Daniel Ball*<sup>8</sup> the power of Congress was sustained to regulate a steamboat plying on water wholly within the state of Michigan but carrying goods coming from and going to points beyond the state. Congress has assumed *exclusive* jurisdiction of water highways;<sup>9</sup> has required all steam vessels running on navigable waters of the United States to be licensed regardless of whether they carry commerce among the states;<sup>10</sup> has regulated the contractual relations of employer and employee;<sup>11</sup> and of owners and shippers.<sup>12</sup>

It was held in *Gibbons v. Ogden*,<sup>13</sup> and this holding was followed in

<sup>6</sup> 12 Wheat. 419, 448 (1827).

<sup>7</sup> 148 U. S. 312 (1892).

<sup>8</sup> 10 Wall. 557 (1870).

<sup>9</sup> *Wisconsin v. Duluth*, 96 U. S. 379, 387 (1877).

<sup>10</sup> *The Daniel Ball*, *supra*; *The Hazel Kirke*, 25 Fed. 601 (1885); *The Oyster Police Steamers*, 31 Fed. 763 (1887).

<sup>11</sup> *Patterson v. Bark Eudora*, 190 U. S. 169 (1902).

<sup>12</sup> *In re Garnett*, 141 U. S. 1 (1890).

<sup>13</sup> 9 Wheat. 1 (1824).

*Brown v. Maryland*,<sup>14</sup> that the power of Congress over commerce is complete and acknowledges no limitations other than those prescribed by the Constitution; that the power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but may enter its interior.

It was said in the *Minnesota Rate Cases*:<sup>15</sup>

"There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

The *Minnesota Rate Cases* establish that a state may lawfully fix local rates within its borders until Congress acts; but that when Congress finds it proper to take over regulation of local rates, in order efficiently and completely to regulate commerce with foreign nations and among the states, there is no defect in congressional power.

The principle of the *Minnesota Rate Cases* was followed in *Houston & West Texas Railway Co. v. United States*,<sup>16</sup> which must be considered to have settled beyond further controversy: that the authority of Congress is at all times adequate to meet varying exigencies and protect national interests, and necessarily includes the right to control operations of carriers in all matters having such a close and substantial relation to commerce among the states that control is essential or appropriate to regulation of such commerce; that transportation by carriers local within states cannot derogate from the complete and paramount authority of Congress, or preclude the federal power from preventing local operations being used as a means of injury to what has been confided to federal authority; that it is for Congress to say, and not the states, what is necessary for com-

<sup>14</sup> 12 Wheat. 419, at 446 (1827).

<sup>15</sup> 230 U. S. 352, at 399 (1912).

<sup>16</sup> 234 U. S. 342 (1913).



plete control of commerce among the states, and that Congress, in order to perfect and protect that control, may regulate transportation wholly within a state.

It has therefore been determined that Congress, under its power to regulate commerce, may itself build railways or provide for government railways by delegation of power to corporations. The government may also provide for transportation of its mails, its armies, and its property by any means it chooses to select. Under these ample powers it may provide its own instrumentalities of transportation or may make use of existing instrumentalities.

In determining the method of exercise of either of the powers referred to, Congress is subject to no limitations except those expressed or implied in the Constitution of the United States. Neither the existence of the states nor any state power imposes such limitation. The power of Congress is as ample as if there were no states.

Congress may therefore adopt the means of chartering new federal incorporations; it may by that means or by direct action build a system of government railways throughout the United States; it may provide for condemnation of existing railways. The broad and unlimited power being granted, there seems to be no difficulty in Congress making the existing railways federal incorporations with such powers and rights as it chooses to confer. The non-consent of the states certainly is not a valid objection. We have long been familiar with the act of Congress under which state banks by specified vote of stockholders may convert themselves into national banks. This transmutation may be made against the will of the state. It may be made against the will of minority stockholders. *Casey v. Galli*<sup>17</sup> holds that no consent of the state is necessary because "it was as competent for Congress to authorize the transmutation as to create such institutions originally." And if the transmutation may be made against the objection of a minority of stockholders it may be made without vote or consent of any stockholder. It would seem to be a conclusive answer to a stockholder's objection that he went into the enterprise subject to the possible exercise of lawful governmental authority.<sup>18</sup>

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<sup>17</sup> 94 U. S. 673 (1876).

<sup>18</sup> *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 480 (1910).

## JUDICIAL INTERPRETATION OF THE CONSTITUTION ACT OF THE COMMONWEALTH OF AUSTRALIA

MORE than thirty years ago federalism was referred to as a "discovery or invention in the art of constitutional architecture," and as "a curious and complicated piece of legal mechanism."<sup>1</sup> The leading characteristics of federalism were then defined as (1) the supremacy of the constitution; (2) the distribution of the different powers of government among bodies with limited and coördinate authority; (3) the authority of the courts to act as interpreters of the constitution. Three federations familiar to the publicists at this time were the United States, Canada, and Switzerland; the Argentine federation, although formed in the middle of the nineteenth century, was practically unknown outside of South America. The constitutional system of the United States was looked upon as embodying to the fullest extent the three principles of federalism.

Since the appearance of Professor Dicey's analysis of the fundamentals of federalism this form of government has had an interesting growth not only among the South and Central American republics but also in the formation of the Australian Commonwealth and in the recently established South African Union.

In the enactment of the British North America Act and in its interpretation by Canadian courts and the Privy Council, Canada has developed a form of federalism in marked contrast with that of the United States.<sup>2</sup> Switzerland also has not accepted federalism according to American notions. The federal legislature, in the first place, is made the final interpreter of the Constitution and, consequently, the position of the Supreme Court is greatly decreased in importance. Moreover, under the Swiss system the executive exercises extensive powers within the scope of administrative law, which leaves a somewhat restricted field for the legislature and

<sup>1</sup> Professor A. V. Dicey, "Federal Government," 1 *L. QUART. REV.* 80.

<sup>2</sup> See "Judicial Review of Legislation in Canada," 28 *HARV. L. REV.* 565.



for the courts and which results in the absence of a separation of powers such as is in vogue in other federal systems. Finally, the necessity of a referendum on constitutional questions and the direct method of procedure for the submission of such questions render some of the fundamental concepts of federalism inapplicable. It remained for the Australasian federal conventions to enact a constitution in which an effort was made to reproduce the principles of federalism in accordance with the American model.

One year after the Convention met in Philadelphia and prepared the Constitution of the United States, Captain Phillips with a band of convicts landed in New South Wales and laid the foundation which later developed into the unique and interesting form of government known as the Commonwealth of Australia. Owing to the general policy of colonial government at the time and the peculiar character of Captain Phillip's settlement the colony he established was governed for more than forty years by autocratic governors. Gradually it became necessary to nominate a council to advise the Governor and then to arrange for the election of certain members of the council, thus laying the basis for a representative legislative body. As an outgrowth of remonstrances and opposition to autocratic power the home government was finally prevailed upon to grant responsible government, with one or both houses elective, to New South Wales, Tasmania, South Australia, and Queensland. About the same time that the grant of self-government was made the colonies themselves began the movement for federation which culminated in the establishment of the Commonwealth before the close of the nineteenth century.

The federation movement made little progress for more than twenty years and it did not become a vital issue of the colonies until the appearance of France, Germany, and the United States as rival colonizing countries. In 1883 the first Australian convention met in Sydney and announced an Australian doctrine similar to the Monroe Doctrine, to wit: The further acquisition of dominion in the Pacific south of the equator by any foreign power would be highly detrimental to the safety and well-being of the British possessions in Australasia and injurious to the interests of the empire. An outgrowth of this convention was the Federal Council of Australasia — the forerunner of the present federation. The experience gained through the council as well as a controversy over

military defense in the London Conference of 1881 led Sir Henry Parkes to undertake the calling of a national Australasian Convention. After considerable delay the Convention met in Sydney in 1891 and drew the famous Draft Bill which contains in substance the present Constitution. This Constitution was put in final form and adopted by the Convention of Adelaide in 1897. It received the Royal Assent in 1900 and went into operation on January 1, 1901.

Mr. A. Inglis Clark, who with Sir Samuel Griffith was the draftsman of the Bill of 1891, was strong in his admiration of American institutions. His knowledge of the constitutional history of the United States was profound and his zeal in advocating American principles had a marked effect upon the Convention. It is generally conceded that the fact that the Constitution of Australia so closely resembles that of the United States is due in a large measure to Mr. Clark.

"For my part," he said in one of his notable speeches, "I would prefer the *lexis* of the American Union to those of the Dominion of Canada. In fact I regard the Dominion of Canada as an instance of amalgamation rather than federation and I am convinced that the different Australian colonies do not want absolute amalgamation."<sup>3</sup>

### FEATURES OF THE CONSTITUTION ACT

The Constitution Act of the Commonwealth of Australia gives evidence of a study and comparison of many existing constitutions. There is a distinct effort to combine the salient features of English parliamentary government with some of the notable principles of federal government as developed in the United States. In some instances the language of the Constitution of the United States is followed directly and there is an evident intent throughout to model the form of government after that of the United States and yet to leave the basic features of parliamentary government intact. While the term Parliament is used, the familiar American designation of the Chambers — Senate and House of Representatives — was adopted. A Governor General with powers similar to those exercised by the Crown in England and by the Governor General of Canada, a

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<sup>3</sup> WISE, *THE MAKING OF THE COMMONWEALTH OF AUSTRALIA*, 74-76. See also pp. 118 and 230.



Senate with at least six senators from each state, a House based on an apportionment according to population, are all included among the salient features of the Act.

The powers of Parliament are specified in thirteen sections and include among other things the control of taxation, trade and commerce, foreign affairs, naturalization, and control of naval and military defenses; foreign corporations; currency, coinage, legal tender, and public credit, including banking and insurance; bills of exchange, promissory notes, bankruptcy and insolvency; light-houses, etc.; quarantine regulations and fisheries in Australian waters; marriage and divorce; postal, telegraph, and telephonic services; invalid and old age pensions; conciliation and arbitration in industrial disputes; control of railways for naval and military purposes. In the scope of powers assigned to the federal Parliament the Constitution Act follows the Dominion of Canada rather than the Constitution of the United States. Finally, authority over matters incidental to the execution of any power has been vested by this Constitution in the Parliament, a provision similar to the elastic clause of the Constitution of the United States. Within one year the home government may disallow any law passed by Parliament. Provision is made for a Cabinet and Council of Ministers, similar to that of England. A judiciary consisting of a High Court is provided with jurisdiction to hear and determine appeals from lower federal courts and with original jurisdiction as to suits against the Commonwealth or its officers and suits between residents of different states. Parliament may confer original jurisdiction along other lines involving federal matters and has full power to define the jurisdiction of other federal courts.

Matters with regard to finance and trade are dealt with in considerable detail in a separate section, and in like manner separate consideration is accorded to the rights, duties, and obligations of states as well as to the admission of new states.

Amendments may be proposed by an absolute majority of each house, or by a second vote by absolute majority in one of the two houses, and when approved by a majority of the electors in a majority of the states become a part of the Constitution.

PECULIARITIES OF THE COMMONWEALTH CONSTITUTION<sup>4</sup>

1. The Commonwealth government is one of limited and enumerated powers and the parliaments of the states retain the residuary powers of government. In this respect the American rather than the Canadian plan is followed.

2. There is no general supervision of the state in the exercise of the powers belonging to it as is enjoyed by the Dominion Government over the provinces of Canada.

3. Declarations of individual right and the protection of liberty and property against the government such as exist in the United States are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution insures him.

4. The theory of the separation of powers after the model of the United States was adopted, but with certain well-understood limitations and modifications.

There is no doubt but that it was intended to establish legal limitations on the organs of government, and that it devolves upon the courts to define these limitations.<sup>5</sup> But attention is called to the fact that the greater number of cases in American courts which refer to the separation of powers have been decided not on the implied prohibition arising from the separation of powers, but upon express restraints imposed on the legislature such as the prohibition of bills of attainder or *ex post facto* laws and the prohibition against the state legislatures as to laws impairing the obligation of contracts, or the deprival of due process of law. Especial care must therefore be taken, say the Australian authorities, in the application of American precedents on this subject to a constitution where these additional restrictions do not exist.<sup>6</sup> The separation of powers in the states is held to be merely a rule of expediency subject to political sanctions.<sup>7</sup> As to the Commonwealth government, any attempt by the Parliament to set aside or reverse the judgment

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<sup>4</sup> Cf. MOORE, COMMONWEALTH OF AUSTRALIA, 2 ed., 68-71.

<sup>5</sup> *Ibid.*, 94, 96, 97.

<sup>6</sup> On the effect of the lack of specific limitations, consult QUICK & GARRAN, CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH, 720-22.

<sup>7</sup> MOORE, 96.



of a court of federal jurisdiction, it is maintained, would be held void as an invasion of the judicial power. Whereas in America the ordinary rule of separation requires that the executive shall exercise no discretion in the making of rules and regulations except as to the details of administration,<sup>8</sup> the executive of Australia is specifically granted an ordinance power.<sup>9</sup>

5. In the distribution of powers the Constitution Act is more specific than the Constitution of the United States. There are matters:

(a) Exclusively federal, such as the location of the seat of government and the public property of the Commonwealth.

(b) Over which the power of the Commonwealth Parliament operates by way of paramount legislation merely, overriding any exercise by the state of its own power. This division includes such powers as are expressly granted to the Commonwealth but concerning which federal legislation is not adequate or exhaustive.

(c) Over which the Parliament of the Commonwealth and the parliaments of the states have concurrent and independent jurisdiction, such as taxation.

On a few subjects procedure is direct from the states to the Colonial Office in England and consequently these matters are not within federal jurisdiction. The most important are the allowance and disallowance of state legislation, the appointment and removal of state governors, and the amendment of state constitutions.

6. The establishment of judicial review in the High Court as to federal constitutional questions.

Each of the peculiar features of the Commonwealth Constitution might profitably be considered in detail, but it is intended at this time to deal particularly with the development of judicial review. After a prolonged controversy in which the representatives of the home government and a few of the Australian delegates aimed to establish an appeal to the Privy Council similar to that in force in Canada, the following section eventually was accepted by both parties and made a part of the Commonwealth Constitution:

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<sup>8</sup> See *Field v. Clark*, 143 U. S. 649 (1891).

<sup>9</sup> For a criticism of the American doctrine and a defense of the Australian plan, see MOORE, 99-101.

"Section 74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State, or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."<sup>10</sup>

The language is sufficiently indefinite to leave some doubt as to the intention of the framers, but the majority of the Australian delegates accepted this wording on the belief that it gave practically final jurisdiction to the High Court on constitutional questions. The controversy which arose over the interpretation of the section is one of the most interesting raised in the history of self-government as well as one of the greatest issues of modern constitutional interpretation.

The interpretation of the Commonwealth Constitution was first presented to the court in *D'Emden v. Pedder*,<sup>11</sup> wherein was involved the Tasmanian Stamp Act, on which the question was raised whether the Act operated as an interference by way of taxation and consequent control with a federal agency or instrumentality. As a similar issue to that determined in *McCulloch v. Maryland* was raised, the court quoted freely from the American precedent and commended the opinion of Chief Justice Marshall. The doctrine of the immunity of federal instrumentalities from taxation as formulated in the *McCulloch* case was accepted and incorporated in the court's opinion and judgment. The intention to follow American precedents was thus expressed:

"When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from the provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation."<sup>12</sup>

It was emphatically asserted to be the duty of the court to determine the validity of an attempted exercise of legislative power, and the principle was announced that

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<sup>10</sup> For the history of the introduction and passage of this clause, consult QUICK & GARRAN, especially pp. 242, 247, 724, 735, 748-50.

<sup>11</sup> 1 C. L. R. 91 (1904).

<sup>12</sup> *Ibid.*, 113.



"if a state attempts to give its legislative or executive authority an operation which if valid would interfere to any, the smallest, extent, with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is invalid and inoperative."<sup>13</sup>

In supporting the judgment of the court, Justice Griffith maintained:

"We are not, of course, bound by the decisions of the Supreme Court of the United States. But we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the United States Constitution by so great a Judge so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court at Washington. So far, therefore, as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance."<sup>14</sup>

In this, as in subsequent cases, it is evident that the High Court is definitely committing itself to the principles and the construction of constitutional law as adopted in the United States. The High Court, like the Supreme Court of the United States, assumes the rôle of guardian of the Commonwealth Constitution Act.<sup>15</sup>

The judicial controversy which has the greatest interest from the standpoint of constitutional law is *Wollaston's Case*, which involved an income tax act of the State of Victoria, held to apply to the salary of a Commonwealth officer.<sup>16</sup> By the Supreme Court of Victoria

<sup>13</sup> 1 C. L. R. 91.

<sup>14</sup> *Ibid.*, 112. In *Municipal Council of Sydney v. Commonwealth of Australia*, Justice O'Connor says: "The principles laid down by Marshall, C. J., in his historic judgment in *McCulloch v. Maryland* . . . are as applicable to the Australian Commonwealth Constitution as to the United States Constitution." 1 C. L. R. 208, 239 (1904). See also *Jumbunna Coal Mine v. Victorian Coal Miners' Association*, 6 C. L. R. 309 (1908).

<sup>15</sup> Cf. QUICK & GARRAN, 725. Also CLARK, *AUSTRALIAN CONSTITUTIONAL LAW*, 2 ed., 6, wherein the author maintains that "In regard to many provisions of the Constitution of the Commonwealth, the historic decisions of the Supreme Court of the United States which were delivered by Chief Justice Marshall and his associates during the first half century of the Republic cannot fail to be followed in Australia whenever the language to be interpreted is substantially the same as that to which the irresistible reasoning of those decisions was applied."

<sup>16</sup> *In re The Income Tax Acts* (No. 4), 28 V. L. R. 357 (1902). For a good account of this controversy, consult MOORE, Part VII, Chap. 3, on the Doctrine of the Immunity of Instrumentalities.

it was held that the principle laid down in *McCulloch v. Maryland* that a state of the Union has no power to impede or control any of the constitutional means to carry into effect federal constitutional powers has no application in construing the Commonwealth Constitution. The leading case in the United States, it was claimed,

"adopted a sweeping generalization which sought to decide once and for all those questions which might, by even distant possibility, arise, as well as those which had arisen."<sup>17</sup>

The court then referred to some recent decisions in the United States which tend to limit the principle of the *McCulloch* case and insisted that, while the actual instrumentalities of government of either the Union or of a state cannot be taxed by a state or by the Union, there is nothing in Chief Justice Marshall's decision to prevent the taxation of the property of a person who is merely an agent of Union or state. Reference was then made to the fact that the courts in Canada readily adopted the guidance of American decisions, although the constitutional position of the Dominion legislature in relation to those of the provinces was very different from that which prevailed in the United States.

"There are, however," says the court, "many essential differences between the Constitution of America and the Constitution of both the Dominion of Canada and of the Commonwealth of Australia. The Crown of England has always insisted on maintaining the prerogative right to disallow any legislation, either by way of ordinance of a Governor in Council in a Crown colony, or by Act of Parliament in any self-governing colony, and this right has been acted on, not very frequently, it is true, but still many times."<sup>18</sup>

Thus the right of disallowance for Australia was cited as evidence of an intention to give effect to a system of government fundamentally different from the American system.

On an appeal of *Wollaston's Case* to the High Court the principle announced in the case of *D'Emden v. Pedder* was emphatically reaffirmed.<sup>19</sup> In rendering judgment Chief Justice Griffith said:

"They [the judges of the Supreme Court of Victoria] said they preferred to follow the decisions of the Judicial Committee of the Privy Council upon the Constitution of Canada, suggesting that this court had

<sup>17</sup> 28 V. L. R. 384.

<sup>18</sup> *Ibid.*, 381.

<sup>19</sup> *Deakin v. Webb*, 1 C. L. R. 585 (1904).



indicated a disposition to show a preference for the American over the English decisions. This is, we think, a somewhat novel mode of dealing with a judgment of a court of final appeal. . . . It is a matter of common knowledge that the framers of the Australian Constitution were familiar with the two great examples of English-speaking federations and deliberately adopted, with regard to the distribution of powers, the model of the United States, in preference to that of the Canadian Dominion."<sup>20</sup>

The scheme of the Canadian Constitution, it is particularly contended, was rejected by the framers of this Constitution, and especially is this true with respect to the distribution of powers between the federal government and the states and as to section 74 which relates to the final interpretation of the Constitution.

"We considered our judgment and have given it" said the court, "and, by the provisions of the Constitution, our judgment is final and conclusive."

The scheme of the Constitution plainly expressed is that for the determination of these constitutional questions this court is to be the tribunal of ultimate appeal, unless the court itself is satisfied that there is some special reason which would justify it in certifying that the question ought to be determined by the Sovereign in Council.<sup>21</sup> Canadian decisions such as *The Bank of Toronto v. Lambe*<sup>22</sup> were held to have no bearing on the case, and the court again cited Marshall's opinion in the Maryland case with the observation that the reasoning of that judgment appeared to be unanswerable. Continuing, Justice Griffith contended:

"In my opinion the principles applicable to the granting by the Judicial Committee of special leave to appeal from this Court or from the Supreme Court of a State are not applicable in this case. Grave responsibility is cast upon this Court by the Constitution. We know historically that that responsibility was only cast upon us after long consideration and negotiation. Various proposals were made, and the establishment of the Commonwealth very nearly fell through in consequence of the differences of opinion upon the point. The final solemn determination of the English Parliament, with the assent of Australia, was that that responsibility should be cast upon the High Court. I agree with Mr. Higgins that we should be guilty of a dereliction of duty almost amounting to a breach of trust if we were to decline to accept that responsibility

<sup>20</sup> 1 C. L. R. 604, 606.

<sup>21</sup> 1 C. L. R. 621, 622.

<sup>22</sup> 12 A. C. 575 (1887).

unless we were in a position to say in intelligible language that there was some special reason, capable of being formulated, why the Privy Council was, and why we were not, the proper ultimate judges of the question."<sup>23</sup>

Even more emphatic is the language of Justice O'Connor:

"So strongly do I feel that that duty has been cast on myself as a member of this Court, that I have no hesitation in saying, if we found that by a current of authority in England, it was likely that, should a case go to the Privy Council, some fundamental principle involved was likely to be decided in a manner contrary to the true intent of the Constitution as we believed it to be, it would be our duty not to allow the case to go to the Privy Council, and thus to save this Constitution from the risk of what we would consider a misinterpretation of its fundamental principles."<sup>24</sup>

The case did not end here, for it was soon appealed to the Privy Council, and in *Webb v. Outtrim*<sup>25</sup> the court of appeal for the British Empire decided to uphold the state court and thereby overruled the judgment of the High Court in two of its greatest decisions.

"No restriction," says the Council, "on the power of the Victorian legislature in favour of such officer is expressly enacted by the Commonwealth Constitution Act, nor can one be implied on any recognized principle of interpretation applicable thereto."<sup>26</sup>

Moreover, the Council denied that the Commonwealth Parliament could take away the right of appeal in this case. The contention that such an act on the part of a state is impliedly forbidden by the Constitution after the analogy of Marshall's reasoning was thus disposed of:

"The analogy fails in the very matter which is under debate. No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. . . . The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute upon the ground that it is unconstitutional. But in the British Constitution, though sometimes the phrase 'unconstitutional' is used to describe a

<sup>23</sup> 1 C. L. R. 622.

<sup>24</sup> 1 C. L. R. 631.

<sup>25</sup> [1907] A. C. 81.

<sup>26</sup> *Ibid.*, 81.



statute which, though within the legal power of the Legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such law, still, notwithstanding such condemnation, the statute in question is law and must be obeyed. It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice suggests."<sup>27</sup>

In reference to that part of the opinion which declares the United States Constitution a model for the Australian Constitution, Their Lordships say they "are not able to acquiesce in any such principle of interpretation." Neither of these sections (73 and 84) authorizes the Commonwealth Parliament, they claim, to take away the right of appeal in such a case as the one under consideration, nor does any other section directly give such authority.<sup>28</sup> For these reasons Their Lordships declined to acquiesce in the judgments rendered by the High Court.

When the issue was again presented to the High Court<sup>29</sup> it was held that the High Court was the ultimate arbiter upon all constitutional questions, unless it was of opinion that the question at issue in any particular case was one upon which it should submit itself to the guidance of the Privy Council, and the court was therefore not bound to follow the decision in *Webb v. Outrim*, but should follow its own well-considered decision. Chief Justice Griffith said that in *D'Emden v. Pedder* the court held

"that the doctrine laid down in the celebrated case of *McCulloch v. Maryland* was applicable to the Constitution of the Commonwealth of Australia. . . . In the case of *Deakin v. Webb* the Court again affirmed that rule, and, adopting the reasoning of the Supreme Court of the United States in the cases of *Dobbins v. Commissioners of Erie County* and *The Collector v. Day*, applied it to the case of a State income tax upon the emoluments of Federal ministers and members of Parliament."<sup>30</sup>

The Chief Justice continued:

"For the first time in the history of the British Empire a Court has been established as to which it has been declared that no appeal shall be

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<sup>27</sup> [1907] A. C. 88, 89.

<sup>28</sup> *Ibid.*, 91.

<sup>29</sup> *Baxter v. Commissioners of Taxation*, 4 C. L. R. 1087 (1907). See also *Commonwealth v. State of New South Wales*, 3 C. L. R. 807 (1906), in which a transfer was declared a necessary instrumentality of the Commonwealth for the acquisition of land for public purposes and that the transfer was therefore exempt from state taxation.

<sup>30</sup> 4 C. L. R. 1100.

permitted from its decisions on certain questions unless the Court itself certifies that the question is one which 'ought to be determined' by the Sovereign in Council. These words cast upon the Court the duty of determining whether the question is such an one or not, and, if it thinks that it is not, it is its solemn duty to say so. . . .

"It appears to us that these considerations show that the High Court was intended to be set up as an Australian tribunal to decide questions of purely Australian domestic concern without appeal or review, unless the High Court in the exercise of its own judicial functions, and upon its own judicial responsibility, forms the opinion that the question at issue is one on which it should submit itself to the guidance of the Privy Council. To treat a decision of the Privy Council as overruling its own decision on a question which it thinks ought not to be determined by the Privy Council would be to substitute the opinion of that body for its own, which would be an unworthy abandonment of the great trust reposed in it by the Constitution. It is said that such a state of things as would follow from a difference of opinion between the Judicial Committee and the High Court would be intolerable. It would not, perhaps, have been extravagant to expect that the Judicial Committee would recognize the intention of the Imperial legislature to make the opinion of the High Court final in such matters. But that is their concern, not ours. . . . For these reasons we are of opinion that this court is in no way bound by the decision of the Judicial Committee in *Webb v. Outrim*, but is bound to determine the present appeal upon its merits according to its own judgment. In other words, we think that this Court is in effect directed by the Constitution to disregard the unwritten conventional rule as to following decisions of the Judicial Committee in cases falling within sec. 74."<sup>31</sup>

The court concluded that the analogy between the Australian and the American Constitutions is perfect. The Privy Council temporarily at least accepted the situation by refusing to allow an appeal.<sup>32</sup>

The outcome of the controversy was the passage of the Commonwealth Salaries Act of 1907 which granted the states authority to impose a tax upon Commonwealth officers.<sup>33</sup>

By another act of the Commonwealth in 1907 an effort was made to prevent a similar controversy to that of *Wollaston's Case* by

<sup>31</sup> 4 C. L. R. 1102 *et passim*.

<sup>32</sup> [1908] A. C. 214.

<sup>33</sup> For the affirmance of this act, see *Chaplin v. Commissioner of Taxes for South Australia*, 12 C. L. R. 375 (1911).



requiring that state cases involving the construction of the Commonwealth Constitution be appealed directly to the High Court. According to all indications the High Court has won, although it is still claimed that the issue remains an undetermined matter in Australian constitutional law. According to Sir A. B. Keith,

"It is far from easy to predict the future of the doctrine of implied prohibition, for if the three senior judges [Griffith, Barton, and O'Connor] of the High Court are fully convinced of the principle which they have adopted from the first as the basis of the consideration of the Constitution, the two junior judges [Isaacs and Higgins] are evidently, if in different degrees, quite unwilling to admit its validity, and they have declared in open court that they do not consider themselves bound by it."<sup>34</sup>

A Commonwealth act, it is maintained, is powerless to undo what has been done and it cannot reverse the Privy Council. The Judicial Committee and the High Court each claim to be the final court of appeal on the interpretation of the Australian Constitution.

The principle of implied prohibitions was considered in *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employes Association*,<sup>35</sup> in which the court applied the principle of previous cases to an attempted interference with the sovereign powers of the states by the exercise of the legislative or executive power of the Commonwealth. The rule laid down in *D'Emden v. Pedder* that when a state attempts to give to its legislative or executive authority an operation which, if valid, would interfere with the free exercise of the legislative or executive power of the Commonwealth, it is to that extent invalid and inoperative, is reciprocal, says the court. It is equally true of an attempted interference by the Commonwealth with state instrumentalities. The application of the rule is not limited to taxation. A state railway is a state instrumentality within that

<sup>34</sup> Keith, "Legal Interpretation of the Constitution of the Commonwealth," 12 J. SOC. OF COMPARATIVE LEGISLATION (N. S.) 120. For a criticism of the judgment and reasoning of the High Court, consult 2 KEITH, RESPONSIBLE GOVERNMENT IN THE DOMINIONS, 821-37.

<sup>35</sup> 4 C. L. R. 488 (1906). For the significance of the rule laid down in this case, see *Attorney-General for New South Wales v. Collector of Customs*, 5 C. L. R. 818 (1908). See also *King v. Sutton*, 5 C. L. R. 789 (1908), in which the High Court appears to have held that the power to make laws with respect to foreign commerce belongs by implication exclusively to the Commonwealth Parliament.

rule with respect to the attempt to regulate the terms and conditions of the engagement, employment, and remuneration of servants.

Few decisions as significant as those relating to the immunity of instrumentalities from taxation have been rendered by the High Court, but the trend of constitutional interpretation is shown in some minor cases which may be briefly reviewed. It was very soon determined that the High Court will not decide abstract questions of constitutional law and that a complainant must show that he has personally been injured before he can have the constitutionality of a law tested.<sup>36</sup> The provision for the distribution of powers between the states and the Commonwealth was discussed in *King v. Barger* with the approval of decisions of the Supreme Court of the United States as to the distribution of powers and the insistence that a similar distribution was made in the Constitution Act.<sup>37</sup> In the *State Railway Servants* case the High Court held that the inclusion of disputes relative to employment on state railways was *ultra vires* as an invasion of the exclusive powers of the state.<sup>38</sup>

A clear presentation of the function of the High Court is given in the *Union Label* case<sup>39</sup> wherein the decision was rendered that the portion of the Trade Marks Act of 1905 establishing a workers' mark was *ultra vires* as involving the state power over domestic commerce and industry. Chief Justice Griffith maintained that

"It would indeed be a lamentable thing if this Court should allow itself to be guided in the interpretation of the Constitution by its own notions of what it is expedient that the Constitution should contain or the Parliament should enact. . . . Now, while there is no doubt that within the ambit of its powers the Parliament is supreme, it has no authority whatever beyond that ambit. . . . But it is for this Court to determine, when its interpretation is sought, whether an asserted authority is or is not conferred by the Constitution."<sup>40</sup>

<sup>36</sup> *Bruce v. Commonwealth Trade Marks Label Association*, 4 C. L. R. 1569 (1907). See also *Attorney-General for New South Wales v. Brewery Employés Union of New South Wales*, 6 C. L. R. 469 (1908).

<sup>37</sup> 6 C. L. R. 41, 67 (1908).

<sup>38</sup> *The Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employés Association*, 4 C. L. R. 488 (1906).

<sup>39</sup> *Attorney-General for New South Wales v. Brewery Employés Union*, 6 C. L. R. 469, 491 (1908).

<sup>40</sup> *Ibid.*, 500.



Justice Isaacs held that

"no considerations of expediency or desirability springing from any source whatever are permissible to the Court in determining the limits of an express and substantive power. It is a mere question of dry law as to the extent of the power granted, to be determined on ordinary legal principles."<sup>41</sup>

As to the right to decide on the validity of acts, Justice Higgins observed:

"Nothing would tend to detract from the influence and the usefulness of this Court more than the appearance of an eagerness to act in judgment on Acts of Parliament, and to stamp the Constitution with the impress which we wish it to bear. It is only when we cannot do justice, in an action properly brought, without deciding as to the validity of the Act, that we are entitled to take out this last weapon from our armour; and the fact that the question raised in this case has not been argued before any other bench, and possibly may not be argued, or even arguable, on appeal from us, adds to the weight of our responsibility in making sure that there is a cause of action."<sup>42</sup>

Among the acts or portions of acts invalidated by the High Court are a state license act discriminating against the citizens of other states,<sup>43</sup> several sections of the Australian Industries Preservation Act of 1906,<sup>44</sup> an award of a federal court of conciliation and arbitration contrary to a prior award of a state wage board,<sup>45</sup> and the regulation of the Governor General pertaining to the publication of a list of subscribers connected with any telephone exchange.<sup>46</sup> On the whole the court has been rather liberal in its review of the recent acts developing and extending the federal powers as defined in the Constitution.

When an issue arose over the Royal Commissions Act of 1902-12 the court could not come to an agreement and availed itself of the power under section 74 to refer a question of constitutional interpretation to the Privy Council. The Council held the act *ultra*

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<sup>41</sup> 6 C. L. R. 559.

<sup>42</sup> *Ibid.*, 590.

<sup>43</sup> *Fox v. Robbins*, 8 C. L. R. 115 (1909).

<sup>44</sup> *Huddart Parker & Co., Ltd. v. Moorehead*, 8 C. L. R. 331 (1909).

<sup>45</sup> *Australian Boot Trade Employés Federation v. Whybrow & Co.*, 10 C. L. R. 266 and 11 C. L. R. 311 (1910).

<sup>46</sup> *Commonwealth v. Progress Advertising and Press Agency Co., Ltd.*, 10 C. L. R. 457 (1910).

*vires* so far as it purported to enable a Commonwealth Royal Commission to compel answers generally to questions in relation to the intrastate sugar industry, or to order the production of documents relative thereto, or otherwise to enforce compliance by the members of the public with its requisition.<sup>47</sup> The Council seemed to recognize an error in its judgment in the Webb case by admitting that in fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada. Recently a Commonwealth land tax assessment act<sup>48</sup> and an act limiting the power of the High Court with regard to awards of the Court of Conciliation and Arbitration<sup>49</sup> were held invalid.

### JUDICIAL REVIEW IN THE STATES

As in the United States, the interpretation of the Constitution is not for the judiciary of the Commonwealth alone; it falls upon every court throughout the Commonwealth. Although every court of competent jurisdiction is an interpreter of the Constitution, and the High Court subject to an advisory review by the Privy Council is the authoritative and final interpreter of the Constitution, the state parliaments enjoy a position of independence unknown to the state legislatures in the United States, or to the provincial parliaments in Canada. This arises from the fact that few prohibitions on the states are included in the Constitution and there are no inhibitions arising from general phrases like due process of law and the impairment of the obligation of contracts. Furthermore the doctrine of implied prohibitions, although accepted by the judiciary, has been given by legislative enactment a very limited application.

The nature of judicial review in the states can best be indicated by some of the decisions in Victoria and in New South Wales. In Victoria it was decided as early as 1862 that the Supreme Court had power to examine the validity of an act of the state parlia-

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<sup>47</sup> Attorney-General for Commonwealth of Australia *v.* Colonial Sugar Refining Co., Ltd., 17 C. L. R. 644 (1913). For a criticism of the action of the Privy Council in this case, see W. J. Brown, "The Nature of a Federal Commonwealth," 30 L. QUART. REV. 301.

<sup>48</sup> *Waterhouse v. Deputy Federal Commissioner of Land Tax*, 17 C. L. R. 665 (1914).

<sup>49</sup> *The Tramways Case*, 18 C. L. R. 54 (1914).



ment.<sup>50</sup> It was declared to be the duty of the court on another occasion to interpret acts so as to carry out the manifest intention of the legislature, even though the court be compelled to strike out words to do so.<sup>51</sup> In the case of *George Dill*,<sup>52</sup> involving the question of constitutionality, the court observed:

"The case of the *Bank of Australasia v. Nias* was cited to shew that the Court has power to examine the validity of an Act of the Parliament of Victoria. Of this there can be no doubt. . . . The case of *Kenny v. Chapman* turned entirely on the question whether the Act No. 128 was valid. But this is a power which should in all cases be exercised by the Court with the greatest caution. A statute passed by the Supreme Legislature of the Colony with all the deliberation which our Constitution demands, ought not to be held invalid by the Supreme Court, except on the clearest and most cogent grounds, especially where it has passed that examination to which all Colonial Acts are subjected in England, and has not been disallowed. . . . The Act of the 20th Victoria, establishes a boundary of the privileges adopted. The Court, when occasions arise, must take care that the boundary is not overstepped. It is no answer to say that the task may, at times, be one of extreme difficulty. It is often so in other portions of our law. The Court must solve it in each case as it occurs."<sup>53</sup>

For New South Wales a similar precedent was established as early as 1861 in *Rusden v. Weekes*.<sup>54</sup> It was held that the courts of a colony have the power and are under obligation to decide whether an Act of the Colonial Legislature is in contravention of an Act of the Imperial Parliament and consequently not binding on the inhabitants of the colony. Justices Marshall and Kent were quoted in a citation of American cases. According to Justice Mulford

"where two laws are apparently inconsistent it is the province of the Court to reconcile them if possible, — if not, to say which is in force and which is not. . . . The fundamental principle of law as applicable to powers of colonial Legislatures is, that they may be controlled by the Imperial Parliament, and every Court must decide whether they have been controlled or not. It is not the duty of the Supreme Court more than any other Court to do this."

<sup>50</sup> *In re Dill*, 1 W. & W. (L.) 171, 187 (1862).

<sup>51</sup> *Regina v. Draper*, 1 Vict. (L.) 118 (1870).

<sup>52</sup> 1 W. & W. (L.) 171 (1862).

<sup>53</sup> *Ibid.*, 187, 190.

<sup>54</sup> Legge 1406, 1416 (1861).

The extent of judicial control is evidenced in *Lazarus v. Stutchbury*, where it was held that although a rule of court was inconsistent with the terms of an act, but the practice of the court had followed the rule for twenty years, the practice must prevail.<sup>55</sup>

When the question was raised whether a power existed in a state court to grant a *mandamus* to compel a federal officer to perform duties imposed upon him by the federal parliament when the duties were to be performed within the state, Justice Owen remarked:

"There is no case analogous to this in any of the English cases that throws any light on the subject. We must go to some country where there are two such Constitutions as we have here, such as America and Canada. In America it had been decided over and over again that a *mandamus* will not lie in a state court to compel the performance of a duty by a Federal officer. That appears to me to be an analogous case to that now before the Court. The American decisions appeared to be based upon the principle of separate sovereignties, the Federal and the State Governments, and here the Federal Government and the State Government are two distinct entities, as distinct to my mind as if they were separated by territorial boundaries. I think that exactly the same principle must apply in dealing with the question in this State as would apply in America. For these reasons I am of opinion that we have no power to grant a *mandamus* to compel the Collector of Customs to perform duties imposed upon him by the Federal Parliament."<sup>56</sup>

In the Royal Commissions case the justices, quoting Sir Edward Coke, held that the king may constitute new courts of law with the assent of Parliament, but insisted that such courts must proceed by due process of law, and administer the law whether common law or statute law, so that the subject may know precisely how and by what law his case is to be dealt with. Consequently, a royal commission intended to inquire into a matter which was within the jurisdiction of the Court of Arbitration was held illegal. The theory of the separation of powers and of the independence of the courts were thus defended:

"No lawyer has ever ventured to contend that the prerogative of the King can be stretched so as to give him the right to interfere with the proceeding of Courts of Justice. Such an interference, whether it be by asserting a right to give judgments in disputes which are pending or

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<sup>55</sup> 7 N. S. Wales L. R. 328 (1886).

<sup>56</sup> *Ex parte Goldring*, 3 N. S. Wales 260, 264 (1903).



to constitute an irregular Court of Appeal to revise the decision of a regular and constitutional Court, is, in my opinion, illegal."<sup>57</sup>

In *Crick v. Harnett*<sup>58</sup> a standing order of a legislative assembly relative to misconduct was attacked as being *ultra vires*. It was held by the court that the House had no power to pass the standing order, even though the order had been passed and had been approved by the Governor. Chief Justice Griffith, holding that the court had power to inquire into the validity of the standing order, said:

"It is obvious that a court of law has the duty of enquiry, should occasion arise, as to what are the inherent powers that must be implied from mere necessity, and would it not be more than strange if the Court was debarred from considering whether the Legislative Assembly, itself the creature of the Constitution Act, was, in a vital matter, exceeding the power expressly given to it by the Act. If the Court was so debarred, then indeed I know not to what excess standing orders might be passed, even to the extent of committing a member to a long term of imprisonment."<sup>59</sup>

Similar authority was exercised by the state judiciary when a portion of the Australian Agricultural Company Act was declared void.<sup>60</sup> On another occasion an act of Parliament giving the Crown power to invade private rights was construed strictly with the observation that

"private rights should be guarded and protected from invasion to a greater extent than the law allowed. When a private right is invaded it is no answer to say that it is for the public good. It is altogether contrary to constitutional principles to permit the invasion of private rights."<sup>61</sup>

Subsequently a New South Wales law excluding Australian native-born convicts was declared *ultra vires*.<sup>62</sup>

For the states the principle had been long established that the colonists carry with them only so much of the English law as was considered applicable to their own situation — the applicability of

<sup>57</sup> *Ex parte Leahy*, 4 N. S. Wales 401, 425 (1904).

<sup>58</sup> 7 N. S. Wales 126 (1907).

<sup>59</sup> *Ibid.*, 133. When this issue was carried to the Privy Council the decision of the Supreme Court was reversed on the ground that it was impossible to say upon a fair view of all the circumstances that the standing order in question did not relate to the orderly conduct of the Assembly. See 7 N. S. Wales 451.

<sup>60</sup> See *v. Australian Agricultural Company*, 10 N. S. Wales 690 (1910).

<sup>61</sup> *Allen v. Fosskett, etc.*, 14 N. S. Wales S. C. R. 456 (1876).

<sup>62</sup> *Rex v. Smithers*, 16 C. L. R. 99 (1912).

any law being a question for judicial determination as occasion arises.

#### CONSTITUTIONAL INTERPRETATION AND JUDICIAL REVIEW IN AUSTRALIA, CANADA, AND THE UNITED STATES COMPARED

Lawyers and the courts in Australia are constantly making comparisons with the law and the practice of judicial review in similar federations, particularly Canada and the United States.

It was intended throughout the movement which resulted in the formation and adoption of the Constitution Act to create a form of union which differs fundamentally from the union of the provinces of Canada. This intention is apparent in the rejection of the Canadian plan of retaining reserved powers in the Dominion and enumerating the powers of the provinces and also the rejection of the Canadian scheme of executive veto over provincial legislation. The difference between the Constitution Act and the British North America Act seemed to the founders of the Australia federation so marked that in defining the new government they refused to accept the term "Dominion" and adopted "Commonwealth"<sup>63</sup> instead.

"It is a curious fact," says the Canadian commentator Lefroy, "that whereas the Canadians living alongside of the United States endeavored when confederating to reproduce British forms and principles rather than American whenever the two differed, the Australians have very largely preferred the latter."<sup>64</sup>

The distinction between the Constitution Act and the North America Act is further evidenced by the fact that the Australian courts refused to follow the Canadian Supreme Court and the Privy Council in determining the doctrine of implied prohibitions and in the insistence on retaining section 74 in the Constitution, whereby the High Court has refused to accept the right of review of the Privy Council on constitutional questions.

In comparison with the federal system of the United States the

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<sup>63</sup> On the significance of the selection of name, consult MOORE, 66, 67.

<sup>64</sup> Lefroy, "The Commonwealth of Australia Bill," 15 L. QUART. REV. 156. "It seems a pity that the Australians should destroy the symmetry of things by preferring the word 'Commonwealth' with its decidedly American flavour. However, in like manner they prefer 'States' to 'provinces' and most deplorable of all, as it seems to me, the term 'House of Representatives' to that of 'House of Commons,' with all its honoured associations," 156-67.



Constitution Act shows striking similarities, first in the distribution of powers between state and federal authorities, and second in the evident intention to adopt American principles of judicial review of legislative acts and judicial interpretation of the Constitution itself. In a number of instances the language of the Constitution of the United States is followed and a similar interpretation is accepted by the courts. A large part of the constitutional law of Australia, it is frequently claimed, has been taken from the legislation of the Congress and the decisions of the Supreme Court of the United States. The similarity in this respect is greatly increased by the extent and freedom with which Australian judges make use of American judicial precedents. In accepting the American doctrine of judicial review, Justice Clark observed:

"so great and momentous a power has probably never been vested in any other judicial tribunal in the world, and the impregnable position assigned to the Supreme Court of the United States may always with pardonable pride be claimed by the advocates of a republican form of government as having been first exhibited to the world in association with republican institutions."<sup>65</sup>

As in the United States, the power is nowhere expressly granted in the Constitution but is held to exist as an incident of judicial power. It is held to belong of right to all courts within the Commonwealth.

Certain differences between the two federations are worthy of note. One difference to which Australian writers usually refer is the extent of popular participation in the making of the Constitution.

"The federation of Australia was a popular act, an expression of the free will of the people of every part of it, and therein, as in some other respects, it differs in a striking manner from the federation of the United States, of Canada, and of Germany."<sup>66</sup>

Moreover, the Australians did not see fit to enact as a part of their Constitution the provisions which are familiarly known as the Bill of Rights of American constitutions. Nor did they insert any of the general phrases, such as due process of law and equal protection of the laws, which have been such a fruitful field for the judicial

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<sup>65</sup> CLARK, 5.

<sup>66</sup> MOORE, 64. In comparison with the United States "the most scrupulous care was taken to make the popular participation a reality and not a fiction," 66, 67.

mind in the effort to limit legislative action. With no inhibition as to the obligation of contracts and no due process restriction, the states of the Australian Commonwealth have a freedom which the states of the United States do not enjoy.<sup>67</sup> In Australia, where there is no background of enumerated and implied individual rights secured against legislative invasion, there is a strong presumption in favor of the power of the legislature as against that of the other organs of government.

There is a disposition to claim also that American courts have gone too far in interposing limitations to legislatures and to charge that judges in the United States have a tendency to make rather than to interpret the law. Thus it is contended that

"the freedom with which American Judges resort to first principles is remarkable. They build up a theory of sovereignty and, in fact, construct laws on that basis, in a manner comparable to that which would be followed by an International Jurist in dealing with some branch of his science not yet covered by authoritative practice. The reasoning of Marshall (making allowance for the fact that he was dealing with popular sovereignty) is such as might have been used by an early jurist in formulating the immunity of a foreign ambassador from local taxation."<sup>68</sup>

In this connection it has been held that an implication as a basis for legislative restrictions must be necessary, not conjectural or argumentative.

While apparently the states of Australia are more favorably situated than those of the federal system of the United States, there is a decided tendency toward centralization which may change the federal relations so as to curtail considerably the range of state powers. That the states are destined to a subordinate position is the judgment of some careful students of Australian affairs.<sup>69</sup> In view of the wide range of subjects which is accorded to the Commonwealth it is thought that the control of state legislation will tend to become as extensive as that of the Dominion Parliament over provincial legislation in Canada.

From the standpoint of constitutional law by far the most

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<sup>67</sup> MOORE, 314-15; also 342.

<sup>68</sup> F. L. Stow, "Federal and State Constitutional Domains," 5 COMMONWEALTH L. REV. 10.

<sup>69</sup> See especially the opinion of Sir C. Ilbert, 12 J. SOC. OF COMPARATIVE LEGISLATION (N. S.) 30. Also Lefroy, 15 L. QUART. REV. 162-63.



important feature of the Constitution Act is section 74, which seems to bring to pass the prediction of Justice Clark that constitutional law in Australia will be largely the product of Australian lawyers. By the interpretation of this section the judicial independence of the Commonwealth appears to have been established and there is afforded the opportunity to which Australians looked forward — that of determining for themselves the great issues of public law and of rendering a contribution to the jurisprudence and constitutional law of the world.

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JUDGMENT, LEVY AND SALE WITHIN FOUR MONTHS OF BANKRUPTCY AS A VOIDABLE PREFERENCE. — Couched in a single sentence containing more than one hundred and fifty words and a formidable array of clauses, the meaning of the vital part of section 60 *b* of the Bankruptcy Act, defining voidable preferences, is, as one might expect, to some extent enveloped in obscurity. A particularly troublesome situation under this section presents itself when a creditor with reasonable cause to believe his debtor insolvent procures a judgment, levies execution and receives the proceeds of the sale, all within four months of the initiation of bankruptcy proceedings against the debtor. Under these circumstances the Supreme Court of Oregon has recently allowed a trustee in bankruptcy to recover from the creditor.<sup>1</sup>

This result, manifestly in perfect accord with the spirit of bankruptcy legislation, is, nevertheless, not easily reached under the wording of section 60 *b*. The material part of the section reads as follows: "If a bankrupt shall have procured or suffered<sup>2</sup> a judgment to be entered against him in favor of any person, or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the

<sup>1</sup> *Anderson v. Stayton State Bank*, 38 Am. B. Rep. 4. In *Clarke v. Larremore*, 188 U. S. 486, Justice Brewer, speaking for the court, raised the question here involved but withheld decision upon it.

<sup>2</sup> These words are satisfied by mere passive non-resistance on the part of the debtor, *Wilson v. Nelson*, 183 U. S. 191.



judgment, or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent *and*<sup>3</sup> *the judgment or transfer then operate as a preference*,<sup>4</sup> and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, *it shall be voidable by the trustee*<sup>5</sup> and he may recover the property or its value from such person."

Much of the ambiguity is wrapped up in the "it" italicized above — does it refer to judgment or transfer, or does it refer to preference? The respective consequences flowing from these alternative interpretations may with propriety be examined as circumstances surrounding the expression of legislative intent.

Assuming, first, that "it" refers to judgment or transfer and not to preference, what is the operation of this section? Some preliminary matters must be noticed at this point. A judgment as such does not entitle the holder to take precedence over simple contract creditors in bankruptcy. A lien, however, does confer priority, and having in mind the prevalence of state statutes making judgments liens on the debtor's real estate, at least one evil in bankruptcy emanating from a judgment is readily perceived. This situation seems to be covered by the section.<sup>6</sup> If, however, the words are to be given their primary import, the statute goes too far — it enables the trustee to invalidate the judgment itself. As certain claims, notably those sounding in tort, are provable only if reduced to judgment,<sup>7</sup> there looms the possibility of grievous hardship upon the creditor. Clearly he should not be deprived of the provability of his claim because he knew of the tortfeasor's insolvency. This difficulty was felt in connection with the use of the word "judgment" in section 67 *f*, and circumvented by construing "judgment" to mean "judgment lien,"<sup>7</sup> a feasible solution in this instance.

In still another way may a judgment militate against the scheme of equality among creditors, namely, by enabling the creditor to sell the debtor's property on execution and pocket the proceeds, — the situation in the principal case. A strict adherence to the language used precludes the application of section 60 *b* here. The judgment has not "operated as a preference," assuming, as we may for aught that appears in the principal case, that the debtor owned no real estate. The subsequent levy of execution might or might not have followed the judgment. That the judgment has operated to enable the holder to get a preference is the most that can be said. Further, the statute declares that the judgment shall be voidable by the trustee. But in the principal case the judgment no longer exists — it has been satisfied. Conceivably, however, the legis-

<sup>3</sup> The italics are the writer's.

<sup>4</sup> Taken literally this clause could never be satisfied, since it is impossible to have a preference until there has been bankruptcy.

<sup>5</sup> And yet not precisely; for if, as is usually the case, the successful litigant must docket his judgment before it becomes a lien, the judgment has not, accurately speaking, operated as a preference.

<sup>6</sup> See REMINGTON, BANKRUPTCY, 2 ed., §§ 635, 680.

<sup>7</sup> *Ibid.*, § 777.

lature may have intended to annex retrospective effect to the trustee's avoidance, thus rendering the judgment a nullity and all proceedings taken pursuant to it unauthorized, in which event the sheriff and a *bona fide* purchaser at the execution sale as well as the creditor would stand liable to the trustee for conversion of the property. This last complication is not the only obstacle in the path of this solution. The courts have repeatedly declined to concede retrospective operation to section 67 *f* under which certain liens are rendered void by the advent of bankruptcy,<sup>8</sup> although the construction suggested would be no more forced there than here. Furthermore, we have indicated in an earlier paragraph the necessity for and the propriety of construing "judgment" as used in section 60 *b* to mean "judgment lien." If that construction is to prevail, the creditor in the principal case is secure in his advantage, for if he ever obtained a judgment lien, in selling the debtor's property he has relied, not upon it but upon his lien of execution — the antedated avoidance of any judgment lien he may have had would, therefore, be a matter of no concern to him. In short, if "it" be taken to refer to "judgment," recovery by the trustee in the principal case seems impossible.

Choosing the second alternative, namely, that the "it" refers to "preference" and not to "judgment," the tangle largely disappears. The trustee is empowered to avoid "preferences," and the fact that there is no "judgment" in existence at the time he proposes to avoid is entirely immaterial. There is now but one conceivable objection to his recovery. As pointed out above, the requirement that the judgment operate as a preference has not been strictly fulfilled. The judgment, however, has operated to enable the creditor to get a preference, and in view of the broad construction given to various parts of the statute in the past,<sup>9</sup> this comparatively slight objection would not seem to be fatal.

An entirely different method of approach to the situation presented in the principal case has been employed in at least one instance.<sup>10</sup> The sale on execution was deemed to be a "transfer" within the meaning of section 60 *b*; warranted perhaps by the comprehensive definition of "transfer" contained in the initial paragraph of the Act. On several occasions, however, the Supreme Court of the United States has shown a marked reluctance to press the meaning of "transfer" to the detriment of a creditor who had secured a questionable advantage,<sup>11</sup> apparently distinguishing between voluntary and involuntary transfers by the

<sup>8</sup> *In re Bailey*, 144 Fed. 214; *In re Resnek*, 167 Fed. 574.

<sup>9</sup> Although the statute makes all general assignments acts of bankruptcy, yet, unless the assignment is fraudulent, nothing contained in the statute allows the trustee to recover the property from the assignee. To avoid the obvious incongruity, the courts, however, have allowed the trustee to recover. *In re Gutwillig*, 92 Fed. 337. See Prof. Samuel Williston, "Transfers of After-Acquired Personality," 19 HARV. L. REV. 557, 580. This suggests a mode of reaching the creditor in the principal case, — the acts of the creditor constitute the act of bankruptcy specified in § 3 *a* (3). Perhaps the right of the trustee to recover may be implied from this.

For further examples of liberties taken with the statute, see *West Co. v. Lea*, 174 U. S. 599, wherein § 3 *b* was whittled away.

<sup>10</sup> *Galbraith v. Whitaker*, 119 Minn. 447, 138 N. W. 772.

<sup>11</sup> See *Thompson v. Fairbanks*, 196 U. S. 516; *Humphry v. Tatman*, 198 U. S. 91, reversing 184 Mass. 361. See also *York Manufacturing Co. v. Cassell*, 201 U. S. 344.



debtor, or, as it is more usually expressed, between giving and taking a preference.<sup>12</sup> The disposition of the court to perpetuate this distinction probably precludes what would otherwise be the simplest and most satisfactory solution of the difficulty.<sup>13</sup>

CONSTRUCTIVE TRUST THEORY AS APPLIED TO PROPERTY ACQUIRED BY CRIME. — If A. has provided that B. is to have certain of his property after A.'s death and B. slays A., does B. acquire the property and if so can he keep it? This question has faced the courts with increasing frequency of recent years.<sup>1</sup> The abundant discussion<sup>2</sup> and criticism of the opposing answers given indicate that no solid ground by which a just result can be reached without judicial gymnastics has yet been generally adopted. The question appears in cases of inheritance, of intestate succession, and of gifts by will. It may also arise out of life insurance policies, as in a recent Minnesota case where the insured was murdered by his wife whom he had made beneficiary of the policy. A brother of the deceased and the murderess were the only heirs under Minnesota law. The court held that the brother could recover in an action on the policy.<sup>3</sup>

The killing in any case may have been intentional, in the heat of blood, negligent, or accidental. Death by accident is dismissed from consideration. That the insane heir may inherit and pass to her heirs the property of her victim was held recently by a Canadian court.<sup>4</sup> This result is clearly right, for no crime<sup>5</sup> was committed according to the view taken of insanity. It may well be argued that only a killing with the purpose of hastening the acquirement of property should deprive one of enjoying its

<sup>12</sup> See Prof. Samuel Williston, "Transfers of After-Acquired Personalty," 19 HARV. L. REV. 557, 577. The source of the distinction is perhaps traceable to the Bankruptcy Act of 1867, under which clearly only preferences which the debtor took an active part in bringing about were voidable. See U. S. REV. STAT. 1875, § 5128.

<sup>13</sup> Most satisfactory, because on the other line of attack the section does not cover the case in which the creditor becomes aware of the debtor's insolvency after the entry of the judgment but before the execution sale. The section could be amended with profit somewhat as follows: A sale on execution shall be deemed a transfer within the meaning of this section, if, and only if, the levy of execution has taken place within four months of the filing of the petition in bankruptcy, or after the filing of the petition and before the adjudication.

<sup>1</sup> For the provisions of continental codes on this subject attention is called to an article by J. Chadwick in 30 L. QUART. REV. 210. On the question whether their effect is to prevent the criminal from taking, or is to allow him to take property and thereafter be deprived of it, see 8 HARV. L. REV. 170.

<sup>2</sup> AMES, LECTURES ON LEGAL HISTORY, 310, reprinting an article in 36 AM. L. REG. (N. S.) 225; 25 IR. LAW TIMES, 423 and 433; 29 CENT. L. J. 461; 32 *Ibid.* 333; 34 *Ibid.* 247; 39 *Ibid.* 217; 41 *Ibid.* 377; 4 HARV. L. REV. 394; 8 *Ibid.* 170; 24 *Ibid.* 227.

<sup>3</sup> Sharpless v. Grand Lodge A. O. U. W., 159 N. W. 1086 (Minn.).

<sup>4</sup> *Re Estate of Maude Mason*, 31 Dom. L. R. 305 (Br. Col.). Accord, *In re Houghton*, [1915] 2 Ch. 173; *Holdom v. Grand Lodge A. O. U. W.*, 159 Ill. 619, 43 N. E. 772 (insane beneficiary does not forfeit policy and is not barred from his right to sue).

<sup>5</sup> Crime, either felony or misdemeanor, is the adopted test of the English and Canadian courts. See *In re Houghton*, *supra*; *Estate of Hall*, [1914] P. 1, 8; *Cleaver v. Mutual Life Fund Association*, [1892] 1 Q. B. 147, 156; *Lundy v. Lundy*, 24 Can. Sup. Ct. 650. Cf. also the language of Earl, J., "He can not vest himself with title by crime." *Riggs v. Palmer*, 115 N. Y. 506, 513, 22 N. E. 188, 190.

benefits.<sup>6</sup> But practical difficulties of proving purpose at once suggest themselves, urging the establishment of a rule that any intentional killing which constitutes murder should demand intervention by the courts on the question of ownership.<sup>7</sup> The cases are not in accord as to manslaughter,<sup>8</sup> but it seems clear that no court should take or keep property from a claimant who has killed another negligently or in the heat of blood.<sup>9</sup>

There is a strong public policy against allowing a murderer to enjoy the benefits of property formerly owned by his victim.<sup>10</sup> To satisfy this policy the English courts hold that a slayer cannot take by will<sup>11</sup> or inherit<sup>12</sup> property at law. Several American courts have likewise read disqualifications into the unambiguous terms of their statutes of descent and distribution.<sup>13</sup> Two of these courts have abandoned this

<sup>6</sup> *Gollnik v. Mengel*, 112 Minn. 349, 128 N. W. 292; *In re Wolf*, 88 N. Y. Misc. 433, 150 N. Y. Supp. 738.

<sup>7</sup> No attempt is here made to formulate a rule as to the admissibility in evidence of a prior conviction or the weight to be given it if admitted. For what little the cases have said on these matters see *Schreiner v. High Court of I. C. O. of F.*, 35 Ill. App. 576, 579; *In re Wolf*, 88 N. Y. Misc. 433, 439, 150 N. Y. Supp. 738, 741; *Estate of Hall*, [1914] P. 1, 4, 7; *Estate of Crippen*, [1911] P. 108, 115; *Yates v. Kyffen-Taylor*, [1899] 2 W. N. 141; *M'Kinnon v. Lundy*, 24 Ont. 132, 143. *In re Cash*, 30 N. Z. L. 577, holds that the record of conviction is *prima facie* evidence. See also *Prather v. Michigan Mutual Life Association*, Fed. Cas. 11, 368, in which Gresham, D. J., charged the jury that the preponderance and not the reasonable doubt test is applicable.

<sup>8</sup> Under the English rule manslaughter disqualifies a legatee (*Estate of Hall, supra*), a devisee (*Lundy v. Lundy, supra*), and presumably an heir or beneficiary.

One who intended to kill A. but in fact killed B. was convicted of manslaughter and later allowed to take and keep property inherited from B. *In re Wolf, supra*.

<sup>9</sup> "No homicide which is the result of carelessness or which is not an intentional killing should bar the plaintiff's rights to the money on her certificate." *Moran, J.*, in *Schreiner v. High Court of I. C. O. of F.*, *supra*.

<sup>10</sup> *Fry, L. J.*, in *Cleaver v. Mutual Life Fund Association, supra*, said, "The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor." Cf. the language of *Field, J.*, in *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 600, "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a person whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired." (For a criticism of the use of the analogy to fire insurance, see 24 HARV. L. REV. 227, 228.)

In discussing the manner in which public policy should bar a murderer, the books make frequent references to an early English case in which it was held that the assignee of *Faulkner*, who had committed forgery and was later executed for his crime, could not recover from the insurers on a policy issued to *Faulkner*. The ground of the decision was that the risk of such a death if expressly assumed by the insurers would have made the policy void. *Amicable Society v. Bolland*, 4 Bli. (N. S.) 194.

<sup>11</sup> *Estate of Hall, supra*.

<sup>12</sup> *Estate of Crippen, supra*. The Probate Court refused to accept *Ethel LeNeve*, the executor named by the murderer *Crippen*, and appointed another as administrator of the deceased wife's estate "on the sister's behalf." It was decreed in the case of *In re Cash, supra*, that the Public Trustee stand possessed for the "next of kin other than the defendant" murderer who would have succeeded under the Administrative Act and was then serving a life sentence.

<sup>13</sup> *Riggs v. Palmer, supra*, holding that *Elmer*, because he murdered his grandfather, could take neither as heir nor as legatee. *Shellenberger v. Ransom*, 31 Neb. 61, 47 N. W. 700, reversed in 41 Neb. 631, 59 N. W. 935 (heir guilty of murder); *Wall v.*



position.<sup>14</sup> The rule of disqualification when applied to wills, can be explained only by presuming that the victim would not want his murderer to receive the legacy declared before the crime in a properly executed instrument. But this is flying in the face of the statutes of wills, which specify the only methods by which a will can be revoked.<sup>15</sup> Moreover, a counter presumption arises if the victim lingers on after receiving the wound,<sup>16</sup> and if he orally expresses his forgiveness the rule of disqualification must still bar the criminal under English law.<sup>17</sup> With more accuracy other courts have held that the murderer can inherit or take by will. But they then declared without justification that they lacked power to effect the ends of justice, and have allowed the murderer to keep the property,<sup>18</sup> thus forcing the matter into the legislatures.<sup>19</sup>

The error in both lines of decisions has grown out of beclouding the fundamental distinction between law and equity.<sup>20</sup> This is due in great part to the almost universal practice today under which the two branches are administered by the same tribunal with the same procedure. But the

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Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (statutory heir guilty of murder); Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641. In *Box v. Lanier*, 112 Tenn. 393, 79 S. W. 1042, a husband guilty of murdering his wife was precluded from taking as heir under the common-law right of survivorship existing in Tennessee. The case arose prior to the statute mentioned in note 19, *infra*. See also note 32, *infra*.

<sup>14</sup> *Ellerson v. Westcott*, 148 N. Y. 149, 42 N. E. 540, holding that the murderer takes and the heir's remedy is in equity. *Shellenberger v. Ransom*, *supra*, holding on second hearing that the murderer could take and keep the property.

<sup>15</sup> See Prof. Ames' article, LECTURES ON LEGAL HISTORY, 310, 312, 36 AM. L. REG. (N. S.) 225, 227.

<sup>16</sup> See *Taschereau, J.*, dissenting, in *Lundy v. Lundy*, *supra*.

<sup>17</sup> See *J. Chadwick* in 30 L. QUART. REV. 211, 213.

<sup>18</sup> *In re Carpenter's Estate*, 170 Pa. St. 203, 32 Atl. 636 (son guilty of murder); *Deem v. Milliken*, 6 Oh. C. C. 357, affirmed and opinion adopted in 53 Oh. St. 668, 44 N. E. 1134 (son guilty of murder); *Shellenberger v. Ransom*, *supra*; *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794 (wife accessory before fact to murder); *Gollnik v. Mengel*, *supra* (second degree murder); *McAllister v. Fair*, 72 Kan. 533, 84 Pac. 112 (husband statutory heir, guilty of murder); *De Graffenreid v. Iowa Land & Trust Co.*, 20 Okla. 687, 95 Pac. 624 (murder by heir, motive not acquisition of property. *Dictum* at p. 728 to effect that decision would have been same if purpose had been to gain immediate rights); *Holloway v. McCormick*, 41 Okla. 1, 136 Pac. 1111 (like preceding case).

<sup>19</sup> The following statutes have been passed in effect barring a murderer from acquiring rights in property by inheritance or will from his victim: *DEERING, CIV. CODE CAL.* 1915, § 1409 (not applicable to manslaughter. *In re Kirby's Estate*, 162 Cal. 91, 121 Pac. 370); 2 *BURNS' ANN. IND. STAT.* 1914, § 2995 (conviction necessary. *Bruns v. Cope*, 182 Ind. 289, 105 N. E. 471. Does not deprive widow of statutory share in personality payable out of estate. *In re Merte's Estate*, 181 Ind. 478, 104 N. E. 753); *IOWA CODE, SUPP.* 1913, § 3386 (does not deprive widow of share in estate she acquires under a statute as matter of contract and of right, and not by inheritance. *In re Kuhn's Estate*, 125 Iowa 449, 101 N. W. 151); *DASSLER GEN. STATS. KAN.* 1909, § 2967; *PELL'S REVISAL OF 1908, N. C.*, § 7; *TENN. ACTS OF 1905, c. 11, p. 22*; *COMP. LAWS OF UTAH, 1907*, § 2823.

The constitutionality of such statutes has not yet been passed upon in any of the jurisdictions. The question was expressly left undecided in *In re Merte's Estate*, *supra*. For what has been said regarding the effect of the Bills of Rights in federal and state constitutions, forbidding forfeiture of property for crime, upon the decisions herein considered, see *In re Carpenter's Estate*, *supra*; *Deem v. Milliken*, 6 Oh. C. C. 357, 361, 362; *McAllister v. Fair*, 72 Kan. 533, 536, 84 Pac. 112, 113; *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 40, 83 N. E. 542, 543; *Perry v. Strawbridge*, *supra*; *Shellenberger v. Ransom*, 31 Neb. 61, 73, 47 N. W. 700, 704; *Beddingfield v. Estill*, 118 Tenn. 39, 50, 100 S. W. 108, 111.

<sup>20</sup> See the opening paragraphs of Prof. Ames' article, *supra*.

keynote to the correct solution has often been struck by courts which failed to recognize what followed from their statement that no man shall profit by his wrongdoing.<sup>21</sup>

It is fundamental that equity will not allow unjust enrichment, and to prevent this equity has long imposed constructive trusts. Thus, when property is acquired by fraud or duress, equity will decree that title be given up.<sup>22</sup> Surely a murderer stands in a more unconscionable position than such title holders, although had the murderer allowed his victim to live on he would probably in time have received the same property. There is as a rule no workable method for taking from a murderer just so much as he has been enriched, *viz.*, a term for years equal to the period that his victim would have lived. Where mortality tables can accomplish this result in a practical fashion<sup>23</sup> it is submitted that such a method should supersede any herein suggested.<sup>24</sup>

The difficult problem in the constructive trust remedy, and the one which has not been deciphered thoroughly, is — to whom shall the property be given by equity after adopting the hypothesis that one who has been unjustly enriched should be decreed to make compensation in specie? Logically, all persons who might have shared in the victim's bounty have a claim to be heard,<sup>25</sup> since their chances, always of some actual value, have been destroyed. But to divide an estate into many fractional parts, according to the proportionate worth of each claimant's chances, might destroy all unity in the holding of the decedent's property and substantially benefit no one. Equity must look for the person or class of persons who in the greatest likelihood would have taken but for the existence and activity of the murderer.

Nearly always the victim's heirs and next of kin will stand in this position. But the deceased may have provided for a third person in case his devisee should predecease him. To give such third person the property will accomplish justice, since he was wronged more than the heirs of the testator. On the other hand, if an insurance policy taken out by the insured names as beneficiary the murderer or his executors, neither the murderer nor, when he has been punished by death, his executors, whose only claim lies as the continuing person of the deceased, should keep any money paid by the company. It should go to the estate of the insured

<sup>21</sup> Thus Earl, J., in *Riggs v. Palmer*, *supra*, says, at p. 511, "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."

See the learned opinions of Start, C. J., and Elliott, J., in *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 831, in which case the court agreed that a constructive trust should be imposed in the devise and insurance cases, but were divided as to the case of statutory inheritance.

<sup>22</sup> *Dixon v. Olmuis*, 1 Cox Eq. 414, decided by Lord Thurlow in 1787.

<sup>23</sup> For example, if a vested remainderman murders the life tenant, thus taking the fee at once, a constructive trust should be imposed upon him in favor of the heirs of the life tenant for the number of years he would have lived according to the mortality tables.

<sup>24</sup> See AMES, LECTURES ON LEGAL HISTORY, 310, 320, 321, 36 AM. L. REG. (N. S.) 225, 237, 238.

<sup>25</sup> "In a word, it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights." Fry, L. J., in *Cleaver v. Mutual Reserve Fund Life Ass'n*, *supra*.



for the benefit of his next of kin except the murderer. One should not be allowed to exercise rights acquired *from a murderer*.<sup>26</sup>

Suppose, however, that in a jurisdiction where primogeniture prevails for the inheritance of land an eldest son, himself having an eldest son, murders his father. The policy of one-man ownership will best be protected by saying that the victim's grandson and not the murderer's brothers shall be given the family estate. Moreover, the grandson from birth was in a position where he would claim either through his father (should the latter survive the grandfather) or direct from the grandfather (should the father be first to die). Thus his position is different from that of the personal representatives of a dead man. The grandson should therefore be decreed the legal and beneficial interest in the land. The fact that legal title has come *through a murderer* should not of itself disqualify one from holding interests at law or in equity.

To accomplish such results as are exemplified by the cases suggested above, the following is submitted as the nearest approach to a rule of thumb which could or should be made to guide the action of the equity court. If the present holder of a legal title, or that person solely because of whose prior existing claim the present owner derives his right, hastened the acquirement of the property by murdering the former owner: decree through the medium of a constructive trust that he convey his title to that person or class of persons who would have taken had the murderer predeceased his victim.

In the life insurance cases where no statutes of descent or distribution are before the courts they have more often reached correct results. The decisions quite generally hold that the company is not excused by the fact that death resulted from the felonious act of the beneficiary.<sup>27</sup> To decide otherwise would enrich the company unjustly, since murders are taken into account in the calculation of rates, etc. No case has held that the murderer, his representatives or assigns,<sup>28</sup> can keep the money. The result in all cases has been a payment ordered to the heirs<sup>29</sup> or personal representatives<sup>30</sup> of the insured, if parties to the action.<sup>31</sup> However, it must be borne in mind that a policy to the making of which the insured

<sup>26</sup> "I think that the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights." Fry, L. J., in *Cleaver v. Mutual Reserve Fund Life Ass'n*, *supra*.

<sup>27</sup> For this point all cases in notes 29 and 30, *infra*, are authorities. *Contra*, *McAlpine v. Fidelity & Casualty Co.*, 158 N. W. 967 (1916, Minn.). See *Schreiner v. High Court of I. C. O. of F.*, 35 Ill. App. 576, 581; 1 MINN. L. REV. 66.

<sup>28</sup> The Supreme Court of the United States, in *New York Mutual Life Ins. Co. v. Armstrong*, *supra*, held that it was error, in an action brought by the representatives of the assignee of the policy, to exclude evidence that the assignee "caused the death of the insured by felonious means," since that "must necessarily have defeated a recovery."

<sup>29</sup> *Supreme Lodge v. Menkhausen*, 209 Ill. 277, 70 N. E. 567; *Sharpless v. Grand Lodge A. O. U. W.*, *supra*.

<sup>30</sup> The leading case of *Cleaver v. Mutual Reserve Fund Life Ass'n*, *supra*, held that a trust created in the insured and his executors in favor of the wife named as beneficiary was destroyed when she murdered her husband, and that a "resulting trust in favor of the estate of the insured" arose. To the same effect are *Schmidt v. Northern Life Ass'n*, 112 Iowa 41, 83 N. E. 800; *Anderson v. Life Ins. Co.*, 152 N. C. 1, 67 S. E. 53.

<sup>31</sup> In a suit at law by the beneficiary the company's plea that the beneficiary murdered the insured was held good on demurrer. *Filmore v. Metropolitan Life Ins. Co.*, 82 Oh. St. 208, 92 N. E. 26.

was not a party and upon which he himself paid no premiums should not furnish a source of unjust enrichment to his estate. In such a case the company should be relieved from any liability further than a repayment of premiums. For if the beneficiary who at law has the only right in the *chose* in action is barred by his crime from reaping its benefits, any disposition of money, just as of lands and chattels willed or inherited, must be made on equitable principles and only to such persons as have been unjustly impoverished.<sup>22</sup>

THE CODE OF MARITIME NEUTRALITY. — A newly completed code of rules of maritime neutrality was submitted recently to the American Institute of International Law, and by it referred to the national societies of international law in the twenty-one American republics.<sup>1</sup> The thirty-four articles of the Code consistently display an attitude and present a method of approach new, in this intensity, to international law. The high tide of belligerent aggression in the present war has brought about what is perhaps the sharpest and most violent neutral reaction in the history of international law.

Article 1, defining neutrality, sounds the keynote of the Code by formulating and stating in keenly insistent language what is certainly generally admitted to be the true relation of neutral governments to belligerents.<sup>2</sup> Article 2, a general declaration though it is, contains the first sharp variance from established principles, in the imposition on neutral governments of a duty to "refrain from increasing the number of belligerents," and indeed more, "a duty of pacification toward mankind."<sup>3</sup>

The chapter entitled Freedom of Commerce in Time of War contains two of the most considerable differences from existing international

<sup>22</sup> As regards the effect of homicide upon dower rights and the rights of tenants by the entirety see, in addition to cases in note 19, *supra*, *Box v. Lanier, supra*; *Beddingfield v. Estill*, 118 Tenn. 39, 50, 100 S. W. 108, 111; and *Lucas v. Harris*, an unreported Tennessee case outlined in 118 Tenn. 39, 50.

<sup>1</sup> In THE CHRISTIAN SCIENCE MONITOR for January 25, 1917, the Code was published in full, with the following introduction, telegraphed from Washington: "A code of rules of maritime neutrality which should govern the relations between belligerents and neutrals, prepared on the recommendation of Secretary Lansing, is to be submitted to the American Institute of International Law today in session at Havana, Cuba. The code was drafted by Dr. Alejandro Alvarez, secretary-general of the institute, and who formerly was jurisconsult of the Chilean Foreign Office and counselor to Chilean legations abroad. The code will be referred to the National Society of International Law in each of the 21 American republics, and final action on the code will be taken by the institute at its next annual meeting."

It is understood that Dr. James Brown Scott, who presided at the meeting of the Institute, has at present in course of preparation an analysis of the Code.

<sup>2</sup> The term "belligerent" is used throughout this note to indicate a belligerent power.

<sup>3</sup> See 2 WESTLAKE, INTERNATIONAL LAW, 2 ed., 190 *et seq.* The first paragraph of Westlake corresponds largely to the definition of neutrality in Article 1 of the Code; but the succeeding paragraph is radically different in spirit and in substance from Article 2. Thus: "We may sum up by saying that neutrality is not morally justifiable unless intervention in the war is unlikely to promote justice, or would only do so at a ruinous cost to the neutral."

Cf. 4 CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE, 5 ed., §§ 2491 *et seq.*



law. Article 7<sup>4</sup> expressly and completely prohibits any form of commercial blockade. Thus is destroyed in its entirety that recently developed and extremely efficient weapon which international law has given to belligerents.<sup>5</sup> This article at least seems to be the result of belligerent application of the principles of blockade in the present war.<sup>6</sup> Article 8<sup>7</sup> provides that neither belligerent nor neutral merchant vessels can be confiscated or sunk,<sup>8</sup> and apparently also exempts from confiscation enemy property on the high seas that is not contraband.<sup>9</sup> The immunity of ships is, of course, a fundamental change from existing law. An explanation of it is to be found not only in resentment at events of the present war, but perhaps also in a realization of the tremendous importance to all the world of any change in the mercantile marine status of any nation.<sup>10</sup> It may indeed be the forerunner of an internationalization of ships. Article 9 of the Code abolishes the right of search, substituting for it a certificate of "no contraband" to be given by the authorities at the port of departure. If a belligerent refuses to take that as conclusive, it may search for contraband: if contraband is found, a fine is to be imposed upon the neutral authorities issuing the false "passport"; if it is not, the belligerent is to be fined.<sup>11</sup> The practicability of this proposed method may perhaps be doubted, but it is to be commended as an attempt to harmonize the present illogical and inconsistent rules of international law on this subject, as well as to adapt them to modern mercantile conditions. Article 10 is an unimportant prohibition, placed on belligerent merchant vessels, to refuse to carry from one neutral port to another enemy nationals (except those who presumably are going to enlist in the enemy forces) or enemy goods. There would appear to be sufficient neutral interest in such transportation to warrant this prohibition. Article 11<sup>12</sup> concisely forbids the seizure (and apparently the examination is included also) of neutral or belligerent "postal correspondence," whether public or private, on the high seas; the required immunity even extends to correspondence on merchant vessels of the

<sup>4</sup> "Article 7 — The commercial blockade, both of the belligerent ports and the maritime zone along belligerent coasts, is formally forbidden, no matter what the means by which the blockade is to be effected."

<sup>5</sup> See HALL, *INTERNATIONAL LAW*, 6 ed., 695 *et seq.*; 2 WESTLAKE, *supra*, c. IX., "Declaration of London and Blockade."

<sup>6</sup> The belligerent aggression against neutral rights referred to here and elsewhere in this note is to be found clearly set forth in the United States' "white books," published as DEPARTMENT OF STATE, *DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL RIGHTS AND DUTIES, EUROPEAN WAR, NOS. 1, 2, and 3.*

<sup>7</sup> "Article 8 — Private property in the open sea is inviolable. Belligerent and neutral merchant vessels may in no case be confiscated, nor sunk, under any pretext whatsoever. If carrying contraband, this may be confiscated or destroyed by the captor."

<sup>8</sup> From the context this prohibition would appear to be restricted to the open sea, but that is not in terms stated.

<sup>9</sup> Cf. 2 WESTLAKE, 147; HIGGINS, *THE HAGUE PEACE CONFERENCES*, 78 *et seq.*; Harold Scott Quigley, "The Immunity of Private Property from Capture at Sea," 11 *AM. J. INT. LAW* 22.

<sup>10</sup> Cf. 30 *HARV. L. REV.* 497.

<sup>11</sup> These fines are to be imposed by the conference of neutrals, discussed later.

<sup>12</sup> "Article 11 — The official or private postal correspondence of neutrals or belligerents found in the open sea on board a neutral or enemy vessel, is inviolable. It may not be seized, even under the pretext of the police right of warships over merchant ships of their own nationality."

searching belligerent. This, excluding from its prohibition, as it apparently does, mailed merchandise, would seem to be not only a rule highly desirable in view of recent belligerent action and the development of a much higher intensity of international commercial competition, but also one that is not textually far from the present Article 1 of the Hague (11) of 1907.<sup>13</sup>

Chapter IV, Rights and Duties of Belligerents, makes practically no changes of importance. Article 12 requires belligerents "to respect the sovereign rights of neutral powers." Article 13, forbidding belligerents to make of "neutral ports and waters the base for naval operations . . . and to install therein wireless apparatus . . .," is taken virtually verbatim from the Hague (13) of 1907.<sup>14</sup> Articles 14 and 15 allow belligerent men-of-war, auxiliaries, and aiding merchant vessels, whether neutral or belligerent, access to neutral ports only in "the duly justified case of force majeure";<sup>15</sup> and Article 15 contains also the repair provisions of Article 17 of the Hague (13).<sup>16</sup> The conditions on which a belligerent merchant vessel may ship fuel and provisions in a neutral port are, by the important Article 16, left wholly to local regulation, or, in the absence of this, the conditions are the same as in time of peace.<sup>17</sup> Article 17 provides that if a merchant vessel has passed to a belligerent man-of-war fuel or provisions obtained by it in a neutral port, "no fuel or provisions shall thereafter be furnished in such country to any ship of the company" owning the guilty vessel. Thus the owners are effectively penalized, and at the same time the skirts of the neutral government are kept clear. Article 18 covers the case of a merchant vessel suspected of such conduct, and provides that other neutrals shall be notified, and that the ship may be refused fuel and supplies by the neutral power, or her agent requested "to furnish bail guaranteeing that said vessel will neither help nor assist the belligerent." Article 19 imposes very severe conditions on the admittance as merchant vessels of retransformed belligerent auxiliaries.<sup>18</sup> Belligerent aeroplanes, dirigibles or airships are forbidden, by Article 20, to fly over neutral territory or jurisdictional waters; and if they break this rule they are to be confiscated, "if possible," and the belligerent government in any case is to pay an indemnity.<sup>19</sup>

<sup>13</sup> See HIGGINS, *supra*, 396, 401. Cf. 16 COL. L. REV. 665.

<sup>14</sup> HIGGINS, 447. Cf. also the Hague (5) of 1907, especially Article 3 (a). HIGGINS, 281 *et seq.*, 291.

<sup>15</sup> Stress of weather is apparently the only "force majeure" recognized, since the article says: "The need of revictualling, of fuel or provisions, does not constitute a force majeure." Would the approach of an enemy man-of-war constitute such a "force majeure"?

<sup>16</sup> HIGGINS, 450, 473.

<sup>17</sup> This article has considerable possibilities.

<sup>18</sup> The conditions are five: (1) that the retransformed vessel has not violated the neutrality of the admitting country; (2) that the retransformation has taken place in the ports or waters of the ship's country or its allies; (3) that the retransformation has effectively deprived the ship of power to serve as an auxiliary in the future; (4) that all interested neutrals have been informed by the belligerent government of all such retransformations; and (5) "that the said government agree that in the future the said vessels shall not again as auxiliaries be destined to the service of the armed fleet."

The fifth clause alone would as a matter of fact be enough to exclude the retransformed ship in almost every case, as the present war has shown repeatedly.

See HIGGINS, 319.

<sup>19</sup> This is more or less in accord with international law as the present war has de-



Chapter V pertains to rights and duties of neutral powers; it differs from existing international law in no important particulars. Article 21 draws the line sharply between acts of aid to a belligerent by a neutral government and such acts by a neutral individual — an elementary distinction that is too often overlooked. Article 22 requires a neutral power, on the commencement of a war, to give belligerent men-of-war in its ports notice to leave within twenty-four hours, or "within the time prescribed by local law."<sup>20</sup> Article 23 places a duty on neutral powers to use "all available means" to prevent the equipping or arming in its waters of vessels for a belligerent armed force.<sup>21</sup> Article 24 states that neutral governments (though they themselves may not sell munitions to a belligerent by Article 20) are not bound to prevent the sale or exportation of munitions to a belligerent by individual neutrals. This, of course, accords with the present rule of the law of nations.<sup>22</sup> Article 25 imposes a duty on neutral powers to prevent recruiting by a belligerent in their territory;<sup>23</sup> but belligerent nationals are to be allowed, as at present, to leave neutral territory voluntarily for military service, "even when organized on a large scale." A neutral government is, however, allowed to prohibit the voluntary leaving of belligerent nationals who are also its own nationals, unless they declare that by enrolling they intend to lose their neutral citizenship. Neutral powers are to be allowed to regulate the use of their telegraphs and cables, provides the rather unnecessary Article 26. Article 27 states that neutral powers have a duty to prevent breaches of neutrality within their territorial waters. By Article 28 a belligerent man-of-war or merchant vessel which enters neutral waters in violation of "these rules" may be at once interned by the neutral power. The neutral controls the internment, and the cost is borne by the belligerent, Article 29 provides. The possibly ambiguous Article 30 says that in the case of such internment of a merchant vessel "the part of the merchandise destined for the neutral country must be unloaded and the part destined for other ports must be transhipped."<sup>24</sup> Article 31<sup>25</sup> is unique and interesting. It provides that neutral powers may send hospital ships to the scenes of nearby naval actions, "which shall, to the end of their mission, enjoy absolute inviolability." And "the said wounded or wrecked shall not be interned, but given their freedom as soon as possible."<sup>26</sup>

Article 33 is an unimportant enumeration of the duties of local authorities of neutral countries.

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veloped it. See PHILLIPSON, *INTERNATIONAL LAW AND THE GREAT WAR* (English, 1915), 314 *et seq.*

<sup>20</sup> An identical rule is laid down by Article 13 of the Hague (13) of 1907. HIGGINS, 449, 469, 470.

<sup>21</sup> Cf. HALL, *supra*, 611 *et seq.*; HIGGINS, 448, 465.

<sup>22</sup> 7 MOORE, *DIGEST OF INTERNATIONAL LAW*, 748, 749. For the similar rule of the Hague (13) of 1907, see HIGGINS, 447, 448, 464.

<sup>23</sup> See HALL, 592.

<sup>24</sup> These provisions concerning internment are in accord with present international practice, with perhaps the exception of the unimportant Article 30.

<sup>25</sup> Perhaps inspired by the exploits of the U-53 off Nantucket Lightship?

<sup>26</sup> This seems to indicate a changing conception of neutral relationship to belligerency, which belligerents, in this respect at least, can hardly object to. The provision for freedom of the survivors is probably warranted because of the immunity given the neutral hospital ships.

Chapter II, entitled Conference of Neutrals, contains what will ultimately prove to be the most important provisions of the Code. It establishes, in brief, a council of the neutral states of the entire world, to be connected with the Administrative Council of the Permanent Hague Court, and to meet in The Hague Peace Palace upon the outbreak of war. This conference of neutrals shall "take all necessary measures to maintain the freedom of commerce and of navigation of the neutral countries," shall "determine the list of articles to be regarded as contraband," shall see to the observance of the neutral rights and duties created by the Code, and shall exercise any other powers given it by the Code. Belligerents shall be invited to send representatives, who shall have full voting rights. "Resolutions shall be adopted by a majority vote, and bind the minority." The conference is empowered to authorize the following severe measures against a belligerent or a neutral who refuses to respect the rights and duties of neutrality: "public blame, pecuniary indemnity, commercial boycott, and even the use of an international force to be determined by the conference."<sup>27</sup>

There is thus to be established a league to protect neutrals which corresponds strikingly to the most advisably urged form of what has been called a league to enforce peace.<sup>28</sup> Every possible method of enforcement of international law is provided by Article 5. This chapter is fraught with a significance almost inestimable: the mere fact of its formulation, unofficial though it may be, is one of the great events in the history of international law and in the development of international relations.<sup>29</sup>

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<sup>27</sup> The text of the articles concerning the conference of neutrals is as follows:

"Article 3 — When war is declared the neutral states of the entire world shall, upon the request of the Administrative Council of the Permanent Hague Court, meet in conference, in order (1) To take all necessary measures to maintain the freedom of commerce and navigation of the neutral countries; (2) To determine the list of articles to be regarded as contraband; (3) To see especially to the observance of all neutral rights and duties established in these present rules, and to exercise any other powers granted them by the said same rules.

"Article 4 — The conference of neutrals shall gather in The Hague Peace Palace, unless the council directs otherwise. The belligerents shall be invited to send representatives who may take active part in the discussion and have the right to vote. Resolutions shall be adopted by a majority vote and bind the minority.

"Article 5 — In important cases the conference may authorize severe measures against the belligerent or against the neutrals refusing to respect the rights and duties of neutrality. Such measures may be: public blame, pecuniary indemnity, commercial boycott, and even the use of an international force to be determined by the conference.

"Article 6 — The conference of neutrals may organize in any number of commissions thought necessary, one of these commissions specially designated to consider such pecuniary indemnities as are considered in these rules."

The conference is referred to also in Articles 9, 18, 19, 20, 32, and 34. Article 34 also says it "might appoint commissions composed of neutrals whose duty it would be to watch, in each belligerent country, over the manner in which the laws and customs of war are there observed. Upon the basis of the information and reports of these commissions the said conference, in the name of all the neutral countries, may, if deemed appropriate, protest against the violation of the laws and usages of war."

<sup>28</sup> Cf. H. N. Brailsford, "Peace by Organization," 11 NEW REPUBLIC 187 (March 17, 1917), at p. 189 especially.

<sup>29</sup> Cf. Sir Frederick Pollock, "Cosmopolitan Custom and International Law," 29 HARV. L. REV. 565, 577 *et seq.*



The Code as it stands needs much revision, and even when it is adequately modified it will not secure the immediate support of the great maritime powers, which alone could make it effective. But its mere formulation indicates the desires and the ideals of the neutrals furthest from the seat of the present war; the last century has seen the gradual incorporation of neutral ideals into international law; and the three great principles the Code embodies — the abolition of blockade, the immunity of ships, and the force-equipped conference of neutrals — may eventually become part of the law of nations.

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THE LABOR PROVISIONS OF THE CLAYTON ACT. — The labor sections of the Clayton Anti-Trust Act<sup>1</sup> were intended, according to the Judiciary Committees of the Senate and House, respectively, "to exempt labor . . . organizations from the operation of the anti-trust acts," and "to constitute for labor a complete bill of rights in equitable proceedings in the United States Courts."<sup>2</sup> Organized labor is naturally relying upon the Act as a charter of immunities.<sup>3</sup> Some current criticism, however, holds the Act entirely futile, a mere declaration that what is lawful is lawful.<sup>4</sup> An intermediate view seems justifiable, — that the Act accomplishes some things, particularly by way of removing uncertainties in the law.<sup>5</sup>

The Act attacks the problem of the labor dispute in the law from two angles, from the side of the substantive federal law of restraint of trade, and from the side of the remedy in the federal courts for threatened injury. The one side concerns the prohibitions of the Sherman Anti-Trust Act, the other, the issuance of injunctions by federal courts in labor disputes.

There can be no intelligent discussion of the effect of the Clayton Act on the Sherman Act as applied to labor unions without careful consideration of the position of the labor union at common law and under the Sherman Act. At the outset it is necessary to appreciate that a combination of sellers of labor to raise the price of their commodity and otherwise to regulate the terms of its exchange must of necessity impose some restraint on the freedom of the buyer of labor to trade in the labor market. This restraint, however, the common law had come to regard as inevitable, and justified by the necessities of collective bargaining. Therefore, by the weight of authority, such a combination, without more, was not considered to be a combination in restraint of trade,<sup>6</sup> nor did it become

<sup>1</sup> 38 STAT. AT L. 730.

<sup>2</sup> Sixty-third Congress, 2d Sess., SENATE REPORT, No. 698, pp. 2, 12.

<sup>3</sup> See Mr. Samuel Gompers, in the AMERICAN FEDERATIONIST, Oct., 1914.

<sup>4</sup> See THE NEW REPUBLIC, Dec. 2, 1916.

<sup>5</sup> See SENATE REPORT, *supra*, 25. "The necessity for legislation . . . arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules." And see p. 33, "The bill does not interfere with the Sherman Anti-Trust Act at all."

<sup>6</sup> *Master Stevedores' Ass'n v. Walsh*, 2 Daly (N. Y.) 1. See 28 HARV. L. REV. 696. Cf. *More v. Bennett*, 140 Ill. 69, 79, 29 N. E. 888, 891, in which case, however, the court found a monopoly purpose which would seem to class the case with those cited *infra*, note 12.

one by pursuing its object by striking<sup>7</sup> and by peacefully inducing others to strike,<sup>8</sup> or by concertedly refusing to patronize the employer and by peacefully persuading others so to do.<sup>9</sup> These were lawful methods of competition. If, however, the combination sought its end by fraud, violence, or intimidation, even of the sort found in the "secondary boycott,"<sup>10</sup> the restraint imposed on the buyer by its tortious conduct was not regarded so indulgently, and the combination was in restraint of trade.<sup>11</sup> If, furthermore, the purpose of the combination was not merely to better the terms of the exchange, but also to drive all independent sellers of labor out of the market, to coerce them into joining the combination, to achieve a monopoly of the labor market, then also the combination was in restraint of trade,<sup>12</sup> and all its acts in furtherance of its un-

<sup>7</sup> The cases in which the legality of the strike, etc., at common law has been considered are tort cases for damages or injunction. But they have to do with restraints imposed by the combination on the freedom of individuals to trade in the labor market. The liability of the combination in tort is often put on the same considerations of public policy which determine the question of restraint of trade. See *Pickett v. Walsh*, 192 Mass. 572, 579, 78 N. E. 753, 756; *Longshore Printing and Publishing Co. v. Howell*, 26 Ore. 527, 538, 38 Pac. 547, 550; *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S. W. 1018; *Wabash R. Co. v. Hannahan*, 121 Fed. 563, 567.

<sup>8</sup> See *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 53 S. E. 273. The closely related question of "picketing" for the purpose of peacefully obtaining or giving information, is generally decided similarly. See *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*, 165 Ind. 421, 430, 75 N. E. 877, 880; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 51. But the question is confused by the close approach of the law of nuisance, and the great opportunity for intimidation. Courts have a tendency to hold that there cannot in nature be such a thing as "peaceful picketing." See *Atchison, etc. Ry. Co. v. Gee*, 139 Fed. 582, 584; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077; 15 HARV. L. REV. 482.

<sup>9</sup> See *American Federation of Labor v. Bucks Stove & Range Co.*, 33 App. D. C. 83, 116.

<sup>10</sup> By the "secondary boycott" is meant action a step removed from mere persuasion of third parties not to patronize the employer, — in other words, the phrase is used to mean intimidation or coercion of third parties by threat of temporal loss, — the "conscription of neutrals." See *American Federation of Labor v. Bucks Stove & Range Co.*, *supra*, note 9. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418; *Pickett v. Walsh*, 192 Mass. 572, 587, 78 N. E. 753, 759; *Fink v. Butchers' Union*, 84 N. J. Eq. 638, 95 Atl. 182; *Wilson v. Hey*, 232 Ill. 389, 396, 83 N. E. 928, 929; 29 HARV. L. REV. 86; 17 HARV. L. REV. 558.

<sup>11</sup> "Complainants were engaged in a lawful business. . . . The law protects them in the right to employ whom they please, at prices they and their employees can agree upon, and to discharge them at the expiration of their terms of service or for violation of their contracts. This right must be maintained, or personal liberty is a sham. So, also, the laborers have a right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly, or in combination, they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars, in a peaceable way, with no attempt at coercion. . . . The law does not permit either party to use force, violence, threats of force or violence, intimidation, or coercion. The right to trade and the personal liberty of the employer alone are not involved in this case; the right of the laborer to sell his labor when, to whom, and for what price he chooses is involved." "May these powerful organizations thus trample with impunity upon the right of every citizen to buy and sell his goods or labor as he chooses?" This is not a question of competition, but rather an attempt to stifle competition." *Beck v. Teamsters' Union*, 118 Mich. 497, 516, 521, 77 N. W. 13, 21, 22.

<sup>12</sup> *More v. Bennett*, 140 Ill. 69, 29 N. E. 888. See *Master Stevedores' Ass'n v. Walsh*, 2 Daly (N. Y.) 1, 10; *Brennan v. United Hatters*, 73 N. J. L. 729, 739, 65 Atl. 165, 169; *Russell v. Carpenters & Joiners*, [1910] 1 K. B. 506, 515. Here also the language of the



lawful object, whether or not they were of themselves tortious,<sup>13</sup> must have been tainted with the same illegality.

Into this situation came the Sherman Act,<sup>14</sup> which declared that all combinations in restraint of trade between the several states were illegal by federal law, and subject to severe penalties at the suit of the United States or of any person damaged. The meaning of restraint of trade in the Act has been referred to the common law;<sup>15</sup> and the Act has been construed to condemn any combination in restraint of trade which directly interferes with the free flow of interstate commerce.<sup>16</sup> It would seem that the labor union, then, which has so conducted itself as to be in restraint of trade at common law, might come within the prohibition of the Sherman Act on either of two grounds, — interference with the flow of labor from state to state,<sup>17</sup> or interference with the flow of a manufactured product.<sup>18</sup>

courts is significant in tort cases, — cases in which the defendant union was fighting for the "closed shop," with a more or less evident monopoly purpose. "If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country. Employers would be forced to yield to all their demands, or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly. The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly." *Berry v. Donovan*, 188 Mass. 353, 359, 74 N. E. 603, 606. See also *Gatzow v. Buening*, 106 Wis. 1, 12, 81 N. W. 1003, 1006; *State v. Stewart*, 59 Vt. 273, 289, 9 Atl. 559, 568; *Hitchman Coal & Coke Co. v. Mitchell*, 202 Fed. 512, 529.

<sup>13</sup> It would seem that any acts of such an illegal combination which cause damage or which threaten irreparable injury should give grounds for recovery or injunction. Thus it has been held that even a strike in these circumstances is tortious. *Plant v. Woods*, 176 Mass. 492, 501, 57 N. E. 1011, 1014; *Erdman v. Mitchell*, 207 Pa. St. 79, 92, 56 Atl. 327, 332. The New Jersey courts, on the other hand, hold the contrary, while at the same time recognizing that "it is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to secure to every dealer on either side of the market." *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 766, 53 Atl. 230, 233. So also *Kemp v. Division No. 241*, 255 Ill. 213, 226, 99 N. E. 389, 394. See 26 HARV. L. REV. 259. Compare *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 326, 63 N. E. 369, 371, with *Jacobs v. Cohen*, 90 N. Y. Supp. 854. See 18 Harv. L. Rev. 471. See also *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 263.

The doubtful act of picketing is tortious in these circumstances. *Jonas Glass Co. v. Glass Bottle Blowers' Ass'n*, 72 N. J. Eq. 653, 664, 66 Atl. 953, 957; *Pierce v. Stablemen's Union*, 156 Cal. 70, 77, 103 Pac. 324, 328. And the "secondary boycott" is generally regarded as tortious under any circumstances. *Loewe v. Cal. State Federation*, 139 Fed. 71; *Irving v. Joint District Council*, 180 Fed. 896, 900; *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 143; *Gray v. Building Trades Council*, 91 Minn. 171, 179, 97 N. W. 663, 666; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 445, 114 S. W. 997, 1003; *Purvis v. United Brotherhood*, 214 Pa. St. 348, 63 Atl. 585. California and Montana are *contra*. *Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027; *Lindsay & Co. v. Mont. Fed. of Labor*, 37 Mont. 264, 96 Pac. 127.

<sup>14</sup> C. 647, 26 STAT. AT L. 210.

<sup>15</sup> See *Standard Oil Co. v. U. S.*, 221 U. S. 1, 60; *U. S. v. American Tobacco Co.*, 221 U. S. 106, 179.

<sup>16</sup> See *Eastern States Retail Lumber Dealers' Ass'n v. U. S.*, 234 U. S. 600, 609.

<sup>17</sup> See *Hitchman Coal & Coke Co. v. Mitchell*, 202 Fed. 512, 530, 556.

<sup>18</sup> *Loewe v. Lawlor*, 208 U. S. 274; *Lawlor v. Loewe*, 235 U. S. 522; *Irving v. Neal*, 209 Fed. 471; *Paine Lumber Co. v. Neal*, 212 Fed. 259. Another somewhat different ground is actual interference with the operation of interstate common carriers. *U. S.*

What, then, is the effect of the Clayton Act on the situation? The pertinent sections are six and twenty. Section six provides "that the labor of a human being is not a commodity or an article of commerce." This clause would seem to prevent any labor combination from falling within the prohibition of the Sherman Act on the ground that in its attempt to monopolize the labor market it had interfered with the flow of labor from state to state. Section six continues: "nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." If the anti-trust laws are not to restrain members from lawfully carrying out the legitimate objects of the combination, it is clearly implied that they are still to restrain them from *unlawful acts* carrying out the legitimate objects of the combination,<sup>19</sup> or from *any acts* carrying out an *unlawful object* of the combination. The result is that, except for the first clause, section six leaves the Sherman Act effective just where it was effective before. Moreover, since such unlawful labor combinations must usually interfere with interstate commerce in some commodity, the first clause, removing labor from the category of goods in interstate commerce, is of no practical significance.

Section twenty (second paragraph) enumerates, beginning with striking and peacefully persuading others to strike, a list of specific acts, which it provides shall not "be considered or held to be violations of any law of the United States." The list does not include the "secondary boycott," and is made up exclusively of acts which, by the weight of authority, as suggested above,<sup>20</sup> did not, as such, amount to restraint of trade. Among the acts enumerated is "persuading others by peaceful and lawful means" to cease to patronize any party to the dispute. This implies that persuasion by violent or unlawful means is still within the prohibition of the federal law. Nor is there any intimation that the hitherto illegitimate monopoly object is to be legalized contrary to the clear implication of section six. The net result of section twenty, then, on this matter, is also to leave the prohibitions of the Sherman Act untouched; the labor union which restrains interstate trade by unlawful acts, or by the pursuit of an illegitimate end, is still liable to the fate of the Danbury hatters. This is not to say that section twenty is entirely futile; it at least gives legislative backing to the *prima facie* innocent character, so far as restraint of trade under the Sherman Act is concerned, of the acts enumerated, in regard to which there was still some difference of judicial opinion at common law.<sup>21</sup>

The Clayton Act affects the remedy in the federal courts for threatened injury in labor disputes by limiting and regulating the issuance of

v. Workingmen's Amalgamated Council, 54 Fed. 994, 1000. Unfortunately, the Debs case went off on another ground. *In re Debs*, 158 U. S. 564, 600.

<sup>19</sup> A declaration alleging such acts was recently held still to state a cause of action under the Sherman Act. *Dowd v. United Mine Workers*, 235 Fed. 1, 7, 13, 16.

<sup>20</sup> *Supra*, notes 7 to 9.

<sup>21</sup> This is particularly true of the act of "picketing." See *supra*, n. 8.



injunctions, and by regulating procedure for contempt. Sections sixteen to nineteen pertain only to injunctive relief against threatened damage from a violation of anti-trust acts,<sup>22</sup> and do not depart essentially from federal equity practice. Section twenty, however, is more vital. The first paragraph provides that no federal court shall issue any injunction in any labor dispute "unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law." "Property right" is broad enough to ground almost any application for injunctive protection likely to arise in a labor dispute; this provision, then, does no more than state the grounds on which courts of equity are accustomed to act. The second paragraph provides that "no such restraining order or injunction shall prohibit" any of the enumerated acts. The same considerations which were suggested above regarding this part of section twenty must apply here. The union which uses violent or unlawful means may still be enjoined; and so also the union which seeks an unlawful object, as monopoly, although the only overt acts fall within the list enumerated. There is nothing to indicate that federal courts of equity are deprived of power to deal with striking and persuading to strike, etc., when these acts are part of an unlawful scheme: under these circumstances the most innocent acts may take on a new complexion.<sup>23</sup> Sections twenty-one to twenty-five deal with contempts of court committed out of the court's presence. The application of the provisions is not extensive. They do not apply to contempt of any order issued in any prosecution by the United States, or to any act of contempt which is not also a crime under the laws of the United States or of the state where committed. In other cases the accused may on demand secure trial by jury, his punishment is limited to \$1000 and six months, and on conviction the evidence may be reviewed on writ of error. It may be questioned whether the right to a change of venue to some judge other than the one who issued the contemned order would not have been as fair as this, and more effective, considering the certainty of a divided jury which exists in labor cases. Appeal on the facts, as in an ordinary chancery case, would have been more substantial than writ of error. At any rate, the reason for the arbitrary restriction of the benefits of the reformed procedure to so small a class of offenders is not apparent, granting the sincerity of the draughtsmen of this bill of rights.

The accomplishments of the Clayton Act fall far short of the promise. Before compelling pressure is brought on Congress and state legislatures for further immunity from the law, it might be well to consider whether the real remedy for the bitterest and most wasteful struggle of modern society — in times of peace — is for the law to withdraw its hand, or whether some measure of compulsory arbitration would not be more

<sup>22</sup> These sections provide a detailed regulation of temporary restraining orders, require notice before the granting of a preliminary injunction, and specific and detailed description of all acts enjoined, and limit the effectiveness of the order to persons "in active concert or participating with" parties to the suit, and who shall have received actual notice thereof.

<sup>23</sup> See Taft, Circuit Judge, in *Toledo, etc. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 737.

regardful of the interests of the general public.<sup>24</sup> To allow labor disputes to settle themselves by protracted struggles of might smacks of the primitive administration of justice by self-help.

**EQUITABLE RELIEF FOR UNILATERAL MISTAKE OF FACT.** — It is a fundamental principle that a party may not escape an obligation imposed by a formal contract, into which he voluntarily entered, merely because he has made a "hard bargain."<sup>1</sup> Where the negotiations of the parties are expressed in writing, their intention to contract is, of necessity, judged objectively.<sup>2</sup> But as mistakes are more or less common in everyday affairs, it is expedient that relief from such an ironclad rule be granted in certain cases. This is a true function of equity, and affirmative relief is obtainable through the remedies of reformation and cancellation.

A mistake of fact may be bilateral, common to both parties, or unilateral, a mistake of one party only. Where the parties have executed an instrument under a mutual erroneous belief in the existence of the subject matter, it would obviously be inequitable to allow either to demand performance.<sup>3</sup> Again, if the terms of a contract are ambiguous and each reasonably takes a different view as to the identity of the subject matter, there is no real meeting of the minds and neither should be allowed to force his interpretation upon the other.<sup>4</sup>

Where the parties have made a real agreement, but there has been a mutual mistake in reducing it to writing, neither should be allowed to profit thereby. Such a mistake does not invalidate the agreement, as equity will reform the instrument so as to express the true intent of the parties.<sup>5</sup> Such reformation may be made by a court of equity even where the Statute of Frauds requires such contracts to be in writing.<sup>6</sup> Likewise, where one party knew of the mistake in the instrument at the time of execution, he cannot be heard to say that the mistake was not mutual; equity will reform the instrument so as to conform to the agreement actually made or determined upon to be the real purpose and intention of the parties.<sup>7</sup>

A more difficult question arises where the mistake in the original agreement<sup>8</sup> is that of one party only. It is clear that there can be no

<sup>24</sup> See Henry B. Higgins, "A New Province for Law and Order," 29 HARV. L. REV. 13.

<sup>1</sup> But equity may refuse to enforce the specific performance of a contract, the result of which would be to impose great hardship on either party. *Falcke v. Gray*, 4 Drewry 651, 660. See FRY, SPECIFIC PERFORMANCE, part 3, c. 6.

<sup>2</sup> "Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words." Holmes, J., in *O'Donnell v. Clinton*, 145 Mass. 461, 463. See *Stoddard v. Ham*, 129 Mass. 383.

<sup>3</sup> *Hitchcock v. Giddings*, 4 Price 135; *Fritzler v. Robinson*, 70 Ia. 500, 31 N. W. 61.

<sup>4</sup> *Raffles v. Wickelhaus*, 2 H. & C. 906; *Kyle v. Kavanagh*, 103 Mass. 356.

<sup>5</sup> *Fowler v. Fowler*, 4 De G. & J. 250. Thus, where the parties made an erroneous mathematical calculation, the instrument was reformed. *Dunn v. O'Mara*, 70 Ill. App. 609.

<sup>6</sup> For a full discussion of this question, see 2 POMEROY, EQ. JURIS., §§ 864-867.

<sup>7</sup> *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293; *Welles v. Yates*, 44 N. Y. 525.

<sup>8</sup> There is always a preliminary question of fact whether the parties intended to be



reformation to accord with the view of the party in error, for this would be forcing upon the other a contract which he never agreed to make.<sup>9</sup> Where the mistake of the one is induced by the fraud or misrepresentation of the other, it seems clear that the latter should not be allowed to take advantage of the formal contract. Hence not only will the party deceived have a valid defense to any action on the contract,<sup>10</sup> but a cancellation of the instrument may be decreed in equity.<sup>11</sup> In such a case the subject of the mistake must be material,<sup>12</sup> and the party's conduct must be determined by it; yet it may relate either to the motive, or to the object of the agreement itself.<sup>13</sup> Further it is not a conclusive bar to relief that the agreement has been partially executed, unless such performance was made with knowledge of the mistake.<sup>14</sup>

If the mistake was unilateral, and of such a nature that the other party knew or should have known of it, he should not be permitted to take advantage of it, even though he was in no way responsible for the error; it is inequitable for one to treat as an agreement that to which he knew or should have known the other never intended to agree.<sup>15</sup> But, in such a case, the mistake must have been as to the essence of the agreement, the very object, as distinguished from a motive or inducement of its execution.<sup>16</sup> It is submitted that the same principles should apply where, as in a recent Minnesota case,<sup>17</sup> the unilateral mistake in an offer was unknown to the offeree at the time of acceptance. It is true that the latter was not guilty of any inequitable conduct during the inception of the contract. Accordingly, if he has changed his position, so that he could not be put *in statu quo*, the court should afford rescission "only when the clearest and strongest equity imperatively demands it,"<sup>18</sup> for he should not be affirmatively prejudiced by the mistake, however honest, of the offeror.<sup>19</sup> But if he has not changed his position, he will be prejudiced only to the extent that he loses the benefit of the apparent contract. It would be unjust for him to take that which he now knows the other never intended

bound by their agreement before it is put into a formal writing. See *Edge Moore Bridge Works v. Bristol County*, 170 Mass. 528, 49 N. E. 918.

<sup>9</sup> *Diman v. Providence, W. & B. R. Co.*, 5 R. I. 130.

<sup>10</sup> *Roebuck v. Wick*, 98 Minn. 130, 107 N. W. 1054. See *Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301.

<sup>11</sup> *Adam v. Newbigging*, 13 App. Cas. 308; *Brewer v. Brown*, 28 Ch. Div. 309.

<sup>12</sup> *Smith v. Kay*, 7 H. L. C. 750, 775; *Flight v. Booth*, 1 Bing. N. C. 370, 377.

<sup>13</sup> *Brown v. Search*, 131 Wis. 109, 111 N. W. 210; *Pratt v. Darling*, 125 Wis. 93, 103 N. W. 229; *Wagner v. Nat'l Ins. Co.*, 90 Fed. 395.

<sup>14</sup> *Butler v. Prentiss*, 158 N. Y. 49, 64, 52 N. E. 652; *Mason v. Bovet*, 1 Denio (N. Y.) 60. But if a party, after discovering the misrepresentation, performs his part, he may be precluded thereby from rescission, though not from the legal remedy of damages. *Whitney v. Allaire*, 4 Denio (N. Y.) 554, aff'd 1 N. Y. 305.

<sup>15</sup> *Webster v. Cecil*, 30 Beav. 62. See *Neill v. Midland R. Co.*, 20 L. T. (N. S.) 864.

<sup>16</sup> Mistake as to a collateral matter or mistake in a party's motive for entering the contract, or in his expectation respecting it, is not sufficient. *Fehlberg v. Cosine*, 16 R. I. 162, 13 Atl. 110. See *Chanteur v. Hopkins*, 4 M. & W. 399.

<sup>17</sup> *St. Nicholas Church v. Kropp*, 160 N. W. 500. For a full statement of the facts see *infra*, p. 649.

<sup>18</sup> *Grymes v. Sanders*, 93 U. S. 62.

<sup>19</sup> *Young v. Springer*, 113 Minn. 382, 129 N. W. 773; *Tatum v. Lumber Co.*, 16 Idaho 471, 101 Pac. 957. Cf. *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329, where depreciation in the value of the property was held not to be a "change of position," and *Werner v. Rawson*, 89 Ga. 619, 15 S. E. 813, where rescission was allowed for a unilateral mistake in respect to the purchase price, though the contract had been executed.

to give. Rescission or cancellation in such a case does not, as has been contended,<sup>20</sup> impair the stability of contractual transactions. Equity will not cancel the contract unless it appears affirmatively that there was a genuine mistake which went to the essence of the contract, and not merely to the motive.<sup>21</sup> The evidence to sustain the claim of mistake must be clear and convincing, and not merely a preponderance.<sup>22</sup> Under such requirements, there is little danger that any real agreements will be fraudulently invalidated; and the alternative to such relief is an unjust enforcement of apparent contracts in many cases where there has been no real agreement.

The language in many cases suggests that "negligence" is a bar to equitable redress in these cases.<sup>23</sup> But unless the other party has been led thereby to change his position, negligence is immaterial,<sup>24</sup> except in so far as it may tend to show that there was no honest mistake. Almost every mistake involves lack of proper diligence; hence such a rule would bar equitable relief in most cases of mistake. In the analogous legal action of quasi-contract for money paid under mistake, it is well settled that negligence is not of itself a bar to recovery;<sup>25</sup> surely equity should not be less slow to apply its own principles. The other party's stand is just as inequitable whether the mistake was made through negligence or through inadvertence.<sup>26</sup> In either case, it would be unjust for him to enrich himself at the other's expense by taking advantage of his formal rights. He cannot complain of the other's carelessness if he has not been prejudiced by it. Equity merely requires that neither party shall be prejudiced where there has not been in fact a meeting of the minds upon the essence of the contract. Accordingly, it would seem that the principal case is consonant with sound equitable principles in looking beyond the formal appearance to the true intent of the parties, where the underlying reasons for the observance of the formalities will not be prejudiced.<sup>27</sup>

<sup>20</sup> *Brown v. Levy*, 29 Tex. Civ. App. 389, 60 S. W. 255; *Moffett, etc. Co. v. Rochester*, 91 Fed. 28 (reversed in 178 U. S. 373); *Steinmeyer v. Schroepell*, 226 Ill. 9, 80 N. E. 564.

<sup>21</sup> See note 16, *supra*.

<sup>22</sup> *Crilly v. Board of Education*, 54 Ill. App. 371; *Nevius v. Dunlap*, 33 N. Y. 676.

<sup>23</sup> See *Grant Marble Co. v. Abbott*, 142 Wis. 279, 124 N. W. 264; *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833; *Steinmeyer v. Schroepell*, *supra*. But an examination of these and similar cases discloses that negligence was but one ground upon which relief was denied; either it was considered that there was not an honest material mistake, or else there had been such performance that the parties could not be placed in *statu quo*.

<sup>24</sup> *Snyder v. Ives*, 42 Ia. 157, 162; *Harris v. Pepperell*, L. R. 5 Eq. 1.

<sup>25</sup> *Kelly v. Solari*, 9 M. & W. 54. See KEENER, QUASI-CONTRACTS, 70-72.

<sup>26</sup> "The ground on which the rule rests is, that money paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be retained by the party receiving it, consistently with a true application of the real facts to the legal rights of the parties. The cause of the mistake therefore is wholly immaterial. The money is none the less due to the plaintiffs, because their negligence caused the mistake under which the payment was made." *Bigelow, J.*, in *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518, 522.

<sup>27</sup> See *Board v. Bender*, 36 Ind. App. 164, 72 N. E. 154; *Harper v. Newburgh*, 150 App. Div. 695, 145 N. Y. Supp. 59; *Moffett, etc. Co. v. Rochester*, 178 U. S. 373; *Scott v. Hall*, 58 N. J. Eq. 42, 43 Atl. 50; *Werner v. Rawson*, *supra*, accord. Cf. *Steinmeyer v. Schroepell*, *supra*; *Brown v. Levy*, *supra*.



**COLLATERAL ATTACK UPON ADJUDICATIONS OF JURISDICTIONAL FACTS.** — Under the full faith and credit clause of the Constitution of the United States, a problem frequently recurs as to a court's power to inquire into certain facts, previously adjudicated by another court, which were conditions precedent to the power of that court to take some ultimate action in the suit.<sup>1</sup>

It is well established that full faith and credit must be given to every judicial act which a court does within its jurisdiction.<sup>2</sup> And that inquiry into the jurisdiction of the court to do the particular act, in our case to make a finding of fact, is always permitted.<sup>3</sup> This involves the questions of jurisdiction of the sovereign, delegation of the jurisdiction by the sovereign to its courts, and the performance by the court of the requisite formalities preliminary to acquiring jurisdiction. If the fact, for the adjudication of which credit is claimed, is one of these conditions precedent to the jurisdiction of the court to make *that adjudication*, it can of course be inquired into by the forum, so that a finding of such a fact practically does not receive full faith and credit. So much for the naked statement of the principles involved. They are clear and present no difficulty. It is with the application of these principles, more especially with the question as to what facts are requisite to jurisdiction to make the finding, that the problem becomes troublesome.

In the first place, it is not always sufficiently emphasized, if apprehended at all, that, as regards the question of jurisdiction, a finding of fact must be looked at as a separate and distinct act of the court, having its own separate and distinct requirements for jurisdiction. For instance, in a proceeding *in personam* between two parties, the court in making a finding of fact is really declaring divisibly that, as to each party, in connection with the subject matter of the suit, this fact is so. In order to do this, jurisdiction of the respective party is all that is necessary. Again, if the proceeding is *in rem*, the court is saying that as regards the *res*, as to all the world, this fact is so. If the court had jurisdiction of the *res* here, it had jurisdiction to make the finding as to every one: but if there was no jurisdiction of the *res*, the court had jurisdiction to make the finding as to any parties before it and it would be binding as to them.<sup>4</sup>

<sup>1</sup> The problem arises also in intra-jurisdictional cases under the doctrine of "*res judicata*."

<sup>2</sup> *Miller Brewing Co. v. Capital Ins. Co.*, 111 Ia. 590, 82 N. W. 1023; *Harris v. Balk*, 198 U. S. 215.

<sup>3</sup> *In re Norton's Estate*, 32 N. Y. Misc. 224, 66 N. Y. Supp. 317; *Thum v. Pyke*, 8 Idaho 11, 66 Pac. 157; *Field v. Field*, 117 Ill. App. 307; *Marshall v. Owen & Co.*, 171 Mich. 232, 137 N. W. 204.

<sup>4</sup> See *Baker v. Baker, Eccles & Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 115. The results of this proposition, though at first glance they appear unfortunate, upon reflection prove perfectly just. For instance, in a divorce suit the fact of domicile to found jurisdiction over the status is adjudicated by a court to be within its jurisdiction. Both parties are before the court. Such a finding, it would seem, should be binding upon these parties, and as a result of this the decree of divorce is binding upon them. When it is remembered that it is only binding as to the parties over whom the court making the adjudication had jurisdiction, that they have had their day in court, this appears perfectly proper.

The authorities in the matter of divorce appear to take a contrary position on the grounds that it would be inexpedient to have parties divorced as to themselves and not as to others. *Andrews v. Andrews*, 176 Mass. 92; affirmed 188 U. S. 14. It is clear that, so far as the parties themselves are concerned, there is no principle of ex-

The courts, though generally reaching a sound result on this matter, have apparently failed as far as expressed opinions are concerned to rest the matter on its proper theoretical basis.<sup>5</sup>

Assuming the proper approach to the problem, it is often somewhat difficult to determine exactly what facts are conditions precedent to jurisdiction to make the particular finding. As to facts going to the jurisdiction of the sovereign — matters required by doctrines of conflict of laws — there is little trouble.<sup>6</sup> But it is otherwise where the requirements of the sovereign in delegating jurisdiction are in question. A recent federal court case<sup>7</sup> furnishes a good example. The United States bankruptcy laws declare that a United States District Court shall have jurisdiction to adjudge a person bankrupt who has had his principal place of business for the preceding six months within its district.<sup>8</sup> A district court upon a voluntary petition in bankruptcy makes a finding that the last principal place of business of a corporation is within its district. This finding is offered as binding in later proceedings in another court, and the question arises: is the existence of this fact one of the conditions precedent to the court's jurisdiction to adjudicate this fact? The proceeding in bankruptcy is *in rem*,<sup>9</sup> the "*res*," so to speak, apparently, being the question whether or not the petitioner is in such a situation that he should be declared a bankrupt. So that the finding which the court made was, that as to this question, as against the world, the last place of business of the corporation was in the district in question. Such a finding necessitates jurisdiction of the *res*, — the question of bankruptcy.<sup>10</sup> The question now comes, does the enactment that the court shall have jurisdiction to adjudicate bankrupt, persons who have had their last place of business within the district of the court, mean that unless this is so the court shall not have jurisdiction of the question for any purpose, or does it mean that though other courts also have jurisdiction of the *question*, for reasons of local convenience, only this court shall be authorized to do the final act. The court in the principal case found that the enactment meant the latter.<sup>11</sup> The result of such a con-

cedency or justice upon which a denial of jurisdiction to the court making the finding could be based. As the policy upon which the Massachusetts case goes seems more apparent than real, it would seem to be the better rule to hold the adjudication binding. See Peaslee, "Ex parte Divorce," 28 HARV. L. REV. 457, particularly at 471.

<sup>5</sup> The courts in working out the question seem in their language to confuse the question of jurisdiction to adjudicate the particular fact with that of general jurisdiction of the subject matter and the parties, and sometimes with jurisdiction to take ultimate action in the case. See *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 173, 174; *Roszell Bros. v. Continental Coal Corporation*, 38 Am. B. Rep. 31, 34.

<sup>6</sup> *E. g.*, it is generally fairly clear whether or not the fact of jurisdiction of a *res* or of certain parties is necessary to the jurisdiction of a court to make an adjudication of that fact. <sup>7</sup> *Roszell Bros. v. Continental Coal Corporation*, *supra*, n. 5.

<sup>8</sup> Act of July 1, 1898, c. 541, ch. 2, § 2, 30 STAT. AT L. 544.

<sup>9</sup> See *In re Hintze*, 134 Fed. 141, 142; *Roszell Bros. v. Continental Coal Corporation*, 38 Am. B. Rep. 31, 36.

<sup>10</sup> Such a finding would be binding against any parties who were before the court although there was no jurisdiction of the *res*, but here the finding is set up as binding against all creditors, and it does not appear that any creditors were before the court, so that jurisdiction of the *res* is necessary.

<sup>11</sup> The only other ground upon which the case could go is that there was jurisdiction of all the creditors in the prior suit. But there was no mention of this in the opinion, and it seems clear that was not the fact, so that the court must be taken to mean that the adjudging court had jurisdiction of the *res*.



struction appears to be that under the bankruptcy laws any United States District Court has jurisdiction of the question of bankruptcy in the case of a voluntary petition.<sup>12</sup> This would mean that *any* federal court can make adjudication binding against all creditors, though there is no personal jurisdiction over the creditors, and further, as a consequence of this, the court's ultimate declaration of bankruptcy cannot be questioned. The correctness of a construction reaching such a result is at least arguable.

## RECENT CASES

**ADOPTION — RIGHTS OF CHILD UNDER UNEXECUTED CONTRACT OF ADOPTION.** — One Cameron contracted to adopt the plaintiff, who therefore lived in his family as a daughter until his death. There was no actual adoption. The plaintiff now claims an interest in the estate of Cameron's son, who died intestate survived only by a brother. *Held*, that the plaintiff may not recover. *Malaney v. Cameron*, 161 Pac. 1180 (Kan.).

To take by inheritance, a foster child must be adopted in the manner provided by statute. See *Chehak v. Battles*, 133 Ia. 107, 114-115, 110 N. W. 330, 333. But when the foster parent has died without performing a contract to adopt, equity will generally grant relief, although the adoption itself cannot actually be carried out at law after the adoptive parent's death. *Starnes v. Hatcher*, 121 Tenn. 330, 117 S. W. 219. If the contract contains an express provision to leave property, this will be specifically enforced. *Pemberton v. Pemberton's Heirs*, 76 Neb. 669, 107 N. W. 996. But *cf. Jaffee v. Jacobson*, 48 Fed. 21. In the absence of an express provision, the contract may also be specifically enforced as an agreement to give such property as a natural child would have received. *Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885; *contra, Renz v. Drury*, 57 Kan. 84, 45 Pac. 71. This is sound, since the chief remaining incident of a legal adoption is the right of inheritance. There is, however, no obligation on the parent not to dispose of his property to others. *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890. That the child be made an heir is thus the substance of the contract to adopt. It may therefore be said that as a consequence of the right of specific performance the child is regarded in equity as adopted. See *Lynn v. Hockaday*, *supra*. But this equitable relation, arising solely from the contract, can give the child rights only against the parent or his property. There is thus no way to reach the property of relatives. Even when an adoption is legally completed, inheritance from collateral relatives must be specifically provided for by statute. *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956.

**ATTORNEYS — DUTY TO THE COURT — DUTY TO DISCLOSE TRUTH IN A CRIMINAL CASE.** — An experienced attorney defending a criminal, permitted a witness to testify falsely upon a collateral matter affecting the witness's credibility, and though he knew it to be false, he adopted the testimony as true in his summing up. There was no evidence that the attorney instigated the false testimony. *Held*, that he be disbarred. *In re Palmieri*, 162 N. Y. Supp. 799 (App. Div.).

By rule five of the Canons of Ethics of the American Bar Association, a lawyer who has undertaken to defend a criminal "is bound by all fair and honorable

<sup>12</sup> The facts of the case go no further than a voluntary petition, but on principle there would seem to be no distinction between a voluntary and an involuntary proceeding as to this question, provided that the court had jurisdiction of the bankrupt in the latter case.

means, to present any defense that the law of the land permits." See also SHARSWOOD, PROFESSIONAL ETHICS, 5 ed., 90-92. This, of course, does not justify any positive obstruction of justice. *In re Billington*, 156 App. Div. 63, 141 N. Y. Supp. 16; *In re Lane*, 93 Minn. 425, 101 N. W. 613. Generally, it is the duty of a lawyer to divulge the truth, even though this should be damaging to his client. *People v. Beattie*, 137 Ill. 553, 27 N. E. 1096; *In re Schapiro*, 144 App. Div. 1, 128 N. Y. Supp. 852. See KINKEAD, JURISPRUDENCE, LAW, AND ETHICS, 329. But see WARVELLE, ETHICS, § 170. Just how far this rule applies in a criminal case, is a difficult question. There is certainly no duty to disclose a confession. See *Courvoisier's Case*, Appendix to SHARSWOOD, PROFESSIONAL ETHICS, 5 ed., 183. But an attorney who knowingly adopts false testimony as true, perpetrates a fraud upon the court, and this would seem to be improper, even in a criminal case. Some courts have attempted to establish definite rules, as to what conduct will justify disbarment. *In re Cahill*, 66 N. J. L. 527, 50 Atl. 119. Clearly, it is not necessary that the lawyer shall have committed a crime. *In re Hardenbrook*, 135 App. Div. 634, 121 N. Y. Supp. 250. Tested by precedent, the punishment in the principal case seems unusually severe. *In re Newman*, 158 App. Div. 471, 143 N. Y. Supp. 590. Cf. *In re Cahill*, *supra*. But precedent is of little value on such a question. The punishment to be given should depend upon the particular facts of each case, and must rest largely in the discretion of the court. See *In re Attorney*, 10 App. Div. 491, 513, 42 N. Y. Supp. 268, 282.

**BANKRUPTCY — DISCHARGE — DEBTS NOT AFFECTED — WILFUL AND MALICIOUS INJURY TO PROPERTY.** — A broker held stock of a customer as security for the latter's indebtedness. The broker wrongfully sold the stock and appropriated the proceeds. Later he was adjudicated bankrupt and received a discharge. The customer sues for the conversion, claiming that it was a wilful and malicious injury to his property and hence was not discharged. *Held*, that the customer may recover. *McIntyre v. Kavanaugh*, 242 U. S. 138.

The present Bankruptcy Act includes among the debts not barred by a discharge those created by a misappropriation while acting in a fiduciary capacity. BANKRUPTCY ACT, § 17 *a* (4). The Acts of 1841 and 1867 also contained this provision. It was held under the Act of 1841 that "fiduciary" meant express trust and that therefore a principal's claim against his factor was not discharged. *Chapman v. Forsyth*, 2 How. (U. S.) 202. Similarly, under the Act of 1867 brokers as well as factors and commission merchants were considered not to be fiduciaries. *Hennequin v. Clews*, 111 U. S. 676. Accordingly, when the present Act went into effect the courts felt bound to follow the established course of decisions on this point, and hold that a broker was not discharged under § 17 *a* (4). *Crawford v. Burke*, 195 U. S. 176, 189. However, the present Act denies a discharge also of liabilities for wilful and malicious injuries to property. BANKRUPTCY ACT, § 17 *a* (2). The attitude of the courts under 17 *a* (4) had been one of tenderness toward the bankrupt, as is evidenced by the decisions just alluded to. The lower federal courts, following the same policy under § 17 *a* (2), decided that a conversion was not a "wilful and malicious" injury. *Matter of Ennis & Stoppani*, 171 Fed. 755. The state courts, however, seemed to take the opposite view. *Kavanaugh v. McIntyre*, 210 N. Y. 175, 104 N. E. 135; *Hallagan v. Dowell*, 139 N. W. 883 (Iowa). See COLLIER, BANKRUPTCY, 10 ed., 395. And the Supreme Court several years ago decided that "malicious" does not connote any evil motive toward the injured party. *Tinker v. Colwell*, 193 U. S. 473, 485. That decision paved the way for the holding in the principal case — that the conversion by the broker was a malicious injury to property. This construction not only shows a much stricter attitude toward the bankrupt, but also goes so far as to be questionable, for the requirement of malice would ordinarily not be found in the unjustifiable appropriation of the property of another and



would require actual ill will toward the person injured. *Matter of Ennis & Stoppani, supra*. The actual decision in the principal case, however, seems desirable; and the liberal construction of 17 a (2) may perhaps be justified as being necessary to counteract the results of too strict a construction of 17 a (4).

**BANKRUPTCY — PREFERENCES — JUDGMENT, LEVY AND SALE WITHIN FOUR MONTHS OF BANKRUPTCY.** — A creditor with reasonable cause to believe the debtor insolvent procured a judgment against him, levied execution and received the proceeds of the execution sale, all the steps occurring within four months of the filing of the petition in bankruptcy. The trustee in bankruptcy sued the creditor for the amount realized from the sale. *Held*, that the trustee may recover. *Anderson v. Stayton State Bank*, 38 Am. B. Rep. 4.

For a discussion of the principles involved, see NOTES, p. 619.

**BANKRUPTCY — PREFERENCE — RETURN BY BROKER TO CUSTOMER OF STOCK REDEEMED FROM A PLEDGEE.** — A customer loaned stock to his broker with authority to pledge. The broker did pledge for his own purposes and within four months of bankruptcy and while insolvent used his own funds to redeem the stock and returned it to the customer. The trustee in bankruptcy of the broker claimed that the transaction was preferential. *Held*, that no preference was effected. *Robinson v. Roe*, 233 Fed. 936 (C. C. A., 2nd Circ.).

The court bases its decision on the ground that the customer was merely reacquiring property to which he always had an exclusive property right. If this were the fact, of course he received no preference; but by authorizing the broker to pledge, his interest became encumbered to the extent of the pledgee's claim. Now if the customer was a creditor when the stock was redeemed and returned to him, he has received a preference. **BANKRUPTCY ACT**, § 60 a. A creditor is defined as one owning a claim provable in bankruptcy. **BANKRUPTCY ACT**, § 1, sub-sec. 9. Although tort claims are not ordinarily provable, the victim of a conversion of personal property may waive the tort and prove on the theory of implied contract. *Crawford v. Burke*, 195 U. S. 176. Hence, if the broker had been guilty of a conversion of the stock, the customer would have had a provable claim and satisfaction thereof by a redemption, and return of the converted stock would be preferential. But there has been no conversion in the principal case inasmuch as there was no unqualified demand for a return. However, even if there was no present obligation to redeem and return the stock, there was at least a contingent claim on the part of the customer, contractual in its nature, and becoming absolute on the customer's election to require his property. If this claim is provable, its satisfaction is preferential. It has been decided that on the bankruptcy of the principal, a surety has a provable claim even before he has in any way discharged the debt. *Williams v. U. S. Fidelity and Guaranty Co.*, 236 U. S. 549. And quite recently the Supreme Court has held that a party to a bilateral contract, still largely executory, may prove for the value of the entire contract against the estate of the other contracting party. *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U. S. 581. But see *In Re Imperial Brewing Co.*, 143 Fed. 579. Hence it is submitted that the necessary elements of a preference are present in the case under discussion. Furthermore it seems immaterial whether the customer loans property to the broker to be pledged, as here, or whether the original transaction was a pledge with power to repledge. It has been decided by the Supreme Court that a pledgor who takes back stock under circumstances identical with those of the principal case does not receive a preference. *Richardson v. Shaw*, 209 U. S. 365. The same reasons rendering the case under discussion open to criticism apply likewise to such a case.

**BANKRUPTCY — PROPERTY PASSING TO THE TRUSTEE — LIFE INSURANCE POLICIES: IN GENERAL.** — One Samuels had insured his life in favor of a third person, reserving power to change the beneficiary. The policy had a cash sur-

render value. After the bankruptcy of the insured, his trustee sought to recover the policy or its value. *Held*, that he may not recover either. *Matter of Samuels*, 237 Fed. 796 (Circ. Ct. of App., 2nd Circ.).

Section 70 a (5) of the Bankruptcy Act gives to the trustee the property which the bankrupt could have transferred, provided that when the bankrupt has an insurance policy with a surrender value "payable to himself," he may retain the policy, if he pays the surrender value to the trustee, and otherwise the policy passes to the trustee. The construction of this clause might have been that all policies payable to the bankrupt or in which he had the right to change beneficiaries should be considered property which he might have transferred, and that the policies should therefore pass to the trustee, unless they were such as were redeemable and redeemed under the proviso. *In re Orear*, 178 Fed. 632; *In re Dolan*, 182 Fed. 949. See 1 REMINGTON, BANKRUPTCY, 2 ed., §§ 1002, 1009. But as to policies payable to the bankrupt, the Supreme Court has held that they remain the property of the bankrupt and that only the surrender values of those policies which have surrender values pass to the trustee. *Burlington v. Crouse*, 228 U. S. 459. The basis of this decision seems to be that no interest in an insurance policy is intended to pass under § 70 a (5) unless it comes within the proviso. It might seem to follow that a policy payable to a third person in which the bankrupt could change the beneficiaries is not "payable to the bankrupt" and that consequently its surrender value would not pass under § 70 a (5). See 1 REMINGTON, BANKRUPTCY, 2 ed., § 1009. But this would seem to be unduly narrowing an already narrow construction; for, since the bankrupt could make himself beneficiary, the policy is in substance payable to the bankrupt. He should, therefore, get the surrender value under § 70 a (5). The same result, it would seem, might be reached under § 70 a (3). This gives to the trustee powers which the bankrupt might have exercised for his own benefit. And the right to change beneficiaries certainly seems to be such a power. Possibly, however, it may be held that no interest in an insurance policy can pass under any part of the Act except the proviso of § 70 a (5). Cf. *Burlington v. Crouse*, 228 U. S. 459, 472. But the Act seems to give little support to such a construction.

**CARRIERS — LIMITATION OF LIABILITY — LIMITATION OF LIABILITY BY AGREED VALUATION.** — The defendant, a common carrier, accepted a shipment of goods from the plaintiff of the value of two thousand dollars. The goods being lost, the shipper brings suit alleging that the goods were converted by the servants of the carrier to their own use. The defendant set up the affirmative defense that the contract of shipment valued the goods at fifty dollars and limited the liability of the carrier to that amount. The plaintiff demurred. *Held*, that the contractual limitation is binding and the demurrer should be overruled. *D'Utassy v. Barrett*, 56 N. Y. L. J. 1367 (N. Y. Ct. of App.).

In England a common carrier may, by contract, completely exempt itself from liability for loss of goods. *Nicholson v. Willan*, 5 East 507. Feeling the danger that the carrier might overreach the shipper, Parliament has provided that the contract must be just and reasonable. *Manchester, etc. Ry. v. Brown*, 8 App. Cas. 703. The American courts have, with a single exception, declared that contracts totally exempting carriers from liability for their own negligence are void as against public policy. *Railroad Co. v. Lockwood*, 17 Wall. (U. S.) 357; *School District v. Boston, etc. Ry. Co.*, 102 Mass. 552; *contra*, *Nelson v. Hudson River R. Co.*, 48 N. Y. 498. As to the possibility of contracting for a limited liability in return for a reduction in rates, American courts are divided. To some courts it seems impossible to limit a liability which, on grounds of policy, cannot completely be avoided. *U. S. Express Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transportation Co.*, 55 Wis. 319; *Moulton v. St. Paul, etc. Ry. Co.*, 31 Minn. 85. To other courts the business sense of allowing a



shipper to get less by paying less caused them to hold valid the limitation of liability to an agreed value. *Graves v. Lake Shore, etc. Ry. Co.*, 137 Mass. 33; *Oppenheimer & Co. v. U. S. Express Co.*, 69 Ill. 62. See H. E. Willis, "The Right of Bailees to Contract against Liability for Negligence," 20 HARV. L. REV. 297, 306. The Federal Supreme Court has, however, held the limitation of liability contracts to be good and, moreover, made the rule the universal one under the Carmack Amendment, so far as loss by negligence is concerned. *Adams Express Co. v. Croninger*, 226 U. S. 491; *Boston & Maine Ry. Co. v. Hooker*, 233 U. S. 97. Granting that the limitation is valid as applied to negligent acts of the carrier's servants it would not be expedient to differentiate the case where the servant's conduct is made worse only by adding a *mens rea*. But see *The New England*, 110 Fed. 415, 420; *Southern Express Co. v. Gulman*, 6 Ky.L. R. 587.

CHOSSES IN ACTION — PARTIAL ASSIGNMENT — WHETHER JUDGMENT IN FAVOR OF PARTIAL ASSIGNEE BARS ASSIGNOR. — An unlawfully discharged employee had an unliquidated claim for damages against his employer. The employee assigned such damages as should accrue up to a certain date, and reserved after-accruing damages. The assignee sued the employer in the municipal court and recovered. The assignor now sues the employer at law for the balance of the claim, and the employer pleads in bar the prior judgment recovered by the assignee. Held, that the assignor may recover. *Carvill v. Mirror Films, Inc.*, 56 N. Y. L. J. 1861 (App. Div.).

At common law, a partial assignee had standing only in equity. See *James v. Newton*, 142 Mass. 366, 8 N. E. 122. Nor have modern codes enabling an assignee to sue at law in his own name generally been extended to partial assignees. In *re Stiger*, 202 Fed. 791. But cf. *Skipper v. Holloway*, [1910] 2 K. B. 630; *Caledonia Ins. Co. v. Northern Pacific Ry. Co.*, 32 Mont. 46, 79 Pac. 544; *Gaugler v. Chicago, etc. Ry. Co.*, 197 Fed. 79. In New York, however, the law has undergone an independent development, and seems still unsettled. It has been said, on the one hand, that the only remedy was equitable. *Chambers v. Lancaster*, 160 N. Y. 342, 348, 54 N. E. 707, 708; *King v. King*, 73 App. Div. 547, 77 N. Y. Supp. 40; *Thompson v. Gimbal Bros.*, 71 Misc. 126, 128 N. Y. Supp. 210. Earlier decisions, however, not expressly overruled, allowed the assignee a legal action. *Morton v. Naylor*, 1 Hill 583; *Risley v. Phenix Bank, etc.*, 83 N. Y. 318, 329; *Chase v. Deering*, 104 App. Div. 192, 93 N. Y. Supp. 434. A middle position is to the effect that the assignee may sue at law by joining the assignor as co-plaintiff, and non-joinder is demurrable. *Dickinson v. Tyson*, 125 App. Div. 735, 110 N. Y. Supp. 269. On practical grounds this latter doctrine appears the most advantageous. Legal enforcement runs afoul of difficulties of procedure or of policy. Only joint obligees could sue jointly at common law, and a partial assignee was not a joint obligee. If separate actions were allowed, the debtor would be subjected to undue litigation, or else a judgment recovered by an assignee would bar the assignor and other assignees. Yet if the right is purely equitable, the claim is *pro tanto* withdrawn from jury trial, and a later total assignment might arguably cut the assignee off. See Williston, "Is the Right of Assignee of a Chose in Action Legal or Equitable?", 30 HARV. L. REV. 97, 104. It is best, therefore, to treat the right as legal-equitable, the assignor and assignee being equitable tenants in common, and the assignor being legal owner of the share assigned, subject, however, to a legal "power" in the assignee, upon notice to the debtor. See Cook, "Alienability of Choses in Action," 30 HARV. L. REV. 449, 482; Cook, "Alienability of Choses in Action," 29 HARV. L. REV. 816, 820. The liberal tendency to allow joinder of parties whose rights are not technically joint, is instanced also by the joinder at law of tenants-in-common, and co-owners of other separate interests in land. Cf. *School Districts v. Edwards*, 46 Wis. 150,

49 N. W. 968; *Watson v. Milwaukee, etc. Ry. Co.*, 57 Wis. 332, 15 N. W. 468. If, as in the principal case, the debtor fails to demur for non-joinder of the assignor, a waiver of his rights against a splitting of the cause of action may well be implied, and hence the assignee's judgment should not bar later actions.

**DAMAGES — LIQUIDATED DAMAGES — WHETHER DEMURRAGE RATE APPLIES TO UNREASONABLE DELAY.** — The defendant was a charterer of a ship under a charter party which provided five lay days for loading, with payment of demurrage at a fixed rate per day after that. After detention of the ship for a reasonable time beyond the lay days plaintiff gave defendant notice that he would no longer accept the demurrage rate, but would hold the defendant for actual damages. The defendant declined to agree to this. The boat was retained some time longer, for which detention plaintiff seeks to recover actual damages. *Held*, that the plaintiff may recover only the demurrage rate. *Inverkip Steamship Co. v. Bunze*, [1917] 1 K. B. 31.

Demurrage may be considered either as an optional right in the charterer to retain the ship on paying a certain sum therefor, or as liquidated damages for a breach of the contract. If the first view be taken the option must be regarded as lasting only a reasonable time, and when the option expires, of course the provision for payment would end, and any further detention would be a breach for which actual damages could be recovered. *Western Transport Co. v. Barley*, 56 N. Y. 544. See *Lilly & Co. v. Stevenson & Co.*, 22 R. 278, 286. See CARVER, CARRIAGE OF GOODS BY SEA, 3 ed., § 609; STEVENS, DEMURRAGE, 69. This result has the advantage that it does not force the shipowner to either leave the boat for an indefinite period, and recover only a fraction of the actual damages, or take the boat away and suffer perhaps much greater damage for which he must rely on his action against the charterer. But the true construction of the contract in the principal case seems to be that the contract is to load the ship during the lay days, and pay damages at a liquidated rate for further detention; the unqualified statement "demurrage at so much per day" seems to indicate clearly that that rate of damages was relied on so long as the contract should remain in force. *Western Steamship Co. v. Amaral Sutherland Co.*, [1913] 3 K. B. 366. See SCRUTTON, CHARTERPARTIES AND BILLS OF LADING, 6 ed., art. 128. Had the defendant merely continued to use the boat after notice by the plaintiff he might be held to have impliedly consented to pay the actual damage, but his refusal to agree forbids such a construction of his actions. *Hagan v. Tucker*, 118 Fed. 731. See WALD'S POLLOCK ON CONTRACTS, 3 ed., 9.

**DESCENT AND DISTRIBUTION — HOMICIDE BY INSANE HEIR.** — An infant who had inherited real and personal property was killed by her insane mother, who then committed suicide. The child's property is claimed by both the mother's heirs and those who would be the child's heirs were the mother disqualified. *Held*, that the property became vested in the mother and passed to her heirs. *Re Estate of Maude Mason*, 31 Dom. L. R. 305 (Br. Col.).

For a discussion of the principles involved in this case, see NOTES, p. 622.

**DOWER — VOID DIVORCE — ESTOPPEL IN PAIS — EFFECT OF IGNORANCE OF ONE'S RIGHTS.** — Plaintiff secured a rabbinical divorce from R., and both parties, believing the divorce valid, "married" again. Plaintiff had knowledge of R.'s "remarriage." Plaintiff then removed from New York to Kansas. Twenty years after the separation, shortly after R.'s death, plaintiff learned that the divorce was invalid. She now claims dower in land acquired by R. and conveyed to an innocent purchaser in the interval. *Held*, she is equitably estopped from asserting her legal right to dower. *Kantor v. Cohn*, 56 N. Y. L. J. 1339 (Sup. Ct., King's Cty.).

Some courts have held that where the right of dower is statutory it can be barred only in such manner as the statute expressly provides. *McCreery v.*



*Davis*, 44 S. C. 195, 22 S. E. 178; *Martin's Heirs v. Martin*, 22 Ala. 86. But by the clear weight of authority the statutory right of dower may be lost by an equitable estoppel like other property rights. *Gilbert v. Reynolds*, 51 Ill. 513; *Norton v. Tufts*, 19 Utah 470, 57 Pac. 409. See 2 SCRIBNER, DOWER, 2 ed., 266 ff. In some jurisdictions, however, it has been held that there can be no equitable estoppel where the conveyance was made while the dower right was still inchoate. *Lohmeyer v. Durbin*, 213 Ill. 498, 72 N. E. 1118. See *Beeman v. Kitzman*, 124 Ia. 86, 93, 99 N. W. 171, 173. The basis of these decisions, that where there is no present right of control or possession, there is no present duty to assert any claim to the property, would seem hardly tenable. The duty to apprise a purchaser of one's rights must in fairness exist as well when those rights are enjoyable in the future as when enjoyable in the present. *Gilbert v. Reynolds*, *supra*; *Wright Lumber Co. v. McCord*, 145 Wis. 93, 128 N. W. 873. That mere silence, failure to assert one's rights, may give rise to an equitable estoppel is now well settled. *Wood v. Seely*, 32 N. Y. 105. See 2 POMEROY, EQ. JURIS., 3 ed., § 818. See 24 HARV. L. REV. 494. But in such case the party sought to be estopped must have had actual knowledge of his rights. *Bringard v. Stelwagen*, 41 Mich. 54, 1 N. W. 909; *Frederick v. Missouri River, etc. R. Co.*, 82 Mo. 402; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Dotson v. Merritt*, 141 Ky. 155, 132 S. W. 181. The court in the principal case argues that the plaintiff had such knowledge since the validity of a divorce, and thus the right to dower, is a matter of law, and everyone is presumed to know the law. That the state should impose a duty of being cognizant of one's rights, as well as the duty, when possessed of such knowledge, to warn innocent third parties of their existence is not inconceivable. But the law is settled otherwise where the estoppel is based on mere silence. See authorities *supra*. And to attempt to alter a doctrine based wholly upon equitable considerations by the introduction of a technical legal fiction is neither good law nor good legislation.

EASEMENTS — MODES OF ACQUISITION — IMPLIED GRANT AND RESERVATION — IMPLIED RESERVATION OF RIGHT TO FLOWAGE OF WATER IN MILL-RACE. — A tract of land included a mill and an artificial mill-race. This mill-race was used solely in connection with the mill. The owner conveyed part of the tract, containing the mill and the inlet and outlet of the mill-race, to a milling company. Later he conveyed the rest of the land, containing the middle of the race, to a town. The mill company dammed the race; and the town, claiming an easement by implication to the flowage of water in the race, destroyed the dam. The mill company seeks to recover. *Held*, that it may recover. *St. Mary's Milling Co. v. Town of St. Mary's*, 32 Dom. L. R. 105 (Ontario).

Where there is apparent and continuous user, that is, a quasi-easement, in one part of a tract of land for the benefit of another part, on the sale of the quasi-servient part of the land many states imply a grant back of an easement if the user was reasonably convenient for the enjoyment of the rest of the land. *Quinlan v. Noble*, 75 Cal. 250, 17 Pac. 69. Cf. *Taylor v. Wright*, 76 N. J. Eq. 121, 79 Atl. 433. Some states require for the grant back that the user be reasonably necessary to the grantor's land. *Wells v. Garbutt*, 132 N. Y. 430, 30 N. E. 978; *Powers v. Heffernan*, 233 Ill. 597, 84 S. E. 661. See 3 ILL. L. REV. 187. However, in England, Canada, and some of the states it is said that the grantor should not be able to derogate from his own grant; and there is no implied grant back to him unless the easement is strictly necessary for the land retained. *Ray v. Hazeldine*, [1904] 2 Ch. 17; *Attrill v. Platt*, 10 Can. Sup. Ct. 425, 480; *Covell v. Bright*, 157 Mich. 419, 122 N. W. 101; *Warren v. Blake*, 54 Me. 276, 286. An exception to this strict English rule has been suggested where before severance there were reciprocal quasi-easements between the two parts of the land. It was intimated that in such a case reasonable convenience is enough to establish a grant back as well as a grant. *Wheeldon v. Burroughs*, 12 Ch. D. 31, 59;

*Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, 567. Cf. *Seymour v. Lewis*, 2 Beas. (N. J.) 439, 448; *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489, 497. But in the principal case the necessity was non-existent at the time of the severance of the property. Consequently even the more lenient view will support the case.

**EQUITABLE ELECTION — WHETHER HEIR CAN CLAIM BOTH LEGACY AND LAPSED RESIDUARY DEVISE.** — An Iowa testator willed one half the residue of his property to his son and the other half to his wife. The son having predeceased the testator, the widow claims by descent the lapsed title to an undivided half of certain land in Minnesota which was part of the residue. By Minnesota law the widow, where there are no lineal descendants, is sole heir-at-law of her husband. Her claim is opposed by those who would have been heirs had there been no widow. They assert that the widow is barred from taking this property as heir because of an election she had made in Iowa to accept the provisions of the will. *Held*, that the widow must abide by her Iowa election, and her opponents are entitled to the lapsed interest in half the land. *In re McAllister's Estate*, 160 N. W. 1016 (Minn.).

It is true that an election at the domicile of the testator will be recognized as binding in another state. *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324. See WHARTON, CONFLICT OF LAWS, 3 ed., § 599 *e*. But it would seem clear that when no election is necessary it should not, when made, affect the party's rights. *Collins v. Collins*, 126 Ind. 559, 25 N. E. 704. The doctrine of election is often said to have its basis in the testator's intention. To justify the result in the principal case, such intention must presumably be that the legatee take no more than has actually been bequeathed to him. Yet as a matter of fact the only legitimate presumption can be, that the legatee only take by the will if he does not proceed counter to its terms. The taking by intestacy of a legacy lapsed by the death of the legatee, would seem in no sense to contradict the testator's intention. It is more likely, however, that the rule rests simply on equitable principles. See 1 POMEROY, EQUITY, § 465; 23 HARV. L. REV. 138. Briefly stated, the rule is that equity will not allow a benefit under a will to be accepted while rights are likewise being asserted, which are antagonistic to the will, and injurious to a third party. So where a defect in the will prevents the legatee from taking, and the heir seeks not only his own legacy, but also the property which failed to pass to the other legatee, an election is required. *Brodie v. Barry*, 2 Ves. & B. 127; *Thellusson v. Woodford*, 13 Ves. 209. But where the testator merely declares that his heir take nothing, and fails to make any other disposition of the property, the heir will take by descent in spite of the expressed intention. *Gallagher v. Crooks*, 132 N. Y. 338, 30 N. E. 746. As, in the principal case, the legatee, to whom the lapsed legacy was bequeathed, has died, the taking by intestacy of this legacy in addition to other gifts by the will is conduct inequitable to no one, for it deprives no one of rights attempted to be conveyed by the will. So an election was not necessary. *Johnson v. Johnson*, 32 Minn. 513, 21 N. W. 725; *Hand v. Marcy*, 28 N. J. Eq. 59.

**EQUITY — CANCELLATION — UNILATERAL MISTAKE OF FACT.** — The defendant sent in a bid for a building contract in which by an honest mistake, without negligence, he omitted to take account of an important item, the bid consequently being much lower than he intended. The plaintiff, not knowing of the mistake, accepted the bid. Before the plaintiff had changed his position in any way, the defendant notified him of the mistake and refused to perform. The plaintiff having brought suit on the certified check deposited by the defendant to insure performance, the defendant seeks cancellation of it in equity. *Held*, that the check should be canceled. *St. Nicholas Church v. Kropp*, 160 N. W. 500 (Minn.).

For a discussion of this case, see NOTES, p. 637.



**FEDERAL COURTS — RELATION OF STATE AND FEDERAL COURTS — STATE PRACTICE OR A FEDERAL RIGHT.** — An interstate passenger sued in a state court for baggage lost. The railroad, over objection, introduced a copy of the schedules of limited liability filed with the Interstate Commerce Commission. The copy was not properly authenticated. The court allowed full recovery, erroneously ruling that the schedules did not limit the liability of the railroad. The state appellate court held there was no prejudice in the ruling since the schedules were not properly in evidence, and could not be considered on the appeal. On review to the United States Supreme Court the railroad seeks a new trial claiming violation of a federal right. *Held*, that there must be a new trial. *New York, etc. R. Co. v. Beaham*, 242 U. S. 148.

On writs of error from the Supreme Court to a state court the scope of its review is confined to so-called federal questions. See *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304. So the decision of a state court upon a question of state practice without more cannot be reviewed by the Supreme Court. *Ludeling v. Chaffee*, 143 U. S. 301. Thus the denial of a second opportunity to submit evidence was held to involve no federal question but merely a question as to state practice. *Thorington v. Montgomery*, 147 U. S. 490. It might well be that a federal question would be raised where a rule of state practice was so arbitrary as practically to deny an opportunity for asserting a substantive federal right. But such is not true of the practice in the principal case. The rule there, of considering on review only the competent evidence in the record, seems a common mode of procedure. See *Lee v. Missouri Pacific Ry. Co.*, 67 Kan. 402, 73 Pac. 110; *Nance v. Oklahoma Fire Ins. Co.*, 31 Okla. 208, 120 Pac. 948; *Huntington National Bank v. Loar*, 51 W. Va. 540, 41 S. E. 901. Nor does the fact that the railroad has not a second chance to prove its right seem to make the procedure unreasonable or arbitrary.

**HOMESTEAD — RIGHT OF JUDGMENT CREDITOR AGAINST WIFE WHO BUYS IN AT FORECLOSURE SALE — EQUITABLE RELIEF AGAINST MERGER — RIGHTS OF MINOR CHILDREN.** — A husband and wife joined in the execution of a note, and a deed of trust upon the homestead to secure it. They jointly executed another note, unsecured, to the plaintiff who secured a judgment thereon, after the husband's death. Later the deed of trust was foreclosed, and the widow bought in the land at the sale. Then the plaintiff had an execution issue against the land, but the sheriff set the land off as the homestead of the widow and her minor children. This was an appeal from the overruling of a motion to quash the sheriff's return. *Held*, that the judgment be affirmed. *McMichaels v. Reece*, 190 S. W. 51 (Mo. App.).

Homestead rights are purely statutory. *Adams v. Adams*, 183 Mo. 396, 82 S. W. 66; *Sayers v. Childers*, 112 Iowa, 677, 84 N. W. 938. The Missouri statutes provide for the ordinary homestead exemption in the head of the family, surviving in his wife and minor children. This is subject to general debts incurred before the acquisition of the homestead, but not to those incurred thereafter. See REV. STAT. MISSOURI 1909, ch. 56. In the principal case, upon the death of the husband, the widow took a vested estate for life during widowhood, and the minor children each a vested term for years during infancy. *Brewington v. Brewington*, 211 Mo. 48, 109 S. W. 723. See *Gore v. Riley*, 161 Mo. 238, 61 S. W. 837; *Linville v. Hartley*, 130 Mo. 252, 32 S. W. 652. These estates were subject, however, to the deed of trust executed by the husband and wife jointly. *Newton v. Newton*, 162 Mo. 173, 61 S. W. 881; *Gladney v. Sydnor*, 172 Mo. 318, 72 S. W. 554. But they are not subject to the unsecured indebtedness to the plaintiff, incurred after the homestead was acquired. See REV. STAT. MISSOURI 1909, § 6708; *Acreback v. Myer*, 165 Mo. 685, 65 S. W. 1015; *Osborne & Co. v. Evans*, 185 Mo. 509, 84 S. W. 867. Nor did the rendition of a judgment create a lien upon the homestead property. *Burton v. Look*, 162 Mo.

502, 63 S. W. 112; *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448; *Green v. Marks*, 25 Ill. 221. But see *Blythe v. Gask*, 114 N. C. 659, 19 S. E. 640; *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426. However, at law, by the purchase of the land at the foreclosure sale, the widow secured the legal fee, and her own life estate in the homestead right merged therein and was lost. And the children's estates, being subject to the deed of trust, were destroyed by the sale. Consequently, although the widow might claim as the head of a family a new homestead exemption for herself and children against all future creditors, the newly-acquired estate in fee must be subject to an execution in favor of the plaintiff, an antecedent judgment creditor. In substance, however, the purchase by the widow is a redemption of the homestead for herself and her children. For practical reasons it may have been more advantageous, or even necessary, for her to buy in the property at the sale rather than to pay off the indebtedness. But the same substantive result is effected, and the same legal consequences should follow, whichever form of redemption is used. So equity, looking at the substance of the transaction, will prevent the merger of her homestead rights in the fee simple. See *Smith v. Roberts*, 91 N. Y. 470; *Swinfen v. Swinfen*, 29 Beav. 199. See 2 POMEROY, EQ. JURIS., §§ 790-793. Upon this principle, the homestead right acquired through her husband may still be asserted by the widow against the plaintiff. And the children's estates, though destroyed at law by the mother's purchase, should be given effect in equity in like manner as if the mother had redeemed by paying off the indebtedness. Such was the substance of the transaction. See *Ailey v. Burnett*, 134 Mo. 313, 33 S. W. 1122; *Drake v. Kinsell*, 38 Mich. 232, 237; *McCreary v. McCorkle*, 54 S. W. 53 (Tenn. Ch.). Nor can the mother be heard as against her children to deny that her purchase was a redemption for their benefit. She owes them a fiduciary duty of care and protection and she can in no way prejudice their rights in their father's homestead. See *Phillips v. Pressor*, 172 Mo. 24, 72 S. W. 501; *Gorman v. Hale*, 109 Mo. App. 176, 82 S. W. 1110. Hence their interest survives and is not subject to this execution. Although the case is one at law, in code states where law and equity are administered by the same courts, there can be no objection to cutting cross-lots to secure a result on a law suit which would formerly have called for a separate proceeding in equity. Nor can the interest in fee in the homestead be sold on execution, subject to the homestead rights of the widow and children. *Armor v. Lewis*, 252 Mo. 568, 583, 161 S. W. 251; *Moore v. Wilkerson*, 169 Mo. 334, 337, 68 S. W. 1035.

**INSURANCE — MURDER BY BENEFICIARY — RIGHT TO PROCEEDS.** — The beneficiary of a life insurance policy murdered the insured. The victim's son and the beneficiary are the sole statutory heirs. The son brings an action on the policy. *Held*, that he recover. *Sharpless v. Grand Lodge A. O. U. W.*, 159 N. W. 1086 (Minn.).

For a discussion of the principles involved in this case, see NOTES, p. 622.

**INTERNATIONAL LAW — ADMIRALTY — ENEMY PROPERTY.** — Goods were seized *en route* from Copenhagen to the United States on a Danish vessel. They were manufactured to order in Germany and the neutral claimant contended that title passed to him when they left the factory. The Crown claimed them as enemy property under the Order in Council of March 11, 1915. *Held*, that the goods were enemy property. *The United States*, [1917] p. 30.

The order in question provides for the seizure of enemy property on the seas. What constitutes enemy property the court declared is decided according to the international law of prize. In support of its decision it applied the doctrine of transfer of title *in transitu*. This doctrine holds that goods which have been shipped as the property of the enemy seller cannot on the voyage be transferred to the neutral buyer so as to avoid capture, but there must be an actual delivery of possession. See *The Baltica*, 11 Moo. P. C. 141, 145. See PRATT, STORY ON



PRIZE COURTS, 64. This principle is not applicable, however, where the title has vested in the neutral buyer before shipment. Thus when enemy goods were consigned to a neutral buyer as his property and at his risk, they were not confiscated. *The Herman*, 4 Rob. 228. Similarly, enemy goods shipped to a neutral buyer by an agent representing him in the enemy country have been held to lose their enemy character. See *The San Jose Indiano and Cargo*, 2 Gall. 267, 291. This was held true even when an enemy firm acted as agent or shipper for the neutral buyer. See *The Portland*, 3 Rob. 41-44. Perhaps all decisions as to goods from a belligerent country with title in a neutral are not entirely reconcilable. See 7 MOORE, DIGEST OF INTERNATIONAL LAW, §§ 1183, 1184, 1185. But it would seem that a doctrine concerning the passing of title to ships and goods on ships *in transitu* can hardly support the confiscation of goods title to which is claimed to have passed before shipment.

INTERSTATE COMMERCE — DISCRIMINATORY RATE — BURDEN OF PROOF. — Shippers of the town of Rockport, Illinois, filed a complaint before the Interstate Commerce Commission alleging that the defendant's rate on certain goods from Rockport to St. Louis was "unduly discriminatory in violation of sections 2 and 3" of the act to regulate commerce. The rate was increased shortly after the filing of the complaint. Held, that the burden is on the defendant to show that no unjust discrimination exists. *Burson Knitting Co. v. C. M. & St. P. Ry. Co.*, 42 Int. Com. Rep. 739.

At common law there is no underlying principle which will enable one to determine in a given issue on whom the burden of proof shall fall other than the general one of fairness based on experience. See 4 WIGMORE, EVIDENCE, § 2486. The Commerce Commission follows the courts in this matter. See JUDSON, INTERSTATE COMMERCE, 3 ed., § 440. Were the act to regulate commerce silent on the question, fairness would seem to demand that the carrier on increasing its rate should not be called upon to show that no one or no locality of possible hundreds was discriminated against. It should not have to prove a general negative. Even if a specific locality complains of such rate there is no reason why the complainant should not be left to establish its case. There are no presumptions arising from the long standing of the previous rate. *People ex rel. N. Y. C. & H. R. R. Co. v. P. S. Comm.*, 215 N. Y. 241, 109 N. E. 252. Nor is there any presumption of wrong arising from a changed rate. *I. C. C. v. Chicago Gt. Western Ry. Co.*, 209 U. S. 108, 119. The practice of the Commission itself has been in accordance with these holdings. *Holmes & Co. v. So. Ry. Co.*, 8 Int. Com. Rep. 561. See JUDSON, INTERSTATE COMMERCE, 3 ed., § 440. But the amendment of 1910 of section 15 of the Act expressly provides that the burden of showing an increased rate is "reasonable" shall be on the carrier. But it would seem that "reasonable" must be distinguished from "discriminatory." For that the word "reasonable" has not a scope sufficiently broad to include discrimination appears from the classification and division of objections to rates in section 1, providing against "unreasonable" rates, section 2 providing against "discriminatory" rates, and section 3 providing against "preferential" rates. *Wickwire Steel Co. v. N. Y. C. R. Co.*, 30 Int. Com. Rep. 415, 420.

LEGACIES AND DEVISES — UNCERTAINTY — DEVISE TO UNBORN BASTARD OF SPECIFIED FATHER. — The testator in a codicil set aside a share of his estate "in case he should leave any other male child by the said Mary Ann," with whom he was unlawfully cohabiting. There was a male child *en ventre sa mère* at the testator's death. Held, that the bastard does not take. *In re Homer*, 115 L. T. R. 703.

A gift by deed or by will to future bastards of either the donor or a third person has in the past been held void. *Medworth v. Pope*, 27 Beav. 71; *Metham v. Duke of Devon*, 1 P. Wms. 529. See *Blodwell v. Edwards*, Cro. Eliz. 509, 510. The reason seems to be the policy against the encouragement of

immorality. See Lord St. Leonards in *In re Connor*, 2 Jo. & La T. 456, 459-60. But at least one exception has since been established in the case of a testamentary gift by the putative father, on the ground that since the gift dates from death the begetting of bastards is not encouraged. *Occleston v. Fullalove*, L. R. 9 Ch. App. 147, 162; *In re Hastie's Trusts*, 35 Ch. Div. 728. Here a difference was taken upon another ground. If the bastard was described as the child of the mother only, it was ascertainable and could take. *Gordon v. Gordon*, 1 Mer. 141; *Evans v. Massey*, 8 Price 22. But, if the description specified the father as well as the mother, it was said that the child must show a reputation as begot by the particular father. *Wilkinson v. Adam*, 1 Ves. & B. 422. For without such reputation the child was *filius nullius* and the law would not inquire into the scandal. See 2 JARMAN, WILLS, 6 Eng. ed., 1765. Hence, if the child is *en ventre sa mère* at the testator's death the gift would fail, since a child must be *in esse* during father's life to acquire the necessary reputation. *Earle v. Wilson*, 17 Ves. 529. See *Blodwell v. Edwards*, Cro. Eliz. 509, 510; *Gordon v. Gordon*, 1 Mer. 141, 152. *Contra*, *In re Connor*, 2 Jo. & La T. 456, 460. See *Occleston v. Fullalove*, L. R. 9 Ch. App. 147, 164. However, the fiction of *filius nullius* is in these days an unstable pediment for any doctrine. The result should rather be rested on the practical difficulty of proof, a question of degree to be determined in each case. See *Occleston v. Fullalove*, L. R. 9 Ch. App. 147, 158. But this difficulty assumes that the testator desires such proof. Usually however he states his paternity simply as matter of belief and not by way of limitation. See 2 JARMAN, WILLS, 6 Eng. ed., 1770, 1781.

NATURALIZATION — FILIPINOS. — A native Filipino applied to be made an American citizen under R. S. XXX, § 2169, as amended in 18 STAT. AT L. 318, and under the Act of June 29, 1906, 34 STAT. AT L., c. 3592, § 30. *Held*, that the petition be granted. *In the matter of Marcus Solis*, U. S. Dist. Ct. for Hawaii, Mar. 25, 1916.

A native Filipino applied under the same provisions to be made an American citizen. *Held*, that the petition be denied. *In the matter of Alfred Ocampo*, U. S. Dist. Ct. for Hawaii, Dec. 30, 1916.

Section 2169, which was in force prior to the Act of June 29, 1906, limits the provisions for naturalization to "aliens being free white persons and to aliens of African nativity and to persons of African descent." But § 30 of the Act of June, 1906, provided that "all applicable provisions of the naturalization laws . . . shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States." As the petitioners come within the description, they are entitled to citizenship unless the former section modifies this provision. Being neither expressly repealed nor inconsistent with the Act of June, it must, by the rules of statutory construction, be still in force. *Bessho v. U. S.*, 178 Fed. 245. See 1 LEWIS' SUTHERLAND STATUTORY CONSTRUCTION, 2 ed., 461-64. It has been argued, however, that as § 30 does not refer to aliens, and as § 2169 only refers to aliens, it cannot be considered an "applicable" limitation. The wording of the statutes certainly justifies such an argument. But the history of § 30 shows that its purpose was to avoid the difficulty of admitting Porto Ricans to citizenship because they were not aliens, could not renounce allegiance to a foreign sovereign, and were not, therefore, within the Act. To extend the rights of citizenship to all emigrants of our insular possessions regardless of race was clearly not the intention of Congress. So it has been held concerning the limitation of § 2169 on other clauses, with wordings similar to § 30. *In re Alverta*, 198 Fed. 688; *In re Lampitoe*, 232 Fed. 382.

PATENTS — PROCEDURE — WHAT CONSTITUTES AN INTERLOCUTORY DECREE. — In an action on two separate patents, a decree was in favor of the plaintiff as to one patent, with an order for an accounting, but in favor of the de-



fendant as to the other. Section 129 of the Federal Judicial Code provides that appeals from interlocutory decrees must be taken within thirty days. The plaintiff appeals from the part of the decree adverse to him more than thirty days after its entry. *Held*, that the decree was interlocutory and the appeal is barred. *Stromberg Motor Co. v. Arnson*, 56 N. Y. L. J. 1599 (Circ. Ct. of App., 2nd Circ.).

When the judgments in an action are absolutely unconnected, there may be partial appeals. *Hall v. Bank of Virginia*, 14 W. Va. 584, 614. So the appeal, in the principal case, can only be barred if the decree appealed from is considered interlocutory. An interlocutory decree has been defined as "an adjudication or order, made upon some point arising during the progress of a cause, which does not determine finally the merits of the question or questions involved." See 1 BOUVIER, LAW DICTIONARY, 3 rev., 805. The question of what constitutes an interlocutory decree is especially difficult when various issues are raised in the same suit. It has been held that a decree which decides the merits is final, even though an accounting not asked for in the pleadings and merely incidental to the relief is still necessary. *Forgay v. Conrad*, 6 How. (U. S.) 201. So a decree which dismisses the action as to some parties, so that they have no further interest in the action, but retains the case as to other parties, is so far final as to allow a separate appeal. *Hill v. Chicago & Evanston R. Co.*, 140 U. S. 52. However the weight of authority is in accord with the principal case, that a decree dismissing some claims in an action and giving relief by an accounting as to others, but dismissing none of the original parties, is entirely interlocutory. *Western Electric Co. v. Williams-Abbott Electric Co.*, 108 Fed. 952; *Ex parte National Enameling Co.*, 201 U. S. 156. *Contra, Historical Pub. Co. v. Jones*, 231 Fed. 784. Under the previous federal statute which allowed appeals from interlocutory decrees only when an injunction was granted or continued, a decree denying an injunction was treated as final, in order that there need not be a separate accounting, if it was reversed. *Scriven v. North*, 134 Fed. 366. The present statute removes the necessity for such construction by allowing an appeal from an interlocutory decree if taken in time. But when the period for appeals is as short as in the Judicial Code, this uncertainty as to what constitutes an interlocutory decree is a cause of great hardship; and it seems that the term should be more accurately defined by statute, or that the courts should be given power to allow appeals, in their discretion, after the time has expired.

PRESUMPTIONS — PRESUMPTION OF DEATH FROM SEVEN YEARS' ABSENCE WITHOUT NEWS — SUBSTITUTION OF ACTUARIAL TABLE. — William died in 1915. Thomas, his brother, disappeared in 1872 at the age of thirty, and has not been heard from since 1894. Thomas' children apply for administration of his estate. If Thomas predeceased William, the petitioners will share *per capita* in William's estate as nephews and nieces; if Thomas survived William, they will take *per stirpes* from Thomas' share. *Held*, that from mortality tables confirmed by family longevity Thomas both survived William and is now dead, and that administration be granted. *The Goods of Thomas Rowe*, 56 N. Y. L. J. 1669 (Surrogates' Ct.).

The presumption of death after seven years' absence from home without news is nothing more than the cessation of the presumption of continued life at the seventh year. See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 323. It is based on two elements. First, the natural mortality of man in the lapse of time. *Cf. Martinez v. Succession of Vives*, 32 La. Ann. 305, 307. See SWINBURNE, TESTAMENTS, pt. 6, s. 13, 2. Second, the probability of continued communication from any one who is not dead. *Cf. Traveler's Ins. Co. v. Rosch*, 23 Ohio Cir. Ct. 491. Like any presumption it is rebuttable by explaining away its basic inferences. Thus the fact that the alleged deceased was a fugitive from justice might explain why he conceals his whereabouts. See *Mutual Ben-*

*efit, etc. Ins. Co. v. Martin*, 108 Ky. 11, 18, 55 S. W. 694, 696; *Sensenderfer v. Pacific, etc. Ins. Co.*, 19 Fed. 68, 69. And, likewise, as in the principal case, an unusual family longevity might rebut the first basic inference. But the use of the mortality tables does not explain away anything; it is rather a substitution of another presumption in which the period varies with the age of the alleged deceased. This is a more scientific application of the inference of death from old age, but it loses sight of the inference from non-communication. It is submitted that this latter is a constant, equally applicable to young and old, and hence that the actuarial tables should be applied only to shorten the period of seven years. Furthermore, the claim of the petitioners is not based merely on the fact that Thomas survived William, but necessarily also that William is now dead. If these claims are distinctly separate, the court is correct in claiming that the mortality tables can raise two presumptions: that Thomas lived to 1916, and that Thomas is now dead. But if the burden of proof were that Thomas died between 1916 and the present, that is, if this were one claim, then though the tables show that a majority of fifty-two year olds in 1894 will have survived 1916, but not the present, however only a very small minority will have died between those periods.

PROCESS — MANNER AND EFFECT OF SERVICE — PRIVILEGE OF NON-RESIDENT WITNESS FROM SERVICE AS OFFICER OF A CORPORATION. — An officer of a corporation was served with process in a county through which he was traveling, in order to serve as a witness, in obedience to a subpoena. A statute provides that "a witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county, while going, returning or attending, in obedience to a subpoena." OKLAHOMA REV. LAWS, 1910, § 5064. *Held*, that the service did not give jurisdiction of the corporation. *Commonwealth Cotton Oil Co. v. Hudson*, 161 Pac. 535 (Okla.).

The statute relates only to the question of venue, and does not mention the rights of a corporation. See *Linn v. Hagan's Adm'r*, 121 Ky. 627, 628, 87 S. W. 1101. But by common law witnesses are privileged from service of process. *Hicks v. Besuchet*, 7 N. D. 429, 75 N. W. 793; *Letherby v. Shaver*, 73 Mich. 500, 41 N. W. 677. See *Lamkin v. Starkey*, 7 Hun (N. Y.) 479. See also TIDD, PRACTICE, 195; ALDERSON, JUDICIAL WRIT AND PROCESS, § 120; 23 HARV. L. REV. 474. This applies even where the witness attends the trial voluntarily. *Chittenden v. Carter*, 82 Conn. 585, 74 Atl. 884. If this privilege were in the nature of a reward for the witness's services, it might be arguable that it extended only to his personal capacity; but if it is considered a privilege of the court, it ought to cover the witness's official capacity as well. Authority supports this latter view. See *Parker v. Marco*, 136 N. Y. 585, 589, 32 N. E. 989. Cf. *Holyoke, etc. Ice Co. v. Amsden*, 55 Fed. 593. So, as the purpose of the privilege is to expedite the administration of justice, and as public policy demands that witnesses shall feel free to attend trials without being subject to service of process, it has even been held that service of process upon a witness constitutes contempt of court. *Bridges v. Sheldon*, 7 Fed. 17; *In re Healey*, 53 Vt. 694. It follows that the decision in the principal case is sound, and it is supported by the authorities. *Sewanee, etc. Co. v. Williams*, 120 Tenn. 339, 107 S. W. 968. Cf. *Mulhearn v. Press Publishing Co.*, 53 N. J. L. 150, 20 Atl. 760. But see *Currie Fertilizer Co. v. Krish*, 74 S. W. 268, 269 (Ky.).

TRADE SECRETS — LIST OF CUSTOMERS: USE BY FORMER EMPLOYEE. — The plaintiff was engaged in the business of supplying towels and aprons to factories and offices. The defendants were former employees. Plaintiff seeks to restrain them from soliciting for themselves the custom of those whom they had served while in his employ. *Held*, that he is not entitled to an injunction *pendente lite*. *New York Towel Supply Co., Inc. v. Lally*, 162 N. Y. Supp. 247 (Sup. Ct., King's Cty.).



The plaintiff alleged that he had built up a large patronage for himself as an accountant; that he had employed the defendant as his confidential manager; and that since his discharge the defendant has made use of information derived from plaintiff's list of customers to solicit the patronage of these customers for himself. The defendant demurred. *Held*, that the complaint sets forth a good cause of action and that an injunction issue. *Goldschmidt v. Sachs*, 162 N. Y. Supp. 323 (Sup. Ct., N. Y. Cty.).

If a servant on quitting his employer carry away with him a list of customers with which he had been entrusted, or a copy of such list, it is a breach of his "duty of loyalty," and he may be compelled to return or destroy the list so taken. *Grand Union Tea Co. v. Dodds*, 164 Mich. 50, 128 N. W. 1090. Some cases go further and restrain him from soliciting the patronage of any customer whose name appeared on the list. *Stevens & Co. v. Stiles*, 29 R. I. 399, 71 Atl. 802. In a sense the more drastic decree is punitive. Yet it is obvious that the other would, in practice, often fail to afford plaintiff adequate protection. A more difficult problem arises when the former employee relies only upon his memory for the names communicated to him. Here no more definite test seems possible than whether, in the light of all the facts, the employer's list of customers may fairly be termed a "trade secret." *Boosing v. Dorman*, 148 App. Div. 824, 133 N. Y. Supp. 910. Thus, for example, if the customers did not deal exclusively with plaintiff and could readily have been located by any business competitor, the departing employee need not "wipe clean the slate of his memory," and no injunction will issue. *Boosing v. Dorman*, *supra*; *Peerless Pattern Co. v. Pictorial Review*, 147 App. Div. 715, 132 N. Y. Supp. 37. But if the customers are exclusive patrons, likely because of a system of trading stamps to continue their dealings with plaintiff, and whose names and patronage have been acquired by years of enterprise and advertising, the former employer is entitled to protection. *Witkop & Holmes Co. v. Boyce*, 61 Misc. 126, 112 N. Y. Supp. 874, affirmed 131 App. Div. 922, 115 N. Y. Supp. 1150; *Witkop & Holmes Co. v. Boyce*, 64 Misc. 374, 118 N. Y. Supp. 461. In each case the particular facts must control. On the one hand the fruits of business industry and perseverance must be protected in so far as is possible; on the other, the whole policy of the law demands that budding competition be not stifled, that employees be not arbitrarily deprived of the increased market value which is a legitimate perquisite of protracted service in any line of business. Both New York cases seem, therefore, sound and reconcilable.

**TRANSFER OF STOCK — LIABILITY OF A BROKER, ACTING FOR AN UNDISCLOSED PRINCIPAL, FOR CALLS ON STOCK.** — The registered owner of bank stock, subject to statutory double liability, sold to a broker at auction. The broker, unknown to the vendor, was acting for a principal. The certificates, assigned in blank, were turned over to the broker who paid for them. He then assigned them to his principal, and collected his commission. Subsequently, and before any change of name on the registry of the bank, there was a call on the stock, which the original vendor, as the owner of record, was forced to pay. He thereupon sued the broker for reimbursement. *Held*, that he may not recover. *Richards v. Robin*, 162 N. Y. Supp. 12 (App. Div.).

Under the law of New York, although a registered shareholder is liable to the corporation, the legal title to the shares nevertheless passes with delivery regardless of any rules of the corporation to the contrary. See 8 N. Y. CONSOL. LAWS, 1989, 1990. Surely, then, there must be recovery in quasi-contract from the title-holder of the shares when the call was assessed, for the payment by the shareholder of record. But such liability cannot extend to the agent in the principal case, for he was not the holder of the shares when the call was made. At common law, although the title to the shares did not pass, the vendee of

stock was likewise liable to indemnify his vendor for calls subsequent to the purchase. See 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 176; 2 COOK, CORPORATIONS, 7 ed., § 258. This result was reached by imposing a constructive trust on the vendor for all dividends paid him as the registered owner, with a consequent right to exoneration from all calls from which he relieved the beneficial owner. *Kellogg v. Stockwell*, 75 Ill. 68; *Humble v. Langston*, 7 M. & W. 517, 530; *Castellan v. Hobson*, L. R. 10 Eq. Cas. 47, 51. See *Locke v. Farmer's, etc. Trust Co.*, 140 N. Y. 135, 143, 35 N. E. 578, 580. But under this trust theory it is equally clear that the agent cannot be held, for the holder of the shares alone would be the beneficiary. Some courts, however, allow the registered holder to recover from his vendee on the basis of an implied contract that he shall be held harmless. *Walker v. Bartlett*, 18 C. B. 845. See *Brigham v. Mead*, 92 Mass. 245. Now in the principal case, as the agent bought to all intents and purposes as the principal, he may be held to the liability of a principal. See 2 MECHEM, AGENCY, §§ 1729, 2419. The question therefore arises, granted that such warranty of indemnification exists, is it limited to the time during which the vendee holds the stock? The basis of this contract theory is the analogy to the promise by the sublessee implied on the assignment of a lease, to indemnify the original lessee for breach of the covenant to pay rent. See *Burnett v. Lynch*, 5 B. & C. 589. But under certain circumstances, even this promise in the case of land is considered limited to the sublessee's period of ownership of the lease. *Walker v. Physick*, 5 Pa. St. 193. In the case of stocks, the ease of transfer and the disinclination that must be present of a vendor to be liable for all subsequent vendees must rebut any implied promise to indemnify for calls after having transferred the stock. The cases have so held. *Rogers v. Tolland*, 43 Pa. Super. Ct. 248, 255. See *Walker v. Bartlett*, 18 C. B. 845, 862.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — OBLIGATION TO PREFER ONE SORT OF CESTUIS OVER ANOTHER. — A testatrix bequeathed all her property to trustees to convert and raise a fund of which the plaintiff was to be life-tenant. The trustees were given power to delay sale or conversion; but in the meantime the plaintiff was to receive three and one-half per cent interest. The trustees decided, *bona fide*, as the court found, to delay conversion until after the war, when a better price might be obtained. The plaintiff desires an immediate conversion in order that he may obtain a larger interest on the money. He sues to compel the trustees to convert. *Held*, that the plaintiff must be preferred to the residuary *cestuis*. *Re Charteris*, 179 L. T. J. 179 (Ch. D.).

A court will interfere to prevent the dishonest or capricious use of the power of a trustee. *Dingman v. Beall*, 213 Ill. 238, 72 N. E. 729. But when, as in the principal case, the trustee's discretion is exercised honestly, it cannot in general be reviewed. *Smith v. Wildman*, 37 Conn. 384. Thus when realty is devised to trustees to convert, with discretion to postpone the sale, they may generally exercise this discretion without interference from the court. *In re Blake*, 29 Ch. D. 913. The tendency, however, is not to allow the trustees to vary the relative interests of different classes of the beneficiaries. *In re Courtier*, 34 Ch. D. 136; *In re Rawlks*, [1900] 2 Ch. 107. See *Hampden v. Earl of Buckinghamshire*, [1893] 2 Ch. 531, 544. But even this will be allowed if it is clear that the testator intended it. *In re Pitcairn*, [1896] 2 Ch. 199. The principal case, therefore, can only stand if the power of delaying conversion was given primarily for the purpose of protecting the plaintiff. A more natural construction would be that it was given to protect the residuary *cestuis*, especially in view of the fact that the plaintiff was to be paid a definite rate of interest before the conversion.

VOLUNTARY ASSOCIATIONS — EFFECT OF INCORPORATION AND SUBSEQUENT DISSOLUTION. — A beneficial society was formed as an unincorporated associa-



tion. Subsequently it became incorporated in New Jersey. Owing to a New Jersey decision unfavorable to the corporation, it was voluntarily dissolved. Some of the members seized property of the society, claiming that the voluntary association still existed. The others seek to recover the property. *Held*, that they may recover it. *Schriner v. Sachs*, 253 Pa. 611, 98 Atl. 724.

After there had been the same organization, incorporation, and dissolution as in the above case, some of the members, as an independent body, were exercising the powers of the society. The others, claiming the existence of the voluntary association, seek to enjoin them. *Held*, that an injunction will not issue. *Doan v. Jones*, 99 Atl. 192 (N. J.).

If the incorporation of an existing association does not destroy the association but merely adds to it a corporate form, then the effect of the dissolution of such a corporation would in every case be no more than a removal of the form and would leave the original association intact. Such is the theory of the Pennsylvania court. But, by statute, dissolution ordinarily means a liquidation, and a distribution of the property. See 5 THOMPSON, CORPORATIONS, § 6465. And it is hard to justify a flat exception to this procedure as to all corporations formed from voluntary associations. Even if the statute were no obstacle, there are practical difficulties in this Pennsylvania view. For example: A majority of stockholders may ordinarily dissolve a corporation. See 5 THOMPSON, CORPORATIONS, § 6500. But, in the absence of regulations to the contrary, it requires unanimous consent to dissolve an association. *Hill v. Rauban Arre*, 200 Mass. 438, 86 N. E. 924. *Cf. Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53, 76. So, where an association becomes incorporated, if the association still exist, there could be no complete termination of the unit without unanimous consent of the members. The better view, it is submitted, is that the incorporation completely ends the association. What few decisions there are, seem to hold this way. See *National Organization v. Zuraw*, 89 Conn. 616, 619, 94 Atl. 976, 977; *Red Polled Cattle Club v. Red Polled Cattle Club*, 108 Ia. 105, 109, 78 N. W. 803, 805. Decisions also hold that unanimous consent is as necessary to incorporate the association as to dissolve it. *Mason v. Finch*, 28 Mich. 282. See *Koprucke v. Mojcrechowski*, 130 N. Y. Supp. 736, 739; WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS, 306. These tend to show that the significance of dissolution of the association and incorporation of it are the same, namely, to entirely end the association. It would follow that the end of the corporation does not in itself mean the revival of the association. However, there is no reason why all the members might not immediately on the dissolution of the corporation form an association to take over the business of the corporation. Nor does there seem to be any reason why the purpose of the dissolution might not show this act itself to be the formation of a new association.

## BOOK REVIEWS

INTERNATIONAL CASES, ARBITRATIONS, AND INCIDENTS. By Ellery C. Stowell and Henry F. Munro. Boston: Houghton Mifflin Company. 1916. Two Volumes. Volume I, Peace, pp. xxxvi, 496. Volume II, War and Neutrality. pp. xvii, 662.

In these volumes the authors collect and classify a large number of incidents bearing upon the practice of nations regarding international rights and duties. The incidents are sometimes narrated in the terms of newspaper accounts of official documents; but to a large extent the authors have been compelled to resort to paraphrase and condensation. The result is a mass of documentary or semi-documentary matter extremely useful as a basis for classroom discussion. Now and then there is expression of the opinions of the authors; but this

happens so seldom that the utility of the volumes in original investigation is not appreciably diminished.

The title is somewhat misleading, as it may cause the reader to expect judicial decisions as the chief feature, whereas the judicial decisions given are a rather small fraction.

The variety and interest of the contents will be best indicated by mentioning some of the topics.

In the volume on Peace there are about one hundred and twenty-five items. Among these are the arrest of the ambassador of Peter the Great in London in 1708 (p. 1), the meddling of the British minister with American politics in 1888 (p. 10), the Koszta incident between Austria and the United States in 1853 (pp. 51, 298), the Dogger Bank incident of 1904 (p. 98), the collective intervention because of the Boxer uprising in China in 1900 (p. 112), the return of the Chinese indemnity by the United States in 1907 (p. 117), the *Caroline* affair of 1837 (p. 121), the Schnaebele incident of 1887 (p. 225), the granting of asylum by the American legation in Chile in 1891 (p. 243), the lynching of Italians in New Orleans in 1891 (p. 264), and the Cutting incident with Mexico in 1886 (p. 386); and there are also summaries of cases before the so-called permanent court of arbitration at The Hague and other arbitral tribunals, and of decisions by courts of several countries.

The volume on War and Neutrality covers almost two hundred and fifty items; and more than one hundred of these relate to the War of 1914. Here one finds, among many other things, the outbreak of war with Spain in 1898 (p. 25), the commencement of hostilities in the Russo-Japanese War of 1904 (p. 26), the escape of German officers interned on the *Kronprinz Wilhelm* in 1915 (p. 49), the terms of Johnson's surrender to Sherman in 1865 (p. 58), abuse of the white flag in 1914 (p. 67), the capture of Major André in 1780 (p. 78), the use of asphyxiating gases in 1915 (p. 117), treatment of civilians in Belgium in 1914 (p. 119), the execution of Captain Fryatt in 1916 (p. 124), Lincoln's letter on confiscation in 1861 (p. 141), the exequaturs of consuls in Belgium in 1914 (p. 147), the protest against the German modifications of Belgian laws in 1915 (p. 150), the Cuban *concentrados* of 1897 (p. 169), the destruction of Rheims cathedral in 1914 (p. 184), the German memorial regarding the employment of colored troops in 1915 (p. 187), the execution of Miss Cavell in 1915 (p. 196), the treatment of British prisoners in Germany in 1915 (p. 209), Belgian relief in 1914 (p. 212), the North Sea Mine Field in 1914 (p. 214), the *Baralong* incident of 1915 (p. 218), President Wilson's reply to the Belgian Commission in 1914 (p. 223), dum-dum bullets in 1914 (p. 227), the segregation of submarine prisoners in 1915 (p. 238), proclamations posted by the Germans in Belgium in 1914 (p. 242), the recognition of Confederate belligerency in 1861 (pp. 247, 260), coinage of money for a belligerent country in 1898 (p. 267), passage of troops across American territory in 1915 (p. 268), the sale of United States ordnance in 1870 (p. 269), German comments on American neutrality in 1915 (p. 271), the request for the recall of Ambassador Dumba in 1915 (p. 286), the treatment of wireless messages by a neutral government in 1915 (p. 289), the coaling of German warships from American ports in 1914 (pp. 290, 311), the treatment of armed merchantmen in American ports in 1916 (p. 315), the negotiating of war loans in a neutral country in 1915 (p. 321), the Austrian protest against the sale of munitions by neutral individuals in 1915 (p. 326), the Alabama Claims Arbitration of 1872 (p. 336), the Trent affair of 1861 (p. 458), war zones in 1915 (p. 485), the Declaration of London of 1909 (p. 492), the *Knight Commander* incident of 1904 (p. 513), the destruction of the *William P. Frye* in 1915 (p. 517), the attack on the *Petrolite* in 1915 (p. 551), the *Wilhelmina* incident of 1915 (p. 559), the *Lusitania* incident of 1915 (p. 571), and the blacklisting of American merchants in 1916 (p. 599); and there are notes of decisions by prize courts.

EUGENE WAMBAUGH.



**LORD STOWELL: HIS LIFE AND THE DEVELOPMENT OF ENGLISH PRIZE LAW**  
By Edward Stanley Roscoe. Boston and New York: Houghton Mifflin Company. 1916. pp. x, 116.

The present is a time singularly appropriate for the appearance of a study of the life and work of William Scott, Lord Stowell, who, as sole judge of the High Court of Admiralty throughout the period of the Napoleonic wars, shaped, integrated, and to a large extent created the common law of prize. It is indeed, only in the last three years that his name has emerged from the shadow so long cast by his brother Eldon, the Lord Chancellor. And it is fortunate that this book should be by so great an authority on English prize law and a writer of such charm as Mr. Roscoe.

Lord Stowell's life is interesting, though not especially eventful. He was, curiously enough, an esteemed and appreciated member of the famous Johnson circle, and, with Reynolds and Sir John Hawkins, was one of Johnson's executors. His eighteen years at Oxford probably afford the explanation of Stowell's intimacy and sympathy with such men as Reynolds, Boswell, Burke, and Sheridan. And these Oxford years had also, as Mr. Roscoe points out, a permanent influence upon Stowell's legal work: "no one quite like him ever, in modern times, occupied a high judicial position."

The description of Doctors' Commons, where Stowell dwelt in company with the High Court of Admiralty and all its practitioners, is of considerable interest. So also is the history of the British prize court. Regretfully we learn that, with the opening in recent years of the admiralty courts to general advocates, the old title of proctor has fallen into disuse, so that one may no longer proclaim himself, with Benedict, "attorney at law, counsellor in equity, proctor in admiralty."

Although contemporary opinion based what scant claims to fame he was allowed upon his ecclesiastical judgments, it is Lord Stowell's prize cases that constitute his great work. This is partially due, of course, to his exceptional opportunities to develop prize law. When Stowell went upon the bench, in October, 1798, there were already arising the first of the prize cases that in the next few years were to deluge and perplex the courts of Great Britain and of the United States. And indeed it is remarkable how many of his famous cases were decided by Stowell in the first few months of his judicial career.<sup>1</sup> When he went upon the bench there existed no reports of prize cases, and the recollections of the judges and advocates, which aided a common-law court, were here largely lacking because of the long intervals of peace in which there were neither prize courts nor prize causes. So that text writers were largely relied on, and Grotius and Bynkershoek were of equal authority in British courts of prize and in French. This was now changed; with Lord Stowell's first decisions Christopher Robinson began his volumes of reports. Thus began the separation of English prize law from that of the Continent — a process which culminated last year in the *Zamora dictum*.

Of this nationalizing process which Lord Stowell's decisions inaugurated Mr. Roscoe fully approves. It is of course true that English prize law is thus harmonized with the rest of English municipal law — a result which may be scientifically pleasing to an English lawyer, but which can hardly be so pleasing to the aliens who alone can appear as claimants in the majority of prize cases. When once one admits, as Mr. Roscoe does (p. 85), that many of the decisions of the English prize court are "legally sound but indefensible from the point of view of commercial equity," it is obvious that the English court is following past decisions of its own in preference to a conflicting general law, whether of the sea or of maritime nations. It would seem that England has made her

<sup>1</sup> For an interesting illustration of this, see the cases cited in 30 HARV. L. REV. 497, n. 2.

prize law conform to her common law at the expense of the harmony of international law. Mr. Roscoe recognizes this, to some extent at least, and offers the following truly British solution: "An assimilation of the prize law of other European countries to that of Great Britain can in the future only be obtained by the international recognition, as expressions of the law of nations, of particular reasoned British precedents. . . ." And this solution, as he justly says, "can scarcely be regarded as probable."

The chapters on "The Stowell Case Law and the Declaration of London," and on "The Stowell Case in the Great War," are valuable. The author regards the Declaration of London with much hostility, though conceding that it may be of some value to countries which have not the English case law of prize. And the existence of the English case law causes the author also to declare: "It is clear that an international Court of Appeal for prize cases is outside the range of possibility" (p. 92). The appendices are well arranged and of value.

The occasional rather naïve outcroppings of patriotism do not affect the value of the volume or destroy its charm. It is a book which should interest all lawyers and many laymen at this time.

RAEBURN GREEN.

**CASES IN QUASI CONTRACT, SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS.** By Edward S. Thurston. St. Paul: West Publishing Company. 1916. pp. xv, 622.

This is an excellent case book. In fact the best on the subject now existing. Its six chapters, covering the conventional topics hitherto dealt with in text-books and case books, are: Nature of Quasi Contract, 50 pages; Benefits Conferred by Mistake, 182 pages; Benefits Conferred under Contract which has been Partially Preferred, 195 pages; Benefits Voluntarily Conferred without Contract, 56 pages; Benefits Conferred under Compulsion, 89 pages; Waiver of Tort, 41 pages. The arrangement of the subdivisions and the selection of cases seem to be admirable. There is of course no better proof of this than the use of the book in the class room, and the volume has well stood a six weeks' test with students. The only possible improvement of classification that might be suggested in the earlier portion of the book would be to place ch. II, 1, I, c, Mistake as to Collateral Matters, after ch. II, 2, IV, Mistake as to the Nature of Subject-Matter of a Contract. But this is arguable.

Many of the cases are new; more than two-thirds of them had not appeared in Scott's Cases. A partial test reveals that they have been excellently abbreviated, with the exception that an interesting point is omitted in *Haven v. Foster* 9 Pick. 112 (p. 228). The citation of cases in the notes is careful; and there seems to be no instance of the fault, exasperating to the teacher, of printing cases not in point. In case book making it is no doubt ordinarily wise to select for the notes, while indicating the weight of authority, only important decisions. This Professor Thurston has done well. But in a subject like Quasi Contract, which is still incompletely understood by the courts, and in which it is difficult to run down cases in digest, it would seem helpful to have a more exhaustive list of authorities in the notes than here appears; though this omission is partially remedied by the number of new principal cases. In any event the important recent decision on change of position of *Baylis v. Bishop of London*, [1913] 1 Ch. 127, should have appeared, or at least been referred to.

We can commend highly the quality of the paper. The book, containing over 600 pages, is less than 1¼ inches thick including the cover; and yet the paper takes readily and retains well pencil or ink annotations.

JOSEPH WARREN.



**AMERICAN DEBATE.** A History of Political and Economic Controversy in the United States, with Critical Digests of Leading Debates. By Marion Mills Miller. New York: G. P. Putnam's Sons. 1916. pp. xiii, 467, ix. 417.

This painstaking work is mainly a history, the first volume dealing with the constitutional questions of this nation from 1761 to 1861, and the second with land and slavery problems from 1607 to 1860. It is, however, copiously interspersed with selections from, and summaries of, arguments by contemporary statesmen.

The volumes are at once a "horn-book of politics," to use an expression in a quotation of the author's from John Randolph, and a manual of our nation's forensic discussion. As the former, they abound in numerous biographical sketches, due prominence being accorded to facts revealing the legally trained man as perennially predominant in our public life. As the latter, they present in the form of quotation concrete illustrations of the application of such training in the arguments of partisans over the living issues of their day. Thus, although these volumes are in no sense of a legal nature, a study of them, without more, would cause wonder whether, notwithstanding the assertion of Theodore Roosevelt,<sup>1</sup> lawyers might not be the sole leaders of a permanently successful nation.<sup>2</sup>

To the student of law, moreover, the appearance of Chancellor Wythe as legal instructor of Marshall, Monroe, and Clay, and the sketches of Lord Mansfield and of Benjamin, author of the treatise on "Sales," are refreshingly unique in a United States history of this scope and size. The work, withal necessarily superficial, relates the fundamentally all-important story of the making of our Constitution with a fair degree of incisiveness. Likewise of legal interest are the "*Essex*" and "*Creole*" decisions and the inevitable *Dred Scott* case.

Accordingly, one aim of the author, as stated in his preface, that his efforts might become acceptable to the bar, seems to hold the promise of realization, for his work possesses that most essential prerequisite of being interesting.

R. S. WILKINS.

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**LEADING CASES ON INTERNATIONAL LAW.** By Lawrence B. Evans. Chicago: Callaghan and Company. 1917.

**POSSESSORY LIENS IN ENGLISH LAW.** By Lancelot Edey Hall. London: Sweet and Maxwell, Limited. 1917. pp. x, 101.

**BUSINESS COMPETITION AND THE LAW.** By Gilbert Holland Montague. New York and London: G. P. Putnam's Sons. 1917. pp. vi, 318.

**THE STORY OF YPRES.** By Hugh B. C. Pollard. London: McBride, Nast and Company, Limited. 1917. pp. 63.

**ADDRESSES AND PAPERS ON INSURANCE.** By Rufus M. Potts. Printed by authority of the State of Illinois. pp. 489.

**THE MORALS OF MONOPOLY AND COMPETITION.** By Homer Blosser Reed. Menasha, Wisconsin: George Banta Publishing Co. 1916. pp. iv, 143.

**LORD STOWELL: HIS LIFE AND THE DEVELOPMENT OF ENGLISH PRIZE LAW.** By E. S. Roscoe. Boston and New York: Houghton Mifflin Company. 1916. pp. x, 116.

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<sup>1</sup> Mr. Roosevelt's exact words, contained in "Law and Order in Egypt," an address before the National University in Cairo, March 28, 1910, were, "No people has ever permanently amounted to anything if its only public leaders were clerks, politicians, and lawyers." See "African and European Addresses," by Theodore Roosevelt. New York: G. P. Putnam's Sons. 1910.

<sup>2</sup> Perhaps Mr. Roosevelt would not dissent. It may have been the contaminating co-leadership of clerks and politicians to which he was objecting.

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## WAR EMERGENCY LEGISLATION — A GENERAL VIEW

IN the War of 1914 the emergency legislation of the several countries of Europe has covered so many subjects that in case emergency legislation is to be framed in the United States the framers of it will look to recent European models. With us such legislation must pass the tests both of expediency and of constitutionality. My present undertaking is to discuss constitutionality. To that end it is advisable to begin with a brief description of the emergency legislation of Great Britain, then to discuss that legislation in the light of the British system, and finally to test it from the point of view of the Constitution of the United States.

### BRITISH WAR EMERGENCY LEGISLATION

The British emergency legislation touches private property in every conceivable way, as it provides for regulating the sale of it or the use of it by the owner, and for taking over the management of it, and for confiscating the title to it, and for destroying it. When the regulation of sale takes the form of fixing prices, the intent is not that the owner shall suffer loss, but simply that he shall not make an unreasonable profit. Similarly, when the management of property is taken over by the government there is no intent that the owner shall suffer a total loss. Also in the case of compensation, at least when the transaction takes the form known to American lawyers as the exercise of the right of eminent domain, there is sometimes, though not invariably, an attempt to give indemnity. Yet beyond



question property owners are suffering losses outside the mere burden of taxation and of war prices; and they are suffering such losses by reason of legislation in a country where legislation has long had as one of its chief purposes the protection of the owner of property.

Nor is the still more highly prized privilege of personal liberty enjoyed as freely as heretofore. Among many restrictions, the resident of Great Britain may not go out freely at night, or have bright lights in his house, or communicate by writing, otherwise than through the mail, with persons in enemy countries or indeed with alien enemies in Great Britain.

Even life itself is not surrounded with the old safeguards of a British jury; for offenders against the emergency legislation may be tried in military tribunals.

This summary indicates the general nature of the restrictions. Later it will be necessary to go into more minute detail.

The items of legislation already given indicate its substance. What is equally interesting is its form. The form is sometimes an Act of Parliament, sometimes a Royal Proclamation, and more frequently a series of Regulations embodied in an Order of the Privy Council or of some other governmental body or official. In comparison with the whole body of emergency documents — covering almost a thousand pages a year — the Acts of Parliament are so slight in bulk as to give to a careless reader the initial impression that by a peaceful revolution in government the King and the Privy Council have largely absorbed the power of Parliament; but even the slightest examination of the documents shows that both the King and the Privy Council, as well as all the other governmental agencies, appreciate that such legislative power as they seem to possess comes through parliamentary authorization or ratification.

As matter of form, then, the legislation usually appears in documents which are not Acts of Parliament. Thus, the chief document has been The Defence of the Realm (Consolidation) Regulations, 1914, covering eighteen pages, issued by the Privy Council under the authorization of the Act of Parliament, only one tenth as long, entitled The Defence of the Realm Consolidation Act, 1914.

Under the British constitutional system there can be no question that the King and the Privy Council cannot, either separately or together, change the law. This has recently been held in *The*

*Zamora*,<sup>1</sup> — a prize case. Yet it is equally clear that there is no assignable limit to the delegation of legislative power by Parliament. Thus one of the questions naturally arising in the United States is non-existent in Great Britain.

No, in Great Britain the legislative power can be delegated; and thus the question is simply whether Parliament itself has power to make such drastic enactments as those which have been summarized. In Great Britain are life, liberty, and property protected against Parliaments? No. There are, to be sure, Magna Charta (1215), the statute of the 28th year of Edward the Third, Chapter 3 (1354), the Petition of Right (1628), the Habeas Corpus Act (1679), and the Bill of Rights (1689); and each of these famous documents is part of the pedigree of the Constitution of the United States. Yet, whereas the Constitution of the United States restricts legislation and executive and judicial power, these old British enactments do not restrict Parliament.

Magna Charta (1215) limits the executive department alone when it says, as commonly translated:

"No freeman shall be taken or imprisoned . . . or outlawed or exiled or in any way destroyed nor will we go upon nor send upon him, except by the lawful judgment of his peers or by the law of the land."

Similarly it is a limitation upon the Crown that is in mind when the Statute of 28 Edward III. (1354), says, as usually translated:

"No man of what estate or condition that he be shall be put out of land or tenement nor taken nor imprisoned nor disinherited nor put to death, without being brought in answer by due process of law."

Again, the Petition of Right (1628) distinctly directs itself against the Crown alone when it quotes the former documents and proceeds to complain of imprisonment by the King, and of billeting of soldiers and sailors, and of the issuing of commissions enlarging the powers of military tribunals.

So, too, the Habeas Corpus Act (1679) is directed exclusively against those having a person in their custody, obviously administrative officials as a rule.

Finally, the Bill of Rights (1689) is frankly nothing but a limitation upon the power of the Crown. The first few of the rights therein declared are worth quoting:

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<sup>1</sup> [1916] 2 A. C. 77.



"1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

"2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

"3. That the commission for erecting the late Court of Commissioners for Ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

"4. That the levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.

"5. That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.

"6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law."

Thus it appears clear that Parliament is under no express limitations regarding legislative power. Indeed, Blackstone, in a familiar passage of his Commentaries,<sup>2</sup> says of Parliament:

"It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power which must in all governments reside somewhere is intrusted by the constitution of these Kingdoms."

Also, in our own time Dicey, in his *Law of the Constitution*,<sup>3</sup> has repeated the doctrine and given many illustrations of it.

It is, then, not surprising to find the Court of Appeal in 1915, in the case entitled *In re A Petition of Right*,<sup>4</sup> holding that under the Defence of the Realm Consolidation Act, 1914, and The Defence of the Realm (Consolidation) Regulations, 1914, the military authorities could, without legal right to compensation, take possession of lands and buildings for securing the public safety and the defence of the realm during the war.

As the British war emergency legislation has been enacted either by Parliament itself or by bodies and officials expressly empowered by Parliament, it is obvious that, for the reasons already outlined,

<sup>2</sup> 1 BL. COMM. 160.

<sup>3</sup> Chapter I.

<sup>4</sup> [1915] 3 K. B. 649.

the British system of government gives no ground for attacking it in the courts as invalid. It will be found that in the United States the questions are very different.

### THE CONSTITUTIONALITY OF FEDERAL WAR EMERGENCY LEGISLATION

Would the British war emergency legislation be valid if adopted by the Congress of the United States?

It has been explained that in form the British legislation is largely composed of regulations promulgated by bodies and officials endowed by Parliament with part of its own unlimited power. The interesting question whether under our Constitution Congress can delegate legislative power to similar bodies and officials will not be discussed at present; and attention will be directed exclusively to ascertaining whether the ground covered in Great Britain can be covered through direct legislation of Congress.

The items of British legislation are so numerous, and so different from one another, that it would not be well to treat them together. Yet before approaching them one by one it is practicable and desirable to notice a few of the pertinent general principles of the American constitutional system.

In the United States there is no counterpart to the unlimited power of Parliament, for the Constitution restricts each of the government's departments — judicial, executive, and legislative.

The constitutional limitations upon Congress are of several sorts. Some are stated as limitations upon Congress expressly. For example,

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Others are found argumentatively. Thus the *prima facie* impossibility of delegating legislative power is deduced from the provision that

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Others are part of the restriction placed upon the whole federal government. Thus,



"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Regarding all the powers given to the national government it is to be said that the Constitution, like any other document, *prima facie* is to be understood as having in mind normal life and not abnormal life — for normal life is, so to speak, its atmosphere and context. As peace and not war is normal, the Constitution, in the absence of clear words to the contrary, by its express language creating express powers is understood to intend to create only the powers requisite for times of peace. Conversely, limitations expressly imposed are to be understood *prima facie* as dealing with times of peace and not of war. Yet the *prima facie* meaning may be so enlarged as to cover the abnormal circumstance of war, in case such construction be reasonable and be not expressly forbidden.

It cannot be denied that both powers and limitations are created by implication. For example, it is by implication that we learn the existence of the national power to charter a corporation,<sup>5</sup> and to take land in a State by eminent domain;<sup>6</sup> and it is by implication that we learn the national inability to tax an official salary paid by one of the States.<sup>7</sup>

If the federal government has an incidental power to secure by eminent domain the performance of some of the functions for which it exists, is it not obvious that it has an incidental power to preserve its own existence, and that this power is at least as applicable in time of war as in time of peace? When the preamble to the Constitution says that

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America,"

does it not indicate argumentatively, even without the aid of express provision in the Constitution, that the United States may preserve its own existence by force?

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<sup>5</sup> *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

<sup>6</sup> *Kohl v. United States*, 91 U. S. 367 (1875).

<sup>7</sup> *The Collector v. Day*, 11 Wall. 113 (1870).

One is aided in answering such questions by remembering the doctrine regarding paper money. Notwithstanding the absence of express constitutional provision that the national government may issue legal tender paper, the national government through Act of Congress may issue such paper either as an incident of maintaining the government's existence in time of war or as an incident of sovereign power belonging to all governments to which it is not expressly denied.<sup>8</sup>

*A fortiori* it would have to be held that the national government may preserve its existence by war. Yet it is unnecessary to rely on implication regarding this matter. The Constitution expressly provides that

"The Congress shall have Power . . . To declare War . . . ; To raise and support Armies . . . ; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . ; And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."<sup>9</sup>

Thus the power to have forces and to prosecute war is granted expressly; and, further, though such a power obviously must carry with it vast incidental powers, the existence of such incidental powers is not left to implication alone but is itself recognized expressly.

The constitutional limitations most likely to be urged regarding emergency legislation are these:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>10</sup>

"Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two witnesses to the same overt Act, or on Confession in open Court."<sup>11</sup>

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<sup>8</sup> Legal Tender Cases, 12 Wall. 457 (1870); *Juilliard v. Greenman*, 110 U. S. 421 (1884).

<sup>9</sup> Art. I., sect. 8.

<sup>10</sup> Art. I., sect. 9.

<sup>11</sup> Art. III., sect. 3.



"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." <sup>12</sup>

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." <sup>13</sup>

"No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." <sup>14</sup>

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." <sup>15</sup>

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." <sup>16</sup>

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." <sup>17</sup>

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." <sup>18</sup>

"The powers not delegated to the United States by the Constitu-

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<sup>12</sup> Am. I.

<sup>13</sup> Am. II.

<sup>14</sup> Am. III.

<sup>15</sup> Am. IV.

<sup>16</sup> Am. V.

<sup>17</sup> Am. VI.

<sup>18</sup> Am. IX.

tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people." <sup>19</sup>

Let us now approach severally some of the items of the British emergency legislation.

The British government promptly, indeed even before the actual outbreak of war, took control over the transmission of messages by wireless telegraphy.<sup>20</sup> As Congress has express power "to regulate Commerce with foreign Nations, and among the several States," and as communication is commerce, and as wireless telegraphy is a mode of communication, and as wireless telegraphy even when not used for interstate or foreign communication may be an interference with such communication, it follows, even without the express provision that Congress shall have power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," that Congress may take control of wireless telegraphy; and, indeed, Congress took the necessary steps several years ago.<sup>21</sup> In the absence of the commerce clause such legislation would be upheld as an incident of the express powers "to declare War," "to raise and support Armies," "to provide and maintain a Navy," and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," since the legislation in question is a reasonable method of making the army and navy efficient and of preventing the transmission of intelligence to the detriment of the army and navy and to the disadvantage of the purposes for which the country maintains the army and navy.

Similarly, when, under an Act of Parliament, the British government prohibited the navigation of aircraft over the whole area of the United Kingdom, the coast-line, and the adjacent territorial waters,<sup>22</sup> what was done was what Congress might do either under the commerce clause or under the powers incident to making war and maintaining forces, as just now outlined.

The prohibition of the export of arms and ammunition <sup>23</sup> would be constitutional under the clause giving Congress power to regulate commerce with foreign nations. It would also be constitutional under the clauses giving Congress power to declare war, to

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<sup>19</sup> Am. X. 9

<sup>20</sup> Aug. 1, 1914; *EMERGENCY LEGISLATION*, 402.

<sup>21</sup> Act of Aug. 13, 1912; 37 U. S. STAT. AT L. 302.

<sup>22</sup> Aug. 2, 1914; *EMERGENCY LEGISLATION*, 47.

<sup>23</sup> Aug. 3, 1914; *EMERGENCY LEGISLATION*, 160.



support armies and maintain a navy, and to make all laws necessary and proper for carrying into execution the foregoing powers; for clearly war is meant to be successful, and an army and a navy to be useful, and war could not be successful nor an army and navy useful without arms and ammunition. And so too of the prohibition of the export of provisions.

Further, it would be possible to sustain by the commerce clause the validity of part of the provisions in the British Aliens Restriction Act <sup>24</sup> for prohibiting aliens from landing and embarking, for deportation of aliens, and for requiring aliens to remain within certain places; but it would be simpler, and quite as easy, to sustain the whole of them under the war and army and navy clauses.

Similarly, it is upon the war and army and navy clauses that one would support in America the provisions of the British Act of Parliament <sup>25</sup> for requisitioning carriages, horses, vessels, aircraft, food, and stores of every description, and the provisions of later legislation expressly extending to all interferences with private rights of property for the purpose of serving the public safety. It is true that an appeal would be taken to the provision in the Fifth Amendment to the effect that no person "shall be deprived of life, liberty, or property, without due process of law"; but the seizure of property in the emergency of war is an ancient procedure, not to be overthrown by language so devoid of specification as is this. Here is a place where one must bear in mind that the due process clause of the Fourteenth Amendment — "nor shall any State deprive any person of life, liberty, or property, without due process of law" — is held not to deprive a State of the power to protect health, morals, quiet, and the like, even at the expense of restricting or destroying life, liberty, or property.<sup>26</sup> If a State may thus, notwithstanding a due process limitation, interfere with life, liberty, and property for the sake of health, morals, quiet, and the like, it follows, *a fortiori*,

<sup>24</sup> Aug. 5, 1914; EMERGENCY LEGISLATION, 6.

<sup>25</sup> Aug. 7, 1914; EMERGENCY LEGISLATION, 11.

<sup>26</sup> *Bartemeyer v. Iowa*, 18 Wall. 129 (1873) (State may prohibit use of intoxicating liquor); *Munn v. Illinois*, 94 U. S. 113 (1876) (State may regulate charges of grain elevators); *Barbier v. Connolly*, 113 U. S. 27 (1885) (Municipal ordinance may prohibit public laundry work between certain hours and within certain neighborhoods); *Lawton v. Steele*, 152 U. S. 133 (1894) (State may protect fish by destroying nets); *Holden v. Hardy*, 169 U. S. 366 (1898) (State may make an eight-hour day for underground mine workers).

that notwithstanding a due process restriction the United States may interfere with life, liberty, and property for the sake of protecting the very existence of the government itself. The question of compensation is more serious. The Fifth Amendment says "nor shall private property be taken for public use, without just compensation." As has been said, all general language must be taken *prima facie* as referring to normal life, and the normal life is peace and not war. Yet the Fifth Amendment in a preceding provision bears war in mind, saying that for infamous crimes there must be a grand jury "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." Besides, payment for requisitions is a normal procedure. It will be urged, therefore, that the Fifth Amendment requires just compensation for requisitions. Nevertheless, it is important to recognize that the Fifth Amendment covers five topics, that these topics are not of the same sort, that the topic mentioning war is the first, that the topic regarding compensation is the fifth, and that the intermediate ones are far from having peculiar bearing upon war, though it may be admitted that they are not incapable of being applied intelligently to war as well as to peace. This will be seen clearly if with these points in mind the Fifth Amendment be read from beginning to end. After the insertion of figures to call attention to the several topics, the Amendment is this:

"(1) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; (2) nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; (3) nor shall be compelled in any criminal case to be a witness against himself, (4) nor be deprived of life, liberty, or property, without due process of law; (5) nor shall private property be taken for public use, without just compensation."

There can be no question that the fifth topic is as a matter of mere words so stated as to require compensation for the use of a battlefield. Yet it seems reasonable to say that these words, however wide their verbal meaning, do not mean to cover takings of such an abnormal nature, but mean simply to cover takings by way of eminent domain — peaceful and normal takings. Payments for requisitions from enemies or from friends are covered by the laws of war, and



payments for battlefields and the like are covered, if at all, by specific legislative grants of indemnity; and, as it seems, the compensation which is the topic of the concluding passage of the Fifth Amendment is compensation only for takings which are normal and peaceful, especially as payment for such normal takings was not required by the common law and needed this express regulation.

Let us now pass from considerations regarding property to considerations regarding personal liberty.

Combining the British Defence of the Realm Consolidation Act, 1914, and the Regulations based upon it, one finds provisions requiring persons to remove from areas important for military or naval uses, and to refrain from liquor selling, and at certain hours to extinguish lights, and to remain within doors, and to refrain from collecting information regarding the armed forces, and to refrain from having photographic apparatus in the vicinity of naval or military works; and one must now ask what would have to be said of the constitutionality of such restrictions in the United States. The apparent way to bring them within federal power is through the war and army and navy clauses of the Constitution; for the power to have an army and a navy carries with it the power to protect the bodies and individuals constituting the forces and to do what is necessary to secure the success of their operations. Here again the Fifth Amendment would be seized, and especially the provision that no person shall be deprived of life, liberty, or property without due process of law. Due process of law includes whatever was recognized as appropriate at the adoption of the Constitution. From the point of view of due process of law, whatever is old is good.<sup>27</sup> In war times such restrictions as those named have been common and are necessary. In other words, they are appropriate; and hence they comply with the requirement of due process.

Still more clearly, it is within congressional power to provide, as in the British Trading with the Enemy Act, 1914, and its successors, that business transactions with persons resident in hostile territory shall be a misdemeanor and that the subject matter shall be forfeited; for such transactions are obviously detrimental to the conduct of war, and contrary to public policy at common law, and within the commerce clause and the army and navy clauses of the

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<sup>27</sup> *Den d. Murray v. Hoboken Land Co.*, 18 How. 272 (1855).

Constitution, and not protected by the due process clause of the Fifth Amendment.

The instances of British legislation thus far discussed have been chosen as samples of the sort of problems and of the mode in which the problems would have to be met under the Constitution of the United States. To discuss the whole mass of British legislation appears unnecessary. Finally, it is also unnecessary at present to discuss whether individual States could enact similar legislation; for the important question now is simply whether the Nation can do so.

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## JURISDICTION OVER FOREIGN CORPORATIONS AND INDIVIDUALS WHO CARRY ON BUSI- NESS WITHIN THE TERRITORY

PROBABLY the most pressing of the tasks now confronting American students of Conflict of Laws is the delimiting of the jurisdiction of the courts over foreign corporations and non-resident individuals who carry on business within a state. It is common knowledge that a few of the states by their extremely liberal corporation laws have secured a practical monopoly of the profitable business of incorporating commercial enterprises the bulk of whose business is transacted in other states. But of more importance is the fact that the entrepreneurs, the investing public and financial resources of the nation, are all concentrated in a few localities remote from the states which constitute the exploited sections of the country. Consequently it has become vital that the states, without violating constitutional guaranties, discover methods of securing justice to their citizens at home in their dealings with foreign trading groups and individuals.

Jurisdiction over foreign corporations may appear to the casual observer to involve a generically different question from jurisdiction over non-resident individuals. But a moment's reflection will make clear that for practical purposes they are merely different phases of the less obvious but fundamentally more important problem of jurisdiction over foreign groups engaged in business within a state. The volume of business transacted by single non-residents through occasional visits or by correspondence is too small to create any social exigency. Our task is a by-product of the activities of great commercial aggregations controlled by non-resident individuals and groups corporate or unincorporate. This article will, therefore, primarily represent an investigation of methods of securing jurisdiction over such organizations.

The jurisdiction conferred upon any particular court is today a matter of statute and simply a question of delegation of authority. It may be settled by a glance at the statute books and annotating

authorities. What is important, therefore, is not to determine what jurisdiction the courts have been given, but what jurisdiction they can be given under accepted principles of Conflict of Laws and subject to the limitations of the Constitution. The discussion, however, of any moot question of jurisdiction must of necessity be prefaced by a restatement of certain fundamental principles axiomatic in Conflict of Laws which will be controlling of any conclusions proposed.

Jurisdiction, in the international sense, rests on the power of a sovereign to command and control persons and things. It does not arise from the consent of the governed; consent is only required for jurisdiction when the person consenting is not one of the governed. A sovereign is universally recognized to have the power to command a subject wherever he is; hence we have jurisdiction by allegiance. A sovereign is recognized by Common Law countries to have the power to command, despite his temporary absence, one who has established a domicile within its borders, giving it jurisdiction by domicile. The best-recognized and oldest form of jurisdiction is that obtained by the presence of the individual. This is the only form of jurisdiction exercised over property.

The sovereign has jurisdiction of the persons and property within its territory altogether irrespective of the consent of those persons, or the owners of the property. They may be rebels denying the authority of the government or even anarchists. But so long as a government is recognized to be *de jure* by other nations, their governments acknowledge its right to exercise sovereignty over all persons and things rightfully within its borders, and recognize abroad the legality of this exercise. We say rightfully, because it is evident that any extension of jurisdiction<sup>1</sup> by a method not recognized internationally as proper, could not be countenanced by other nations. It is particularly desirable to keep in mind that consent has nothing to do with the application of the laws of a sovereign to one who enters its territory. No government makes it a condition of admission into its territory that each person entering agree in fact to be governed by its laws. Certainly very few travelers are conscious parties to any such social contract. Indeed, every government is aware that a great many cross its borders with the

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<sup>1</sup> E. g., bringing persons or property within the existing boundaries of a sovereign by kidnapping, robbery, etc.



intention of being governed as little by its laws as they can manage. Yet entrance with such an intention alone has never been made a crime. As a matter of fact, their entrance into a territory cannot be said to constitute consent to be governed by the laws of that territory or even evidence it, because consent is neither asked nor necessary to the application of those laws.

The courts are generally entrusted with all the judicial jurisdiction actually exercised by their sovereign, only to be assumed, however, when invoked by suitors in the ways provided by the procedural law. This jurisdiction is over persons and things. When the former, it is said to be *in personam*; when the latter, *in rem*. When jurisdiction is exercised over property to give damages to the plaintiff without jurisdiction of the person of the defendant, it is said to be *quasi-in rem*. As the principles upon which jurisdiction *in rem* and *quasi-in rem* depend are simple and well settled, our attention may be confined to jurisdiction *in personam*.

In order to impose a personal obligation by means of a judicial proceeding, the court must get jurisdiction in one of four ways: (1) by presence, (2) by domicile, (3) by allegiance, (4) by consent. It is conceived that a court may obtain jurisdiction of a foreign corporation in two of these ways: by its consent or by its presence. The foreign corporation, assuming it to be a single group chartered by a single foreign state, is domiciled in and owes allegiance only to that state.

A brief survey of the history and legal theories of group personality affords the best avenue of approach to our subject. The mature development of the law of corporate association then suggests the advantage of treating next jurisdiction over foreign corporations. As space does not permit a discussion of the extent of state control of foreign corporations engaged in interstate commerce, the only constitutional questions raised in this division of the article will be those depending on principles of Conflict of Laws. The last division of the article covering jurisdiction of foreign unincorporated groups and individuals involves a study of the comity clause of the Constitution. It may be profitably subdivided into (a) scope of the comity clause, (b) jurisdiction over foreign unincorporated groups, and (c) jurisdiction over non-resident individuals.

## I

In the early law, the group of kindred living together constituted the legal unit. It was responsible for the delicts of its members, and all obligations were owed to it. It came to be represented by *paterfamilias*, who alone had legal personality, that is, was the subject of rights and duties. He owned the property of the group, he was liable for the delicts of its members, and he was entitled to their acquisitions.<sup>2</sup> But as Sir Henry Maine pointed out, the progress of law has, until recently, been from status to contract, that is, from the legal recognition of but a single member of the group, with the rest *in potestas*, to the recognition of each member as the subject of rights and duties equal with the first save in so far as natural incapacity prevents. Hence today we say that the individual is the natural legal unit.

But dealing with man as an individual does not exhaust his jural significance. His activities and interests are not merely individual; they are also collective. His home life is bound up with the family; his economic life is bound up with his business associates. He seeks to secure his religious interests in the church, and his more important communal interests in the state and its various subdivisions. Passing from the individual to the group, we find its members working as a unit to secure group ends. Ordinarily, while engaged in group pursuits, a man's individual ends are for the moment submerged — his activity is merely a phase of the group activity directed towards effecting the group purpose. An excellent example of this is an army in action. The individual's interest in protecting himself on the one hand, and in self-glorification on the other, is absolutely subordinated to the group purpose, the destruction of the enemy. Further, there is a group consciousness and a group will with which the individual consciousness and individual will are assimilated. It is elementary that men act in groups in a way that would be incomprehensible in most of the members of the group taken individually. Mob psychology attempts to deal with some of these phenomena. Corporation and national morality are notoriously lower than individual morality.

The group directs its activities in ways precisely analogous to those adopted by the individual. It contracts as an entity, it com-

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<sup>2</sup> MAINE, ANCIENT LAW, Ch. V — *Patri Potestas*.



mits delicts, it holds group possessions, and acts generally as a unit. Indeed the superiority of group over individual action is due to the fact that the group can apply the method of the individual with many times his force. Hence it would appear that the group is as capable of supporting legal personality as the individual, while the protection of group interests seems to require group rights to nearly the same degree that individual interests require individual rights. But what is more important, the protection of society makes it imperative that the group be subject, as such, to duties, and duties distinct from those imposed on its component members, because the group is often infinitely more formidable than the sum of its members.

The law has recognized this social aspect of man's life and his group interests in various ways. Family interests are protected through the laws relating to the disposal of the property of husband and wife, through community property laws, family exemption laws, through death statutes, and through the actions allowed for alienation of affections and seduction. Because, however, of the small size of the group it has been possible adequately to secure these interests by conferring individual rights upon the members of the family against one another and against the whole world, and imposing the correlative obligations. Thus the law, while not dealing with the family group directly, makes the relations of its members to the group itself and to the outside world, the bases of the rights which afford it legal protection. This has similarly been true of man in his economic relations. Where his common interests have been those of a small group or partnership, they have been treated not unlike the interests of the family. While the law recognizes the community of interest and of activity, nevertheless it has, until recently, secured them entirely through the individual. But it should be remembered that this method is not a necessary one, and that it persists only because of legal convenience and legislative inertia. The partnership has always been treated as a unit in the mercantile world. As conditions require, it is daily coming to be treated more like a unit in the legal world.<sup>3</sup>

For a long time the only groups with which the state directly concerned itself were those which exercised such a degree of social con-

<sup>3</sup> Uniform Partnership Act; Bankruptcy Act; Statutes making large partnerships suable in firm name to be discussed *infra*.

trol as to be the state's competitors. Such groups were so large that it was obviously impracticable to deal with them through their individual members. That was too cumbersome a way to secure the interests of the group, and an almost impossible way of securing the interests of society in the control and regulation of the group. When the mediæval courts declared it a usurpation against the king to set up a corporation without his charter, they had no reference to our ordinary trading corporations, and were not thinking of the privilege of limited liability. What the courts were striking at was the founding of municipal corporations and guilds, which, if not well under the royal control, might threaten the very monarchy itself. The royal apprehension will be readily understood if one but recalls the power of the City of London in the great feudal wars, and the exploits of the butchers' guilds of Paris when they made the rulers of France, and held the mighty Burgundy at their beck and call. The guilds and municipal corporations exercised a control over their journeymen and burghers, respectively, covering the most important phases of their economic and communal life, and existed for the sole purpose of furthering their interests. In turbulent days, such organizations could only be tolerated as the vassals of the king, exercising their governmental authority by virtue of his charter. This is the secret of the kings' jealousy, and control of the corporate franchise, since nearly all early corporations which were not religious were governmental. In the later Tudor periods, when the government had become more firmly settled, the great trading corporations became more common. But these were also governmental in their nature, and in time acquired and governed great territories for the Crown of England under its charters.<sup>4</sup> Gradually, however, the governmental feature became less significant, and corporations became popular because of their facilities for obtaining capital from the investing public and the limited liability involved. The state, nevertheless, retained control of the corporate franchise, not now as a measure to insure its own safety, but in order to protect the public from the ruinous stock speculations which finally led to the Bubble Act. In this way we have our modern corporation coexisting with the trading copartnership, and differing from it as a practical matter only in the possession of certain legal privileges.

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<sup>4</sup> British East India, London, and Plymouth Companies.



The private corporation has become completely distinguished from the public corporation.

Thus, up to the middle of the nineteenth century, the law of corporations furnished but meager jural material for the regulation of our varied forms of group activity. As a matter of fact there were relatively very few private corporations, and until well into the last century practically all of the cases dealt with public corporations. After Tudor times, however, the English state, although still retaining a close grasp on the corporate franchise, did not display its earlier jealousy of association. Standing armies had made single groups of artisans or untrained burghers comparatively innocuous. Hence we find developing contemporaneously with the private corporation all sorts of unincorporated associations ranging from the closely knit church organizations, Catholic and Non-Conformist, to the loose underwriting groups of the Lloyd's type; — from the great friendly societies to the select social clubs, each securing adequate legal protection behind its hedge of trustees.<sup>5</sup> That absolutely unique of English legal institutions, the adaptable trust cleverly shaped by centuries of the subtlety of the English Bar, secured practically all the advantages of corporate organization without any of its drawbacks. The citadel of corporate association, made impregnable to a frontal attack by the imposing maxims of Crown lawyers, was furnished with an easy approach from behind. Nevertheless the personality of these groups as such was not recognized by the courts, and hence we have the complete separation of legal from natural personality in the law of group activity.<sup>6</sup>

But coming into the nineteenth century, the state again faced the problem of dealing with combinations of men which threatened to shake its very foundations. The discontent of the great proletarian masses under the new industrial régime made the struggles of small groups of burghers and journeymen seem but teapot tempests. Little consideration was given to the interests of the group; the legislature only thought to secure the state. At first it sought

<sup>5</sup> 3 MAITLAND, COLLECTED PAPERS, 321 (Trust and Corporation); Introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE.

<sup>6</sup> Williston, History of Law of Business Corporations, 3 SELECT ESSAYS ANGLO-AMERICAN LEGAL HISTORY 195; Carr, Early Forms of Corporateness, 3 SELECT ESSAYS 161; 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 362; 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 486; 3 MAITLAND, COLLECTED PAPERS, 271 *et seq.*

to solve the problem through repression, by making associations for certain purposes illegal. This expedient by the very nature of the case was soon found to be a social impossibility and more conciliatory methods were gradually adopted. It is not our intention to go into the history and development of the combination laws here.<sup>7</sup> But it will suffice to say that the present English solution is to permit the utmost liberty of association under the maximum of feasible government supervision. What is feasible is frequently for a number of reasons very limited. Today the English law confers corporate personality upon registration on any group complying with a few formalities,<sup>8</sup> and requires registration where the group consists of more than twenty persons and is organized for profit.<sup>9</sup>

The French and German laws as to association have had a similar history except that the German law was more profoundly affected than the French by the concession theory of Innocent IV.<sup>10</sup> In mediæval times, the continental states reserved to themselves the prerogative of licensing associations for reasons similar to those obtaining in England. All associations without a license were illicit. But in France when we reach the mercantile period, the Government has become firmly established by Richelieu. The law is no longer so jealous of associations in general, and groups organized for mutual gain without a license are not considered illegal, but they are, so to speak, extra-legal and hence not recognized as possessing legal personality. It was natural to attribute the juristic personality of the licensed associations to the license.<sup>11</sup> Thus, by the time of the Code Napoléon in 1804, we have a complete separation of the concept of personality from the right of association. The Code took much the same attitude towards associations as that adopted in England. But, as in England, the French law throughout the nineteenth century was marked by a growth of liberality towards associations in general, and a constant broadening of juristic personality. This culminated in the French Law of Associations of

<sup>7</sup> Reference for that may be made to Professor Dicey's article in 17 HARV. L. REV. 511. See also Geldart, "Status of Trade Unions in England," 25 HARV. L. REV. 579.

<sup>8</sup> Companies Act of 1862, Consolidation Act of 1908, 5 HALSBURY, LAWS OF ENGLAND, §§ 58, 59; Quasi-Corporations, 5 HALSBURY, LAWS OF ENGLAND, § 1352; Trades Unions Act of 1913, 27 HALSBURY, LAWS OF ENGLAND, §§ 1164 *et seq.*, 1168.

<sup>9</sup> *Ibid.*, 5 HALSBURY, LAWS OF ENGLAND, §§ 55, 56.

<sup>10</sup> See *infra*, p. 684.

<sup>11</sup> Of course this was correct in a sense, but the more proximate cause was the fact of legal recognition.



1901, in which liberty of association is secured, and juristic personality is conferred on all associations legally constituted.<sup>12</sup> The German Code, likewise, allows full freedom of association, and confers juristic personality on any group complying with a few formalities.<sup>13</sup> Today, we may say that the Continental Law makes no distinction between the individual and the group as to personality. It is obtained by each on registration.

The so-called concession theory, that the personality of a corporation is a pure fiction created by the state, and not merely a natural fact given legal recognition, is being discarded throughout the world, first in fact, now in theory. The general corporation laws and the *de facto* doctrine in this country, the English Companies' and Trades Unions' Acts, the French Associations Law of 1901, and the German Code indicate what has happened in fact. Sir Frederick Pollock tells us the English Common Law never adopted the theory.<sup>14</sup> In the face of our doctrines as to *de facto* corporations, and corporations incorporated in two states, we can hardly claim that our courts ever did more than lip service to it. It is significant that the English Interpretation Act of 1899, section 19, provides that the word "person" shall be taken to include any body of persons, corporate or unincorporate, unless the contrary intent appear. Similar statutes are not uncommon in this country.

In order, however, to deal with the problems of jurisdiction over foreign corporations or groups, we must examine the relations of the group and its members to the community outside of the group. The corporate group affords the most profitable field for observation, but our conclusions will be applicable to all group activity. It is apparent that the individual member of any group devotes but a part of his time to the activities of that group, most members a relatively small part of their time. Outside of this time, their activity cannot be said to be in any sense the group activity, and our coming in touch with them does not put us in touch with the group. The stockholders of a corporation may perhaps attend the annual meeting — it is more likely that they will send proxies — but that

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<sup>12</sup> CAPITANT, DU DROIT CIVILE, 160 *et seq.*

<sup>13</sup> GERMAN CIVIL CODE, §§ 21, 22; SCHUSTER, PRINCIPLES OF GERMAN CIVIL LAW, 37 *et seq.*

<sup>14</sup> "Has the Common Law Received the Fiction Theory of Corporations?", 27 L. QUART. REV. 219.

concludes their relations with the group. At the meeting, however, they do elect directors who take a more immediate part in the group's operations, formulating its policies and in a very general way supervising its management. But even the directors devote a relatively small part of their time to the corporation's business, perhaps attending a meeting once a month. The immediate management is in the hands of a group of officers who devote all their economic activity to managing its affairs. They, with all the employees of the corporation, are the most evident part of the group, the most important, and frequently the most permanent. When one comes in contact with an officer or an employee of the corporation engaged in the corporate business within the scope of his employment, he comes in contact with the group, and the activity of such an officer is group activity. We have been accustomed to separating the corporation from its agents very sharply as a matter of law, — treating the relation between the corporation and agent as that between individual and individual, — when, as a matter of fact, the agent is a part of that natural group which is given legal personality as a corporation. Indeed the legal recognition of the personality of a group unit, or the lack of such recognition, is not material. If we take the case of a great banking firm, instead of a corporation, we find that employers and employees are both members of one group, working for the mutual advantage to accrue from the successful operations of the firm. The internal distribution of profits cannot affect the external fact apparent to the world. To make the employer the single proprietor of a great banking house does not seem to change the result any. The only difference is that now one controls, and one takes the lion's share of the profits. The internal structure of the group or the relations of its members *inter se* have little significance for the purposes of jurisdiction. But it is of the utmost importance that courts become cognizant of a fundamental fact of group organization, *viz.*, that the humblest miner in the employ of the United States Steel Company is as truly a member of that group as its president or any shareholder; that the least of the clerks employed by the firm of J. P. Morgan & Company is as certainly a member of the group associated for mutual profit under that name as J. P. Morgan himself. The civil law, not having as broad a conception of agency as our law, has been compelled to adopt the organic theory, at least in dealing with the gov-



erning boards of corporations.<sup>15</sup> It is questionable whether the problems of Conflict of Laws have not now forced us into a position in which we must take a more realistic view of the relations of individuals in and to their groups.

## II

It was thought at Common Law that a corporation could not be sued unless service of summons was made upon its head officer.<sup>16</sup> Such service was conceived to be impossible in the case of a foreign corporation, because it was said that the officer dropped his official capacity as soon as he left the state of incorporation.<sup>17</sup> Indeed, this was the ground for setting aside an attachment of a foreign corporation's property in New York.<sup>18</sup> Seemingly the only difficulty felt by the courts was that of service, since none of the cases seem to doubt that once that difficulty was removed the courts had power to render a personal judgment.<sup>19</sup> These doctrines, however, were apparently breaking down and the weight of authority taking a more liberal view,<sup>20</sup> when the *dictum* of Chief Justice Taney appeared in *Bank of Augusta v. Earle*<sup>21</sup> in 1839. He tells us:

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

The source of the doctrines of the early cases and of Chief Justice Taney's theory is of course very clear. Throughout the early part of the nineteenth century the law of private corporations took its complexion entirely from the law of municipal corporations. For

<sup>15</sup> Maitland, Introduction to GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE*, 40.

<sup>16</sup> 1 KYD, *CORPORATIONS*, 272.

<sup>17</sup> *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5, 7 (1819); see also *Peckham v. North Parish*, 16 Pick. (Mass.) 274, 286 (1834).

<sup>18</sup> *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5, 7 (1819).

<sup>19</sup> *Bushel v. Insurance Co.*, 15 Serg. & R. (Pa.), 173, 176 (1827); *ANGELL & AMES, CORPORATIONS*, (1831), ch. 10, § 12.

<sup>20</sup> In *Libbey v. Hodgdon*, 9 N. H. 394 (1838); *March v. Eastern R. Co.*, 40 N. H. 548, 577 (1860); *Day v. Essex County Bank*, 13 Vt. 97 (1841), personal judgments were given against foreign corporations doing business within the territory without the consent of the corporation to the jurisdiction of the courts.

<sup>21</sup> 13 Pet. (U. S.) 519, 558.

one thing, the law of municipal corporations having been carefully worked out, furnished the most handy analogies. But more important, the law of private corporations was historically a mere outgrowth of the law of public corporations.<sup>22</sup> Most books prior to Angell and Ames in 1831 treat the subject of private corporations as only a small and unimportant branch of the law of municipal corporations.<sup>23</sup> Moreover, what is most significant, all the books on practice and pleading of the early part of the century in discussing suits against corporations consider only public corporations and cite only municipal corporation cases.<sup>24</sup> It is of course evident why a municipal corporation could neither migrate nor have a legal existence outside of the state, and why service must have been made on one of its head officials.

A corporation is merely a group constituting a natural unit upon which the state has conferred personality just as it has upon individuals who are also natural units. Incorporation is said to be a status. Does it follow that legal recognition is only effectual intra-territorially? Among continental countries the personality of individuals is a status. But when the individual migrates from one state to another his personality will be recognized there by doctrines of Conflict of Laws. When the corporation, another natural unit, migrates it must be given similar recognition. In Common Law countries this is certainly true of any other status, whether it be marriage or legitimacy or ownership. The status created by the sovereign with jurisdiction will be recognized elsewhere. Foreign corporations are permitted to own property within the jurisdiction, to have rights against the sovereign's subjects, sue in the domestic courts, and altogether are given the same privileges as foreign individuals. But we are told this arises merely from the fact of the recognition of the foreign status as existing where created, and the foreign corporation is not allowed to do more than any foreign individual might do with the aid of agents. Whether this is an answer or no is not quite plain. Both the foreign individual and foreign corporation are thereby granted rights within the sovereign's terri-

<sup>22</sup> In *Sutton's case*, 10 Rep. 29 b, Coke states a "place" to be one of the requirements of a corporation; Williston, *History of Law of Business Corporations*, 3 SELECT ESSAYS, 206.

<sup>23</sup> ANGELL & AMES, *CORPORATIONS*, Preface.

<sup>24</sup> 1 TIDD, *PRACTICE* (1803), 116; 1 CHITTY, *PLEADING* (1809), 368; American edition (1812), 368; 1 ARCHBOLD, *PRACTICE K. B.* (1834), 450.



tory and are recognized as possessing them there. This necessarily involves the recognition of the foreign status as a domestic institution for some purposes at least. Of course the powers of a foreign corporation must depend on the law of the state creating it, since that law governs its charter, which is the compact of the group delimiting its activities.

But if we are to consider the corporation as a group unit we must allow it the attributes of group unity. One of these is the capacity to be in several places at once. The Roman Catholic Church is as truly present in America as in Rome. The American Federation of Labor is in New York, Chicago, and San Francisco simultaneously. A group is wherever its members may be carrying on authorized group activities. Unless we accept this proposition we can never say a group is in any place unless all its members are there. The American Federation of Labor cannot be in the United States so long as a single organizer is at work in Canada, under this theory. But if we say it is in the United States on these facts we must also say it is in Canada. To adopt a crude physical parallel, it is in somewhat the same position as a man lying across the border line. He is in both Canada and the United States. The English courts have recognized the validity of this reasoning in a long line of cases, following Lord St. Leonard's *dictum* in *Carron Iron Co. v. Maclaren*,<sup>25</sup> that a corporation "may, for the purposes of jurisdiction, be deemed to have two domiciles . . . The places of business may, for the purposes of jurisdiction, properly be deemed the domicile." It is evident that the noble lord meant only to say that the corporation doing business in both England and Scotland was present and amenable to process in both. Blackburn quotes him with approval in the leading English case on the subject, *Newby v. Van Oppen*.<sup>26</sup> In that case a New York corporation doing business in England was held to be subject to the jurisdiction of the English courts and servable with process in the ordinary way. The case and Blackburn's opinion have since been put beyond doubt by the decision of the House of Lords in *La Compagnie Transatlantique v. Law*,<sup>27</sup> where the Lord Chancellor placed the decision of the case on the ground that the corporations

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<sup>25</sup> 5 H. L. Cas. 416, 449 (1855).

<sup>26</sup> 7 Q. B. 293 (1872).

<sup>27</sup> [1899] A. C. 431, 433.

"are here and if they are here they may be served."<sup>28</sup> In *Logan v. Bank*, the Court of Appeal said:

"If a foreigner is found within the jurisdiction, he may be served with a writ, although the cause of action did not arise in England; and it is not easy to see why there should be a difference as to the right to serve a foreign corporation which is found to have a place of business, and to be trading in this country, and which is therefore to be treated as resident here."

Neither Dicey nor Westlake seems to find anything unnatural or strange in this English conception of corporate presence.<sup>29</sup>

All American authority reaches the same result. But it has been thought that the American cases can be explained on the ground of a previous consent by the corporation to submit to the jurisdiction of the court. It may be said that the corporation has agreed with the state to submit to the jurisdiction of its courts, or that the corporation has agreed with the individual plaintiff to submit any difficulties arising out of their transactions to the jurisdiction of the domestic courts, or both. Contract claimants might very well claim that they had a right to expect that the corporation had complied with the laws of the state as to doing business there, and that submission to the jurisdiction of the domestic courts was an implied term of their bargain. This reasoning, however, would exclude all other types of claimants, and there is no evidence that the courts discriminate against tort suitors.

The basis of the consent theory is found in the power of the state to exclude absolutely corporations not engaged in interstate commerce.<sup>30</sup> If the state may exclude the corporation altogether, it may admit it to do business within the state on the condition that it consent to the jurisdiction of the state's courts, making business done on any other terms illegal. It may make such an offer to the corporation which the latter can accept. Coming in to the state and doing business there might be said to constitute an acceptance, the reasonable impression of the state being that the corporation was acting legally and accepting its offer. There are two very ob-

<sup>28</sup> *Haggin v. Comptoir D'Escompte De Paris*, 23 Q. B. D. 519 (1899 C. A.); *L'Honeux v. Bank*, 33 Ch. D. 446 (1886); *Dunlop v. Actiengesellschaft*, [1902] 1 K. B. 342; *Logan v. Bank*, [1904] 2 K. B. 495, 499.

<sup>29</sup> DICEY, *CONFLICT OF LAWS*, 2 ed., 160-163; WESTLAKE, *PRIVATE INTERNATIONAL LAW*, 5 ed., 395.

<sup>30</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868).



vious difficulties. The corporation might set up that it was never acquainted with the offer and hence could not have accepted it. This line of defense has never been tried. Every one is perfectly well aware that it would be futile. Nevertheless the proffer of such a defense tests the consent theory. The courts would answer that everyone is presumed to know the law. The consent we speak of, is not a consent to any particular law but a consent to all the laws of the jurisdiction. By coming into a jurisdiction one consents to be bound by its laws. But nobody would contend that an individual entering a state consents in fact to be bound by its murder laws. Certainly no would-be murderer makes such an agreement. He is bound by them all unwillingly, because he acts within the state. A more fundamental difficulty is, however, that the state ordinarily gives not the slightest evidence of a bargaining mind.

The statutory provisions appear to be of three kinds. The most common type adopted by nearly all the important jurisdictions forbids the doing of business in the state before the filing of a written consent to the jurisdiction of the state courts. The statute also usually requires the designation of one or more persons on whom process may be served.<sup>31</sup> A few jurisdictions expressly permit service upon any agents of the corporation who are doing its business in the state,<sup>32</sup> while some of the jurisdictions cited *supra* allow service not only upon the designated agent but upon all others.<sup>33</sup> Others provide that service on a foreign corporation may be made in the same manner as upon a domestic corporation.<sup>34</sup> A few seem to have made no special provision at all.<sup>35</sup> But in these states a foreign corporation appears to be servable in the way provided for domestic corporations.<sup>36</sup>

In states having statutes of the first type there is no ground what-

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<sup>31</sup> Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, Wisconsin, Wyoming.

<sup>32</sup> Delaware, District of Columbia, Texas.

<sup>33</sup> Idaho, Michigan, Minnesota, Missouri, New Mexico, Pennsylvania, South Carolina.

<sup>34</sup> Florida, Maine, Louisiana, Maryland, Massachusetts and Tennessee.

<sup>35</sup> Georgia, New Hampshire and West Virginia.

<sup>36</sup> *Fire Insurance Co. v. Carrugi*, 41 Ga. 660 (1871); *Hayden v. Androscoggin Mills*, 1 Fed. 93 (1879); *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65 (1870).

ever for supposing that the corporation has agreed to the condition imposed by the state, unless the corporation accepts in the manner indicated by the offer. Yet it is perfectly clear law that where the corporation does business within the state without filing the required consent, service made upon its agents will sustain a judgment against it.<sup>37</sup> The only ground on which these cases may be supported is that the corporation is present in the state. But the cases go further. The consent of the corporation to the jurisdiction of the courts cannot be said to be any broader than that required by the statute. Yet in *Steamship Co. v. Kane*,<sup>38</sup> the United States Supreme Court held that service on an agent was sufficient to give the Federal Court jurisdiction in a suit brought by a non-resident although the New York statute only provided for suits by residents. The court put its decision on the broad ground that the foreign corporation was present within the jurisdiction.<sup>39</sup> Even where the statute requires the designation of a state officer to accept service and the designation is not filed, judgments rendered upon service on that officer are sustained, and rightly so.<sup>40</sup> The corporation while doing business in the state is within its jurisdiction and the question of service alone is raised. Service on the state officer in charge of any particular type of foreign corporations on whom the duty is imposed to notify the defendant, is not an unreasonable method of service.<sup>41</sup> But it has been suggested that the statutes in question might be construed to include two things: the imposition of a condition that the foreign corporation, if it comes into the state to do business shall consent to be sued, and a provision as to the method of suit. From

<sup>37</sup> *Mining Company v. Johnson*, 173 U. S. 221 (1898); *Ins. Co. v. McDonough*, 204 U. S. 8 (1906); *Harvester Co. v. Kentucky*, 234 U. S. 579 (1913), cited *infra*; *Modern Woodmen of America v. Noyes*, 158 Ind. 503, 64 N. E. 21 (1902); *Funk v. Ins. Co.*, 27 Fed. 336 (1886); *Thomas v. Placerville Co.*, 65 Cal. 600, 4 Pac. 641 (1884); *St. Louis Ry. Co. v. DeFord*, 38 Kan. 299, 16 Pac. 442 (1888); *Hagerman v. Slate Co.*, 97 Pa. 534 (1881).

<sup>38</sup> 170 U. S. 100 (1897).

<sup>39</sup> See also *Colorado Iron Works v. Mining Co.*, 15 Colo. 499, 25 Pac. 325 (1890).

<sup>40</sup> *Sparks v. National Masonic Association*, 100 Ia. 458, 69 N. W. 678 (1896); *Surety Co. v. Slinker*, 42 Okla. 811, 143 Pac. 41 (1914); *Ehrman v. Ins. Co.*, 1 Fed. 471 (1880); *Diamond Plate Glass Co. v. Insurance Co.*, 55 Fed. 27 (1892); *Mason's, etc. Ass'n v. Riley*, 60 Ark. 578, 31 S. W. 148 (1895); but see *contra* *Rothrock v. Insurance Co.*, 161 Mass. 423, 37 N. E. 206 (1894).

<sup>41</sup> Where no duty is imposed upon the state officers to notify the corporation, of course the statute violates the requirement of due process. *Southern Ry. Co. v. Simon*, 184 Fed. 959 (1910), *aff'd* 236 U. S. 115 (1914).



a glance at the statutes it seems obvious that this is a most artificial construction adopted solely for the purpose of reconciling the cases with the consent theory, although it is generally recognized that the statutes must be strictly construed.<sup>42</sup> But even if such a construction were to be adopted, the doing of business by the corporation within the state would give rise to no presumption of consent. In the other cases, consent might be inferred because it would be unreasonable to assume that the corporation was acting illegally when its conduct was equally capable of a legal interpretation. But in this case the corporation is acting illegally, from any viewpoint, by failing to designate an agent to receive process.

Under the second and third types of statutes, which do not require an express consent, it is not so difficult to work out an implied consent. But even here it can only be done by totally disregarding the actual language of the statutes. The statutes do not say: "We forbid you to do business within the state unless you consent to the jurisdiction of our courts." The statutes assume for the most part that the corporation is present, and that it is only necessary to provide for the method of service. This seems also to be the attitude of the states which have made no provision for jurisdiction over foreign corporations. They are served whenever an agent can be found within the state on corporate business.<sup>43</sup> However, since only the legislature has the power to offer terms to foreign corporations, no ground at all is afforded for presuming the consent of the corporation to the jurisdiction of the courts in these states.

Moreover, the courts, except in the very earliest cases, see no necessity for consent. The course of decision of the United States Supreme Court is typical. It is particularly instructive as it controls to a great extent the decision of state tribunals since the question of jurisdiction is usually raised on the Fourteenth Amendment. In *Insurance Co. v. French*, decided in 1855,<sup>44</sup> the opinion of Mr. Justice Curtis is based wholly on the consent theory. But in *St. Clair v. Cox*,<sup>45</sup> Mr. Justice Field makes the consent theory only one of his

<sup>42</sup> BEALE, FOREIGN CORPORATIONS, § 269.

<sup>43</sup> *Railroad v. Harris*, 12 Wall. (U. S.) 65 (1870). In *Hayden v. Androscoggin Mills*, 1 Fed. 93 (1879), service on a foreign corporation doing business in Massachusetts, where there was no statute, was sustained. See also *Fire Insurance Co. v. Carrugi*, 41 Ga. 660, 670 (1871).

<sup>44</sup> 18 How. 404.

<sup>45</sup> 106 U. S. 350 (1882).

*ratio decidendi*; the other he makes the presence of the corporation. *In re Hohorst*<sup>46</sup> makes no mention of the consent theory, while *Steamship Co. v. Kane*,<sup>47</sup> going altogether on the theory of the corporation's presence, is irreconcilable with the consent theory.<sup>48</sup> The real character of the consent theory is shown in *Insurance Co. v. McDonough*,<sup>49</sup> which purports to be decided on that theory. The Insurance Company made a contract in Indiana, while it was doing business within Pennsylvania, without complying with the Pennsylvania statute requiring foreign insurance companies to designate the Commissioner of Insurance as agent to receive service of process. The plaintiff subsequently attempted to bring suit in Pennsylvania on this Indiana contract by serving the Commissioner of Insurance. On the argument counsel made the point that there was no evidence that the Company was doing business in Pennsylvania when the suit was brought, and hence under the authorities the Pennsylvania court was without jurisdiction. The court so decided, but Mr. Justice Harlan, one of the older judges, who wrote the opinion, rested the decision on less tenable reasoning. He said that, while service on the commissioner could bind the corporation as to business transacted within the state, it could not as to transactions entered into without its borders, as the corporation could not be presumed to consent to service in such cases. But it must be perfectly clear that, if the insurance company is to accept the condition of the state, it must accept it as a whole, as the state has not split its offer. In this case, however, we have the additional difficulty that the corporation did not accept the offer of the state at all, because it made no attempt to comply with its terms, and hence there was no ground to presume a real consent to the condition.

This was pointed out in *Bagdon v. Reading Co.*,<sup>50</sup> where the New York Court of Appeals sustained a judgment in an action on a foreign tort, service having been made upon the agent designated by the foreign corporation to receive it. The court adopted the distinction previously taken in *Smolik v. Reading Co.*,<sup>51</sup> between actual consent and consent implied in law. Of course the latter form of consent is purely fictional and will not support jurisdiction. Jurisdiction under such a statute must exist apart from the implied con-

<sup>46</sup> 150 U. S. 653 (1893).

<sup>48</sup> See *supra*, p. 691.

<sup>50</sup> 217 N. Y. 432, 111 N. E. 1075 (1916).

<sup>47</sup> 170 U. S. 100 (1897).

<sup>49</sup> 204 U. S. 8 (1906).

<sup>51</sup> 222 Fed. 148 (1915).



sent and in the case of a foreign corporation can rest only upon its presence. In *Simon v. Southern Ry.*,<sup>52</sup> although the judgment was clearly invalid and the statute in question unconstitutional for other reasons, the court treated the case as identical with *Insurance Co. v. McDonough*, and took occasion to lay down the flat rule that a statute authorizing service upon a state officer where the cause of action accrues out of business transacted outside the state is *pro tanto* unconstitutional. The decision leaves the question open where there is actual consent. As it does not purport to overrule *Steamship Co. v. Kane*,<sup>53</sup> a foreign corporation not having consented to the jurisdiction of the courts is still subject to service upon its agents in actions accruing out of transactions outside the state. The most that can be said, then, is that at present the court is of opinion that service upon a state officer in actions accruing from extra-state transactions is not a reasonable method of service and hence unconstitutional.

The last blow to the theory of the necessity of consent seems to have been administered by *International Harvester Co. v. Kentucky*,<sup>54</sup> decided in 1913. In that case the corporation had been engaged in intrastate business within the state of Kentucky, and had designated an agent to receive service of process. The corporation discontinued its intrastate business and revoked the agency. It continued, however, to do an interstate business, and while so engaged was served in a criminal proceeding through one of its agents in the state, not the one originally designated. The court upheld the service on the sole and necessary ground that the corporation was present in the state. The corporation had never agreed to accept service on any but the designated agent, hence it was impossible to work out consent. Since this article went to press *International Harvester Co. v. Kentucky* has been followed by the New York Court of Appeals in *Tauza v. Susquehanna Coal Co.*<sup>55</sup> The opinion of the court, written by Judge Cardoza, furnishes an impressive buttress to the theory of jurisdiction by corporate presence.

The courts appear to adopt the view of Morawetz, who says:<sup>56</sup>

"There is not the slightest reason why service of process upon a foreign corporation, at common law, should not be governed by the same

<sup>52</sup> 236 U. S. 115 (1914).

<sup>53</sup> 170 U. S. 100 (1897).

<sup>54</sup> 234 U. S. 579.

<sup>55</sup> 220 N. Y. 259 (1917).

<sup>56</sup> PRIVATE CORPORATIONS, § 980.

principles and rules as service of process on domestic corporations, at common law."<sup>57</sup>

They seek first to assure themselves of jurisdiction by deciding the question of the corporation's presence. The most mooted difficulty is what constitutes "doing business within the state." This is merely a question of statutory construction, and is not necessarily as broad as the question of the corporation's presence.<sup>58</sup> Jurisdiction being found, the court then turns to the statute to settle the method of service.<sup>59</sup> A particularly striking illustration of this attitude is found in the decision and reasoning of the New York Court of Appeals in the case of *Dollar v. Canadian C. & F. Co.*<sup>60</sup>

A corporation may be said to be present in a state when any member of the corporate group is within the state's territorial limits on authorized business. The mere presence of any member of the group will not suffice to give jurisdiction of the corporation. It is necessary to sharply distinguish the personality of the individual from that of the group. The member's personality only merges in the group's when he is engaged in group activity. The group

<sup>57</sup> *Mining Co. v. Johnson*, 173 U. S. 221 (1898); *Packing Co. v. Hunter*, 8 Biss. 429 (1879) (Federal Court, Illinois); *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (1905); *Colorado Iron Works v. Mining Co.*, 15 Colo. 499, 25 Pac. 325 (1890); *Western Union Tel. Co. v. Pleasants*, 46 Ala. 641 (1871); *Equity Life Ass'n v. Gammon*, 118 Ga. 236, 46 S. E. 100 (1903); *Reeves v. Ry. Co.*, 121 Ga. 561, 49 S. E. 674 (1905); *Railroad Co. v. Akers*, 4 Kan. 453 (1868); *Council Bluffs Canning Co. v. Omaha Mfg. Co.*, 49 Neb. 537 (1896); *Railroad Co. v. Keep*, 22 Ill. 9 (1859); *Boyd v. Coates*, 24 Ky. L. 730, 69 S. W. 1090 (1902); *American Casualty Co. v. Lea*, 56 Ark. 539, 20 S. W. 416 (1892).

<sup>58</sup> *Colorado Iron Works v. Mining Co.*, 15 Colo. 499, 25 Pac. 325 (1890); *International Text Book Co. v. Tane*, 220 N. Y. 313 (1917).

<sup>59</sup> It is important to delimit the scope of jurisdiction obtained by consent, and that obtained by presence, in order to avoid decisions like *Moulin v. Insurance Co.*, 24 N. J. L. 222 (1853), 25 N. J. L. 57, where the statute merely provided for a method of service. In that case, the court enforced a judgment obtained in New York upon service on an officer of a foreign corporation which had ceased to do business there. As soon as a corporation has withdrawn its representatives from the state, it is no longer present there, and jurisdiction must be obtained by consent. The statute may properly require consent to the jurisdiction of the courts as to disputes arising out of previous business to continue after the withdrawal of the corporation from the state. *Mutual Reserve, etc. Ass'n v. Phelps*, 190 U. S. 147 (1902). And that does not appear to be an unreasonable construction of any statute actually requiring the corporation's consent, or the designation of an agent to accept service. *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (1905). But the statute should actually require consent, and would be without effect unless consent was given.

<sup>60</sup> 220 N. Y. 270 (1917).



activity of a stockholder is generally limited to signing one proxy a year, and receiving an occasional dividend cheque. The foreign corporation would be present in the jurisdiction only during those processes which take an infinitesimal time, too fleeting to be caught. The corporate activity of the ordinary director consists solely of attending the meetings of the Board of Directors. The corporation will surely be wherever the board may meet, usually at the head office of the company. But when the director leaves the meeting his active connection with the corporation ceases for another month, and his presence or residence will not give a state jurisdiction of the corporation.<sup>61</sup> Of course, the corporation is present at any time isolated pieces of business are done within a jurisdiction by its agents properly authorized, but it is not present in the interim unless it maintains some representative or place of business there. But if the president of a foreign corporation lives in a state, or spends most of his time there, and is accustomed to supervise the corporate activities therefrom so far as is necessary, it would seem that that state had jurisdiction of the corporation although it had no office within the state and transacted no other business there.<sup>62</sup>

### III

The court may get jurisdiction of individuals not domiciled in the territory, through allegiance, consent or presence. To dispose of the first, which is not of primary importance (an individual is a citizen of the state of his domicile) to American students, we may say that a sovereign or its court has jurisdiction to impose an obligation or judgment *in personam* upon a subject even though he is domiciled abroad.<sup>63</sup>

It is clear that a sovereign state can exclude citizens of other states from doing business within its territorial limits, and it is equally clear that it can admit them on the condition that they consent to the

<sup>61</sup> *Riverside Mills v. Menefee*, 237 U. S. 189 (1914).

<sup>62</sup> *Grant v. Cananea Copper Co.*, 189 N. Y. 241, 82 N. E. 191 (1907). The presence of an officer or other employee of a foreign corporation, unless engaged on corporate business, will not give jurisdiction of the corporation. It is solely the corporate activity of the individual which links him with the group. Nor will the residence of an officer or employee be sufficient unless the state is the scene of a large part of his corporate activity, as in *Grant v. Cananea Copper Co.*, *supra*. The employee or officer is then a continuously active and permanent part of the group whose presence gives jurisdiction.

<sup>63</sup> *Douglas v. Forrest*, 4 Bing. 686 (1828); *Russell v. Cambefort*, 23 Q. B. D. 526 (1889).

jurisdiction of the domestic courts, in suits brought within the state. It has, however, been suggested that the comity clause of the Constitution prevents the states of the United States from putting such a restriction upon the activities of citizens of the other states. Art. IV, sec. 2, cl. 1 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Amendment XIV provides in sec. 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The effect of the amendment is to enlarge the class of persons entitled to the benefits of the comity clause to include persons who, while citizens of the United States, are not citizens of states. Article IV of the Articles of Confederation, the predecessor and source of Article IV of the Constitution, reads as follows:

"The free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."

It indicates very clearly that the purpose and scope of the comity clause was to guard against discrimination by a state in favor of its own or against the citizens of other states. In the words of Mr. Justice Field in *Paul v. Virginia*:<sup>64</sup>

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States . . . it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws."<sup>65</sup>

<sup>64</sup> 8 Wall. (U. S.) 168, 180 (1868).

<sup>65</sup> The United States Supreme Court has never enumerated the privileges and immunities guaranteed by the Constitution, although in *Blake v. McClung*, 172 U. S. 239 (1898), it approved the partial enumeration made by Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. C. C. 371, 380 (1823). It may be observed that the comity clause applies only to civil or private rights, not to political, public, or rights given by the state in its proprietary capacity. 1 WILLOUGHBY, CONSTITUTION, 213 *et seq.* "The Privileges and Immunities of Citizens in the Several States," 1 MICH. L. REV. 286, 364.



It may, then, be fairly said that any state law which does not deny to citizens of other states substantial equality of private right will not violate the comity clause. A statute requiring residents of other states to consent to the jurisdiction of the state's courts in suits brought in these courts as a condition of doing business within the state does not necessarily affect that substantial equality. Since such a statute applies to citizens of the state residing abroad it might well be argued that the comity clause does not touch it at all. The only possible answer to this reasoning is that the number of citizens residing temporarily abroad and doing business in the state of their domicile is negligible, and hence the statute as a practical matter applies only to non-citizens.<sup>66</sup>

Citizens of a state doing business in its territory, whether through an agent or not, are liable to suit in, and subject to, its courts. To permit citizens of other states to do business within the state without being similarly amenable to process is to discriminate against domestic enterprise. A statute should not, however, attempt to extend the jurisdiction of the courts over non-citizens to a greater extent than that exercised over citizens. If, for example, a personal judgment may not be given against a citizen without personal service, a statute allowing such a judgment against a non-citizen will be unconstitutional.<sup>67</sup> But the fact that "personal service" has been used ambiguously to cover both service on the defendant in person and service by leaving the writ at his home, may explain a number of cases.<sup>68</sup> The statutes upon which service in these cases was based provided for service on a resident defendant in person, or if that be impossible, then by leaving the writ at his house, while they provided for service on a non-resident by leaving process with his agent.<sup>69</sup> The courts were thus immediately impressed by the ap-

<sup>66</sup> In this section of the article non-resident and non-citizen are used interchangeably.

<sup>67</sup> KENTUCKY CODE OF PRACTICE OF 1895, §§ 48, 56, 419; *Moredock v. Kirby*, 118 Fed. 180 (1902).

<sup>68</sup> 19 ENCYCL. OF PL. & PR. 613; ALDERSON, JUDICIAL WRITS AND PROCESS, 179; *Johnston v. Robins*, 3 Johns. (N. Y.) 440 (1808); *Dunkle v. Elston*, 71 Ind. 585 (1880); MINN. STAT. 1913, § 7732.

<sup>69</sup> MINN. STAT. 1913, § 7732, LAWS OF 1901, ch. 278; DELAWARE REV. CODE 1893, ch. 102, § 2, ch. 192; LOUISIANA-GARLANDS REV. CODE OF PRAC. 1914, § 187 *et seq.*; CODE OF TENN. 1896, § 4535 and cases and sections there cited, §§ 4516, 4542; *Cabanne v. Graf*, 87 Minn. 510, 92 N. W. 46 (1902); *Caldwell v. Armour*, 1 Pen. (Del.) 545, 43 Atl. 517 (1899); *Aikmann v. Sanderson*, 122 La. 265, 47 So. 600 (1908); *Brooks v. Dun*, 51 Fed. 138 (1892).

parent discrimination against non-citizens in making them subject to personal judgments under a substituted service while citizens were only subject to such judgments under personal service, using the term in the broader sense. The courts have found no difficulty in supporting service at the home of a non-citizen temporarily within the state,<sup>70</sup> for that is personal service in the broader sense to which citizens are subject.

The difference in the circumstances surrounding citizens and non-citizens makes a difference in the method of service upon the two necessary. No discrimination is involved if the difference in the means adopted to put all business enterprises operating in the state upon an equal footing bears a fair relation to the difference in the conditions attending each. Both citizens and non-citizens are subjected to the jurisdiction of the courts upon substituted service. It is natural to serve the citizen at his home, while in the great majority of cases such service would not be possible on non-citizens. The obvious place to serve process upon the latter is at his place of business. Apart from the possibility of discrimination the method of service is immaterial provided it be reasonably calculated to give the defendant notice of the controversy and afford him an opportunity to be heard in court. In *Pennoyer v. Neff*,<sup>71</sup> the leading case in this field of the law, the opinion of the court expressly recognizes the right of a state to impose this condition on non-citizens.<sup>72</sup>

But even were it admitted that such a statute did to some extent tend to infringe upon the guarantees of the comity clause, it might nevertheless be supported as a proper exercise of the police power. While the scope of the police power has never been exactly delimited, it is certain that "it extends to regulations designed to promote public convenience or the general prosperity."<sup>73</sup> It is also

<sup>70</sup> *Harrison v. Farrington*, 35 N. J. Eq. 4 (1882); *Davidson v. Hastings*, 2 Keen 509 (1838).

<sup>71</sup> 95 U. S. 714 (1877).

<sup>72</sup> At page 735 Mr. Justice Field states: "Neither do we mean to assert that a State may not require a non-resident . . . to appoint an agent . . . to receive service of process and notice in legal proceedings [arising out of business done within the state] . . . As was said by the Court of Exchequer in *Vallee v. Dumergue*, 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed' . . ."

<sup>73</sup> *Sligh v. Kirkwood*, 237 U. S. 52, 59 (1914); *Noble State Bank v. Haskell*, 219 U. S. 104 (1910).



well recognized that the extent of several of the guarantees of the Federal Constitution is limited by the exercise of the police power of the states.<sup>74</sup> Nor is the comity clause an exception. Statutes forbidding the sale of liquor without a license which will be granted only to citizens, have time and again been upheld in the state courts and finally in the United States Supreme Court,<sup>75</sup> as proper police measures.<sup>76</sup>

If the purpose of the statute be within the scope of the police power, two further inquiries remain: (1) Does the statute bear a real relation to the accomplishment of that purpose? (2) Does it "operate alike upon all persons and property under the same circumstances and conditions"? With reference to the first inquiry it might well be argued that the statute should not be broader in terms than is reasonably required to secure the end sought and therefore that it should be restricted to cover suits brought by citizens of the state, or at any rate suits arising out of the business done within the state. Thus restricted it certainly makes for the security of commercial transactions within the state, and clearly coincides with the sentiment of the business public. Passing to the second inquiry, if a difference in treatment of groups is based upon and bears a relation to a substantial difference in the conditions surrounding each, then it does not violate the Fourteenth Amendment.<sup>77</sup> There is obviously a real difference in the accessibility of citizens and non-citizens in courts of justice. Statutes such as those in question, which merely provide a different and more appropriate method of substituted service on non-residents than that used for residents would seem to be constitutional beyond any question, although this point has not been discussed in any of the cases. Numerous similar statutes, many of them on all fours with those under discussion, have been sustained on this theory.<sup>78</sup>

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<sup>74</sup> COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 832.

<sup>75</sup> *Welsh v. State*, 126 Ind. 71, 25 N. E. 883 (1890); *Mette v. McGuckin*, 18 Neb. 223, 25 N. W. 338 (1885), 149 U. S. 781 (1892).

<sup>76</sup> See collection of authorities in 14 L. R. A. 582, particularly *Haney v. Marshall*, 9 Md. 194 (1856), and kindred cases; see the physician cases in 1 MICH. L. REV. 286, cited *supra*.

<sup>77</sup> *Barbier v. Connelly*, 113 U. S. 27, 31-32 (1884).

<sup>78</sup> Nearly every state in the Union has statutes regulating non-resident persons and associations, whether incorporated or not, engaging in the business of insurance within its limits. These statutes invariably require the appointment of an agent within the state to receive service of process as a condition of the right to do business. Not

It is now settled that a statute requiring foreign corporations engaged in interstate commerce to submit to the jurisdiction of the state courts disputes arising out of interstate business transacted within the state is justified as an exercise of the police power before action by Congress.<sup>79</sup> The numerous quarantine and other regulations previously supported on the same ground made this an almost necessary result. By a parity of reasoning a similar statute covering individuals engaged in interstate commerce should be supported.<sup>80</sup> As it will hardly be contended that the right of citizens to do business within a state is of a more sacred nature than that of a corporation engaged in interstate commerce, these cases have a very close bearing on our main problem.<sup>81</sup>

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merely have none of these statutes been upset because of this provision, but they have always been expressly upheld except where the statutes were obviously calculated in other respects to put non-residents at a disadvantage, and the discrimination had no basis in a difference of position between residents and non-residents adequate to justify it. *People v. Gay*, 107 Mich. 422, 65 N. W. 292 (1895); *State v. Stone*, 118 Mo. 388, 24 S. W. 164 (1893); but see *State v. Ins. Commrs.*, 37 Fla. 564, 20 So. 772 (1896); *Barnes v. People*, 168 Ill. 425, 48 N. E. 91 (1897); 25 L. R. A. 238 for statutes upset because clearly discriminatory. Many statutes making it more difficult for non-citizens to obtain relief in domestic courts have been sustained, because the difference in position between citizens and non-citizens required different provision to protect all parties to litigation. The presence of the citizen and his property within the jurisdiction affords a surety lacking in the case of non-citizens. In *Haney v. Marshall*, 9 Md. 194 (1856), the statute required security for costs from non-residents. In *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911 (1887), the statute dispensed with an undertaking in attachment proceedings where defendants were non-residents. *Campbell v. Morris*, 3 Harr. & McH. (Md.) 535 (1797), was another case making a different provision for non-residents with respect to attachments. See also the liquor license and physician cases cited *supra*, notes 75, 76; also see 14 L. R. A. 582.

<sup>79</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 579 (1913); *Western Union Tel. Co. v. Pleasants*, 46 Ala. 641 (1871); *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259 (1917).

<sup>80</sup> *Adams Express Co. v. Crenshaw*, 78 Ky. 136 (1879).

<sup>81</sup> It seems settled on authority that the problem of getting jurisdiction by consent over non-incorporated associations of citizens of other states is not different from that of getting jurisdiction similarly over individual citizens of other states. As *res integra* one might have quarreled with the decision in *Paul v. Virginia*, 8 Wall. (U. S.) 168, dividing all extra-state enterprises into corporations not entitled to the benefit of the comity clause and citizens who are. It might have been argued that the corporate group was simply a convenient form of organization employed by citizens in commercial undertakings and equally entitled with citizens to the protection of the comity clause. If, however, the distinction had to be drawn between citizens and group units which are not citizens, the point might have been made that all groups must be withdrawn from the scope of the comity clause, because each unit has an identity although not a legal personality distinct from its members, the citizens.



As a matter of fact, most of the statutes attempting to extend the jurisdiction of the courts over non-citizens doing business within the territory show not the slightest intention on the part of the state to bargain or to admit the group or individual to do business on the condition that it or he consent to the jurisdiction of the courts. Those statutes which disclose such a state of mind very sensibly forbid the parties to do business until they have filed with a state officer a designation of an agent to accept service. The insurance statutes are all of this type; as also is the Kentucky provision for service on non-residents engaging in the surety business within the state.<sup>82</sup>

Most of the statutes seem to assume the existence of jurisdiction over the parties and merely provide a method of service. Generally the courts, which have held this type of statute unconstitutional, have made the validity of this assumption, or rather its invalidity, one of their two principal *rationes decidendi*. The other has been the alleged infringement of the rights secured to citizens of other states by the comity clause previously discussed. We must now proceed to investigate the validity of the assumption made by the statutes, that is, to what extent, if any, jurisdiction through presence may be obtained over non-resident individuals and groups.

The problem of obtaining jurisdiction by presence calls for the application of several principles already laid down. A restatement of the problem will probably aid in its solution. Where an individual is not (1) present within the state, or (2) domiciled there, (3) owes it no allegiance, and (4) has not consented to its jurisdiction, the state's courts have no power to render a personal judgment against him since *Pennoyer v. Neff*.<sup>83</sup> In the case under discussion, while the individual is not personally present in the state, he is doing business there either as an individual entrepreneur or as a member of a group of entrepreneurs, through agents who represent him. The latter case, while giving rise to the more numerous and vital problems in the modern state, theoretically affords us less difficulty than the former. Today we have great aggregations of capital doing a business which recognizes no territorial limits, with every conceivable form of organization; partnership, limited partnership, joint stock company, and trust, possessing vast powers for

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<sup>82</sup> KENTUCKY STATUTES, 1915 (Carroll), § 3720 d.

<sup>83</sup> 95 U. S. 714 (1877).

good and evil. But more important perhaps are the immense combinations of men with power to shake the very foundations of the state, such as our labor unions, political groups, and religious organizations, not to mention the mushroom-like growth of coöperative and fraternal societies of all characters. Some of these in the United States and England, but more particularly on the Continent, have, by judicial decision and statute, been given many of the attributes of a corporation. Whether the effect of such laws has been to confer personality on any group or not, is a question to be determined by the laws of any place in which the group may happen to be present. Whether the jurisdiction which creates a status calls it by that name is immaterial.<sup>84</sup> We are not directly interested in the domestic status and regulation of these groups.<sup>85</sup> Our problem is the control the courts of a state may exercise over one of them, formed under the laws of another sovereign, which do not recognize its corporate personality, when it engages in activities within the territories of the state. We shall not stop to consider the jurisdiction of courts of law or equity over such members of the group as are within the jurisdiction. It is obvious that the courts have no jurisdiction over the non-resident members of these groups except such as they can exercise through the group.

If group A, an unincorporated union, is running a strike, or group B, an unchartered farmers' coöperative society, is disposing of its members' eggs within a state, either group is very clearly present and doing business within that state. If a negro slave domiciled in a state which denied him personality,<sup>86</sup> came north and did some business while present within a northern state, there would in common law countries be no question as to the right of that state to predicate personality upon him, that is, the capacity for rights and obligations.<sup>87</sup> Personality is not a status in the common law. There

<sup>84</sup> *United States v. Adams Express Co.*, 229 U. S. 381 (1912); *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940 (1896); *Pipe Co. v. State Board*, 57 N. J. L. 516, 31 Atl. 220 (1895); *Express Co. v. State*, 55 Ohio St. 69 (1896).

<sup>85</sup> For the nature of the difficulties involved in these problems reference should be made to 3 MAITLAND, COLLECTED PAPERS, 271 *et seq.* Geldart's brilliant paper on Legal Personality, 27 L. QUART. REV. 90, Jethro Brown's discussion of the Personality of the Corporation and State, 21 L. QUART. REV. 365, the articles of Dicey and Geldart already cited, note 7, in English, and the vast continental literature on this subject.

<sup>86</sup> STROUD, SLAVE LAWS, 2 ed., 34 *et seq.*; *State v. Mann*, 2 Devereux Law (N. C.) 263 (1829); *Ex parte Boylston*, 2 Strobhart Law (S. C.) 41, 43 (1846).

<sup>87</sup> *Somerset v. Stewart*, Lofft 1 (1772); *Polydore v. Prince*, 1 Ware \*402 (1837).



seems, therefore, to be no reason why the laws of a state should not predicate personality upon any foreign group, capable of a capacity for rights and obligations, at any rate to the extent of the business done within the state. The United States Supreme Court has expressly held that Congress might do this.<sup>88</sup> The courts of the state would then have the power to render a judgment *in personam* against the group as such, and, what might be more important, make a decree in equity binding it.

It seems that this is exactly what has been done by states that have passed statutes similar to the Texan one sustained in *Sugg v. Thornton*.<sup>89</sup> Texas Statutes, section 1224, provide:

"In suits against partners the citation may be served upon one of the firm and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

Section 1346 provides:

"Where the suit is against several parties jointly indebted upon a contract and the citation has been served upon some of the parties, but not upon all, judgment may be rendered therein against such partnership and against the partners actually served, but no personal judgment or execution shall be awarded against those not served."

The effect of this statute is to impose an obligation on the partnership as such, enforceable only against the property of the partnership, which is to that extent treated as a legal person. In *Sugg v. Thornton*<sup>90</sup> the United States Supreme Court sustained a personal judgment against a firm, one of the partners of which resided in another state, although service was made only upon the resident partner. Texas not having jurisdiction of the non-resident partner could not charge his share of the partnership assets by a personal judgment. But Texas had the right to treat a partnership present in Texas as a legal person as well as a commercial unit and as such to impose a personal judgment upon it enforceable against all its property no matter to whom that property might go in the event of a distribution of the firm's assets. In other words, such statutes cannot be supported as mere procedural conveniences when applied to partnerships all the members of which are not within the

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<sup>88</sup> *United States v. Adams Express Co.*, 229 U. S. 381, 390 (1912).

<sup>89</sup> 132 U. S. 524 (1889).

<sup>90</sup> *Ibid.*

jurisdiction of the court.<sup>91</sup> *Sugg v. Thornton* and the long line of similar decisions hold that a state may personify a foreign partnership for the purpose of jurisdiction. Such statutes are to be found in nearly every jurisdiction in the United States, and judgments against foreign partnerships based upon the service they prescribe have been universally upheld.<sup>92</sup> Some similar statutes have been held unconstitutional, and properly so, when they have made no provision for limiting the enforceability of the judgment to the property of the firm and of those partners personally served.<sup>93</sup> The English rules of the Supreme Court<sup>94</sup> similarly provide for suits against the partnership as such when the firm is doing business in England. The judgment binds only the firm assets and the assets of any partner who may be served within the jurisdiction.<sup>95</sup>

Most of these statutes make service on the agent in charge of the local business enough to support a judgment against the firm, and this is clearly sound if the partnership is present and doing business in the jurisdiction. The presence of one partner cannot give the courts any peculiar right to charge the share of non-resident partners in the partnership assets; that power can exist only by virtue of the presence of the firm, and the presence of a partner is no more the presence of the firm than the presence of any other agent in the scope of his employment. Indeed, it would seem less so where an immense business is carried on in a partnership form and where the holder of a certificate for a 1/1000 distributive interest is a partner. The presence of such a partner taking no active part in the business

<sup>91</sup> If all the members are within the court's jurisdiction it may be said that reasonable notice of the controversy is all that is required by due process.

<sup>92</sup> *Sugg v. Thornton*, 132 U. S. 524 (1889); *Winter v. Means*, 25 Neb. 241, 41 N. W. 157 (1888); *Broatch v. Moore*, 44 Neb. 640, 63 N. W. 30 (1895) (only enforceable against firm property); *Brawley v. Mitchell*, 92 Wis. 671, 66 N. W. 799 (1896); *Sketchley v. Smith*, 78 Ia. 542, 43 N. W. 524 (1889); *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913 (1897) (S. C. Stat. not complied with); *Yerkes v. McFadden*, 141 N. Y. 136, 36 N. E. 7 (1894); *Whitmore v. Shiverick*, 3 Nevada, 288 (1867); *Johnson v. Lough*, 22 Minn. 203 (1875); *Brooks v. McIntyre*, 4 Mich. 316 (1856); *Ralya Market Co. v. Armour*, 102 Fed. 530 (1900); *Thomas v. Nathan*, 65 Fla. 386, 62 So. 206 (1913); *Kearney v. Fenner*, 14 La. Ann. 870 (1859).

<sup>93</sup> *Flexner v. Farson*, 268 Ill. 435, 109 N. E. 327 (1915); *Caldwell v. Armour*, 1 Pen. (Del.) 545, 43 Atl. 517 (1899); *Brooks v. Dun*, 51 Fed. 138 (1892); *Aikmann v. Sander-son*, 122 La. 265, 47 So. 600 (1908), all partnership cases.

<sup>94</sup> Order 48; A, sec. 1, 8.

<sup>95</sup> *Banking Co. v. Firbank*, [1894] 1 Q. B. 784, but see PIGGOTT, SERVICE OUT OF THE JURISDICTION, 81 *et seq.*, for previous state of the law and difficulties raised before this conception was accepted.



of the group would, it seems, have no more the effect of giving the court jurisdiction than the presence of a stockholder in a corporation, provided the corporation were not otherwise engaged in business in the jurisdiction.<sup>96</sup>

Where the group is of such character it has all the advantages of a corporation together with the protection of the comity clause. If it could insist on having all its members joined as necessary parties defendant as a condition of suit, it would obtain practical immunity from personal obligation. This difficulty has likewise been met by statutes which in effect make such companies legal persons. A typical statute is to be found in the New Jersey Practice Act, section 40 of which provides as follows:

"Any unincorporated organization, consisting of seven or more persons and having a recognized name, may be sued by such name in any action affecting the common property, rights and liabilities of such organization; all process, pleadings and other papers in such action may be served on the president . . . or the agent or manager or person in charge of the business of such organization; such action shall have the same force and effect as regards the common property, rights and liabilities of such organization as if it were prosecuted against all the members thereof; and such action shall not abate by reason of the death, resignation, removal or legal incapacity of any officer of such organization or by reason of any change in the membership thereof."

The sections following treat the group in all respects as a corporation. Service under this statute was made the basis of a personal judgment against a Lloyds Association for insurance in *Bank v. Fire Association*.<sup>97</sup> Such judgments have been invariably sustained,<sup>98</sup> even where the group has been organized outside the state and is composed principally of non-residents.<sup>99</sup> New York has gone to

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<sup>96</sup> It should be remembered that service on an agent is not upheld because he is an agent of the partners. That reasoning would be equally applicable to support a personal judgment against each partner, and, *a fortiori*, to support a personal judgment against each and all of the partners where only one has been served. The court having jurisdiction of the agent of the partnership group has thereby jurisdiction of the group through its presence, and the service is upheld as service on the group.

<sup>97</sup> 63 N. J. L. 5 (1899).

<sup>98</sup> *Bank v. Van Derwerker*, 74 N. Y. 234 (1878); BLISS, ANNOTATED NEW YORK CODE, § 1919 *et seq.*, and cases cited; *Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938 (1906) (VT. STAT., § 1099); *Appeal of Baylor*, 77 S. E. 59 (S. C. 1913).

<sup>99</sup> *State v. Adams Express Co.*, 66 Minn. 271, 68 N. W. 1085 (1896); *Taylor v. Order of Railway Conductors*, 89 Minn. 222, 94 N. W. 684 (1903); *Adams Express Co. v.*

the extent of treating a joint stock company, which it declares not to be a corporation and which has non-resident members, as having personality sufficiently distinct in law to allow one of its members to sue it for a wrong arising out of its dealings with him as a common carrier.<sup>100</sup> The United States Supreme Court has held that the Interstate Commerce Act has personified the joint stock companies engaged in the express business to the extent of making them indictable.<sup>101</sup>

The form in which the group's business is carried on should not affect the question of jurisdiction. The sole question should be: Is the group present? It is conceived that it is not present unless it maintains agents or members engaged in the group business within the state. If the group is actually doing business there, whether the profit sharers are partners, or *cestuis que trustents*,<sup>102</sup> or mere shareholders,<sup>103</sup> should be immaterial. There is certain property being used in the business and judgment can always be enforced against that — the judgment itself can run against the group in its business name. If a hedge of trustees holds legal title to the assets of the business, the equitable title is at any rate in the group and its members, and may be levied upon in a judgment against the group. A trust estate is not less capable of personality than other groups; it possesses personality on the continent. Indeed, all these groups receive more or less recognition as persons, principally in taxing statutes.<sup>104</sup>

As a matter of fact, the external group activities of the house of J. P. Morgan, of which J. P. Morgan is the sole proprietor, are not distinguishable from those of the firm of J. P. Morgan & Co., of which J. P. Morgan and H. P. Davison are partners, or from those of J. P. Morgan, Inc., of which J. P. Morgan owns all the shares except those allotted to dummy directors. If J. P. Morgan & Co. and J. P. Morgan, Inc., can as matter of fact be said to be present in a foreign jurisdiction, then the house of J. P. Morgan may simi-

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Schofield, 23 Ky. L. 1120, 64 S. W. 903 (1901); *Messler v. Schwarzkopf*, 35 N. Y. Misc. 72 (1901).

<sup>100</sup> *Westcott v. Fargo*, 61 N. Y. 542 (1875).

<sup>101</sup> *United States v. Adams Express Co.*, 229 U. S. 381, 390 (1912).

<sup>102</sup> *Williams v. Milton*, 215 Mass. 1 (1913).

<sup>103</sup> *In re Associated Trust*, 222 Fed. 1012 (1914).

<sup>104</sup> Federal Corporation Income Tax.



larly be there. But if a state in which the house of J. P. Morgan is doing business decides to endow it with legal personality, it may certainly do so. If judgment be given against the new entity, against what property may it be enforced? Evidently it is enforceable against the property within the jurisdiction actually engaged in the business, such as office furniture, cash in hand, and securities employed as collateral. But can the plaintiff go further and attach the property of J. P. Morgan not actually being used in the business at the present moment? It is thought that he may. Where an individual engages in business, his relation to that business is different from his relation to a partnership of which he is a member, or to a corporation in which he invests. In each of the latter two cases a definite sum is generally laid aside as capital with which to carry on the business. This sum may not be reduced without considerable formality. In the case of the individual, except occasionally as a matter of bookkeeping and then without further significance, no distinction is made between property to be used in the carrying on of his business and that to be used for his other activities. He puts money into the business and takes it out as circumstances demand. Thus, in a sense, it may be said that all the property owned by J. P. Morgan personally is, as a matter of fact, as it is as a matter of law, the capital of the house of J. P. Morgan. In other words, the whole property of the individual in this case is the property of the group entity known as the house of J. P. Morgan and it is subject to execution on a judgment against that entity. When a man is carrying on several enterprises which he is really desirous of isolating, he incorporates them. Unless he does so, it may be said that they constitute a unit only separated so far as convenience demands, the capital and labor of each flowing into the other whenever desirable. A law subjecting the whole of an individual's property to execution under a judgment against his business should not be held unconstitutional. The capital of his business is admittedly subject to execution under such a judgment, and the test laid down for determining that capital cannot be said to be an unfair or unreasonable one, because in the great majority of cases the individual's property is the capital of his business, and in those few cases in which this might not be true, it would as a practical matter be impossible to distinguish the individual's property from the capital of his business. Allowing the judgment to be taken against the

individual directly, is merely a matter of procedure and cannot affect the substantial rights of the parties. *Pennoyer v. Neff*<sup>106</sup> has not concluded this reasoning, because the statute in that case was not restricted to individuals engaged in business within the state. Indeed, as we have seen, the opinion of the court specially excepted such a case from its decision.

The courts have not yet expressly formulated this theory, although it has been the basis of several decisions. For a time it appeared to be the theory adopted by the British judges in drawing up their rules under the Judicature Act of 1873. Rules of the Supreme Court, Order IX provides:

"When one person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there, and subject to any of the rules of the Supreme Court, such service shall be deemed good service on the person sued."

Order XVI provides (section 8):

"Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm."

In *O'Neil v. Clason*<sup>106</sup> the Divisional Court upheld service on the manager of the business of a resident of Germany not then within the jurisdiction, doing business under the name of Clason & Co. Since the court had no jurisdiction over the non-resident, this decision interpreted the rules as recognizing the personality of a man's business apart from himself. Unfortunately, some seventeen years later the case was overruled by the Court of Appeal in *St. Gobain v. Hoyermann*,<sup>107</sup> where the rules were interpreted to cover only a resident doing business under a firm name. But as Dicey points out, the question is not yet free from doubt in England.

In *Alaska Commercial Co. v. Debney*,<sup>108</sup> the United States Circuit Court of Appeals for the Ninth Circuit committed itself to the same theory, by enforcing a judgment obtained in Canada against a defendant residing in the United States upon service on the agent in

<sup>106</sup> 95 U. S. 714 (1877).

<sup>107</sup> [1893] 2 Q. B. 96.

<sup>106</sup> 46 L. J. Q. B. (N. S.) 191 (1876).

<sup>108</sup> 144 Fed. 1 (1906).



charge of his business in Canada, without in any way raising the question of defendant's consent to the service. As the Canadian court did not have jurisdiction of the defendant but only of his business, the decision recognizes the possibility of the business constituting a legal personality distinct from its owner.

*Guenther v. American Steel Hoop Co.*<sup>109</sup> is probably the leading American case. The facts are the same as those in the English case, but the statute is in the ordinary American form. It is as follows:<sup>110</sup>

"In actions against an individual residing in another State or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

The court, in the most carefully reasoned opinion on the subject, proceeding from the *dictum* of Mr. Justice Field in *Pennoyer v. Neff*,<sup>111</sup> seems to feel that the question of discrimination under the comity clause is the only one involved. But it recognizes that the judgment given in Kentucky does not necessarily have to be given full faith and credit abroad in such states as do not possess statutes similar to the Kentucky one. Such states have not recognized a legal personality similar to that created by the Kentucky statutes, and hence there is no defendant amenable to their courts against whom the judgment might be enforced. The court in *Johnson v. Westerfield*<sup>112</sup> dealt with an individual engaged in interstate commerce in the same way, and correctly so. The fact that the individual is engaged in interstate commerce cannot affect the question before Congress has taken action. In Indiana we have a decision of the highest court in *Edwards v. Van Cleave*,<sup>113</sup> supporting a judgment rendered against a non-resident individual doing business within the state based on service upon his agent in charge. *Green v. Snyder*<sup>114</sup> and *Carpenter v. Laswell*<sup>115</sup> are exactly in point.<sup>116</sup>

<sup>109</sup> 116 Ky. 580, 76 S. W. 419 (1903).

<sup>111</sup> Cited *supra*.

<sup>113</sup> 47 Ind. App. 347, 94 N. E. 596.

<sup>115</sup> 23 Ky. L. 686, 63 S. W. 609 (1901).

<sup>110</sup> KY. CIVIL CODE, sec. 51, subsec. 6.

<sup>112</sup> 143 Ky. 10, 135 S. W. 425 (1911).

<sup>114</sup> 114 Tenn. 100, 84 S. W. 808 (1905).

<sup>116</sup> *Adams Express Co. v. Crenshaw*, 78 Ky. 136 (1879); *Crane v. Hall*, 165 Ky. 827, 178 S. W. 1096 (1915); *Rauber v. Whitney*, 125 Ind. 216, 25 N. E. 186 (1890); *Behn v. Whitney*, 125 Ind. 599, 25 N. E. 187 (1890), are all cases containing *dicta* supporting the principal cases, but being partnership cases are not in point. Probably they are wrongly decided where the judgment is not limited to firm assets.

The only decision squarely holding a statute of this type unconstitutional when applied to non-resident individuals is *Cabanne v. Graf*<sup>117</sup> decided by the Supreme Court of Minnesota in 1902. The court very properly pointed out that the defendant in that case had never consented to submit himself to the jurisdiction of the Minnesota courts. But it then went on to beg the question by assuming that *Pennoyer v. Neff*<sup>118</sup> had concluded it when that case settled that a personal judgment could not be given against a person over whom the court had no jurisdiction. There are, however, several cases not themselves in point containing *dicta*, founded principally on the comity clause, denying the constitutionality of similar statutes.<sup>119</sup>

So far we have been discussing the right of a state to give a personal judgment against a group or individual residing abroad. If this right is conceded we can secure a judgment enforceable not merely against property now within the state but against any property subsequently brought in, thus making it practically impossible to do business within the state until the judgment is satisfied. As a remedy for the plaintiff, this is immensely superior to leaving him to bring separate *quasi-in rem* actions against each piece of property brought in. How far the judgment would be enforceable in a state other than that in which it was rendered would depend on the law of that state. If the state in which it was sought to enforce the judgment recognized the personality of the group or entity against which the judgment had been rendered, the judgment would come within the guaranty of the full faith and credit clause. If the state recognized no such personality, of course it would be justified in refusing to enforce a judgment running against someone who could not be brought before its courts.<sup>120</sup>

William F. Cahill.

NEW YORK CITY.

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<sup>117</sup> 87 Minn. 510, 92 N. W. 46 (1902).

<sup>118</sup> 95 U. S. 714 (1877).

<sup>119</sup> *Caldwell v. Armour*, 1 Pen. (Del.) 545, 43 Atl. 517 (1899); *Brooks v. Dun*, 51 Fed. 138 (1892); *Aikmann v. Sanderson*, 122 La. 265, 47 So. 600 (1908); *Flexner v. Parson*, 268 Ill. 435, 109 N. E. 327 (1915), are all partnership cases in which judgment was not restricted to partnership assets and hence properly set aside. In *Moredock v. Kirby*, 118 Fed. 180 (1902), the state code did not allow judgments against citizens except on personal service. See note 67, *supra*.

<sup>120</sup> *Flexner v. Parson*, 268 Ill. 435, 109 N. E. 327 (1915).



## STATUS OF STATE MILITIA UNDER THE HAY BILL

A NOTE in the HARVARD LAW REVIEW for December discussed under the above caption the questions involved in the recent case of *Sweetser v. Emerson* and, going farther, examined into the scope and constitutional basis of the Federal authority over the National Guard assumed by the Hay Bill. Rather strangely, the discussion passes over *sub silentio* the many obviously questionable means of "federalization," and out of all the new Federal powers exerted by the Bill selects as constitutionally deficient the one which seems authoritatively established beyond doubt or criticism, namely, the power to draft the National Guard, or organized militia, of the several States into the Federal Army. Though the argument fails to recognize, indeed denies, the basis of such Federal authority, more strangely still it proceeds to sustain it, extra-constitutionally as it were, by resort to a theory that is destructive of all balance between the Nation and the States.

That theory, as unnecessary as unsound, merits here a moment of consideration. The proposition is that Congress is without power to provide for drafting the organized militia into the Army of the United States, because such is not one of the constitutional purposes for which the militia may be called into the Federal service. But sanction is sought for legislation thus assumed to be unconstitutional in the acceptance by the States of the Federal pecuniary aid appropriated on condition of State compliance; and thus, it is said, "the States will waive their right to object to the action of Congress under the terms thereof," and, as for the individual members of the Guard, their enlistment oath to defend the United States and obey the orders of the President "would seem to constitute an express waiver of their constitutional right to object to draft for other than the constitutional specified purposes." Poise is likely to be lost in contemplating a statement like this:

"Congress accomplishes this result [that is, using the militia for an assumed unconstitutional purpose] by using its constitutional power to organize the militia to abolish the constitutional limitations placed

on its use of the militia. A state is given the choice of having no militia or one unprotected by constitutional guarantees. The net result is that the old sort of militia, known to the Constitution, is to be done away with."

Such an argument clashes with reason as its consequence clashes with fundamental law. Surely neither the argument nor its consequence is appreciated. See what it means: Legislation which it was incompetent for Congress to enact, because transgressing the limit of its power and invading that expressly reserved to the States, may nevertheless be validated by being accepted or acquiesced in by State legislation which it was equally incompetent for the State to enact. Constitutional amendment by unconstitutional statute; by unlawful agreement between Congress and the State legislature; by purchase, indeed!

My interest, however, lies in the proposition that the militia cannot be drafted into the Federal army, rather than in the theory suggested to sustain it. The draft section is the capstone if not the keystone of the military structure which it was the purpose of the Bill to provide. "Federalize" was the key word of the agitation and debate which produced the legislative result, pervading the entire legislative environment. The Dick Bill had provided that the organized militia or National Guard, as such, should be available for use, like a Federal army, for general military purposes "either within or without the territory of the United States" (section 5). That declaration seemed to satisfy all (except perhaps those lawyers interested enough in the subject to read the limited purposes for which the Constitution had authorized the Federal use of the militia) until the Attorney General in 1912,<sup>1</sup> concurring with the Judge Advocate General of the Army, held in a well-considered opinion that there was no constitutional warrant for such general Federal use of the militia beyond the territory of the United States. To make the militia fit and available for general military use wherever a Federal army might be called upon to execute the national will has been the object of all the agitation since, and was the chief object of the Bill under discussion. But the most extreme "federalizationist," upon reflection, realized that the militia as such could not be so used; that the militia status served not as a basis for but a bar against such use, and that to make the militia so available

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<sup>1</sup> 29 Op. 322.



the status of its members would have to be, not simply that of militiaman over whom the Federal government has only a limited constitutional control, but must become that of federal soldier — a member of the Army of the United States — over whom the Federal government has exclusive and plenary control. The Bill proceeds upon a theory, heretofore unquestioned, that the militiaman is a citizen having a duty to render Federal military service which is paramount to, and therefore not incompatible with, his obligation to render local militia service, and it is upon him as a citizen of the United States that section 111 of the Bill provides for imposing in the imminence of war the Federal military status. If the enlistment obligation alone (section 70) accomplishes such a change of status immediately, then the organized militia of the several States under the Bill is something more than what is suggested, and what apparently Congress intended to suggest, as the status of the "National Guard of the United States"; it becomes indeed *an Army of the United States*. Perhaps such is not the legal effect of the obligation, and certainly, speaking extra-judicially, Congress did not intend it so to be. The method adopted, then, to render the organized militia of the several States available for general Federal military service for war purposes out of the territory of the United States was a draft into the Army of the United States operative upon the members of the militia, not in their status as militiamen, but in their capacity as citizens, obliged as such to render to the Nation such military service as the Nation might require. Whatever may hereafter be found as to the validity and efficacy of some of the new Federal powers asserted by the Bill, the least questionable and most effectual element of federalization is to be found in the section criticized. True, Congress may draft any of its citizens without the preliminaries established by the Act; but now it has expressed the policy of especially preparing, rendering available for use, and using the members of the organized militia to the declared national end.

It is now asserted that this cannot be; that the organized militia by virtue of its status is constitutionally exempt from service in the armies of the United States. If so, what is attempted is in violation of the constitutional right of the citizen or in derogation of the reserved rights of the States. The Nation, then, in the realm of national defense is not, as our fathers said it was, supreme; it has not the superior right to the military service of all its citizens; as

to all those who offer themselves to, and are accepted by, the several States in their own local service, it has no rights at all. Such a question is one of prime legal and political importance, exigent now. It involves a principle which applies to a wider field than the militia, and goes indeed to the vitals of the Nation. It is worthy of a lawyer's serious consideration, and it is believed that brief study and reflection will bring the conviction that the Hay Bill is not subject to criticism for this particular assertion of Federal power.

The power of Congress to raise armies finds no limitation in any quarter. It finds none in the terms of the grant or in any other provision of the Constitution. And none can be implied out of deference to State or individual right without offending reason, historical precedent and legal principle. In the international realm, preservation of the Nation and of all its constituent elements is the dominant national purpose, and the national power conferred in unrestricted terms to that end finds no logical limitation in regard for subordinate elements that have divested themselves of their separate power of protection and conferred it upon the sovereign who might the more effectually exercise it all in their behalf. Even an unrefined philosophy detects the lack of wisdom in one who would seek protection from the storm by pulling his shelter down upon him. Legislative precedents and governmental practice, Federal and State, have never recognized any such immunity in the militia status. Drafts of State troops were resorted to during the Revolution,<sup>2</sup> and the Act of June 30, 1834, refers to "drafted militia" as in the service against Indians on our frontier. During the Confederation the States maintained an active militia and frequently used it to supply the requisitions made on them for regular soldiers in the continental army. In *Burroughs v. Peyton*, *post*, the court cites many instances where Virginia made up the deficiencies in her quota by requiring drafts from the militia by legislation which provided that —

"Each man so drafted shall be considered to all intents and purposes as a regular soldier, and shall serve as such for three years if the war should so long continue."

Throughout our history the States have recognized the feasibility of parting with their organized militia when a national crisis has

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<sup>2</sup> 2 JOURNAL CONGRESS, 458, 459; 3 *idem*, 38.



demanded it. In the Civil War the States parted first with their active militia in raising their quotas for the Federal Army, and the State organizations with their members became, when mustered into the service, United States Volunteers. The same thing prevailed in the Confederacy during that period. In the War with Spain the Volunteer Army was raised in the same manner. Of course, in contemplation of law the militia has been taken not as militia, nor as militia organizations, but as individuals owing the Nation allegiance and service. Such a long-continued course of governmental conduct is not without significance.

The historic Draft Acts recognized no such theory of constitutional exemption. The Federal draft act of 1863 rendered liable to draft all able-bodied citizens of the United States, and all aliens who had declared their intention to become citizens, between twenty-one and forty-five years of age; and while providing for the acceptance of substitutes and for pecuniary commutation in lieu of service, it is a remarkable fact that the governors of the several States were the only officers of the States excepted from the provisions. The same was true of the Confederate conscript acts, and, though frequently attacked on the theory that they deprived a State of a necessary instrumentality and thus assaulted her indestructible character, the courts of the Confederate States, as will later be shown, condemned the contention. It is significant also that Federal law providing for the army, including the present National Defense Act, has never excluded members of the National Guard from enlistment in the Federal forces, although, indeed, it might be wise to do so as a matter of policy within legislative control.

Such historic considerations negative the suggestion that the draft of the organized militia into Federal armies trespasses upon the constitutional realm assigned to the State or offends against the constitutional right of the citizens comprising the militia and thus drafted.

But the dominant character of this Federal power is more firmly established on legal grounds. Judicial authorities accord in sustaining these propositions:

1. There are no limitations, express or implied, upon the Federal power to raise and support armies, or upon the method or manner of the exercise thereof; and, specifically,

2. The Federal government is not dependent upon the will, either of the citizens or of the State, to carry that power into effect; and, more specifically still,

3. The power to call out the militia, itself a compulsory service, does not limit the power to raise and support armies, nor is the latter power subordinate to the power conferred over the militia.

The Supreme Court of the United States in *Tarble's Case*<sup>3</sup> said:

"Among the powers assigned to the National government is the power 'to raise and support armies' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine without question from any State authority how the armies shall be raised, whether by voluntary enlistment or forced drafts, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what constitutes military offenses, and prescribe their punishment."

And, continuing —

"No interference with the execution of this power of the National government in the formation, organization and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service."

The rights of the citizen do not countervail the right of the Nation in the realm of national defense. As was said in *In re Grimley*,<sup>4</sup> —

"The government has the right to the military services of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all."

And, as was adverted to by Mr. Justice Harlan delivering the opinion of the court in *Jacobson v. Massachusetts*,<sup>5</sup> —

". . . he [the citizen] may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."

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<sup>3</sup> 13 Wall. 397, 408.

<sup>4</sup> 137 U. S. 147, 153 (1890).

<sup>5</sup> 197 U. S. 11, 29 (1904).



A volume of judicial pronouncement recognizes, without a discordant note, the unlimited character of this Federal power.<sup>6</sup>

The Federal draft acts were tested in the courts and sustained in *McCall's Case*<sup>7</sup> and *Kneedler v. Lane*,<sup>8</sup> upon the theory of the full and unrestricted character of the constitutional grant. And the constitutionality of the Confederate conscript acts, which was much more vigorously contested, was sustained upon the same ground by the courts of the Confederate States without exception.

Such constitutional canon pronounced by the highest court of the nation repels the contention and closes the door to the argument that the militia status furnishes an exemption from the operation of the vital national power, though the court has had no opportunity to apply the canon to the specific question. But in several instances the highest courts of the Confederacy did have such occasion, and in every instance rejected all such contentions in opinions justly celebrated for their cogency, learning, and completeness of disposition.

In *Ex parte Coupland*<sup>9</sup> the Supreme Court of Texas, in disposing of the contention in the course of an admirable opinion, said:

"The fallacy of the position seems to be manifest from the qualifications which they are forced to give it. For, as we have shown, the citizen has no right to exercise volition, with regard to the performance of military duty, so as to impair, or qualify the power of congress to raise armies, and, if the qualification exists by reason of the rights of the State over the arms-bearing citizens as its militia, and to appoint their officers when in the service of the Confederate States, these rights could not surely be affected by the voluntary action of the citizen. Nor can the difficulty be gotten over by saying that it is further to be assumed that the State must be presumed to have consented to his voluntary enlistment; for it is as impotent as the citizen to destroy in this manner a constitutional right conferred upon congress, or thus to confer one not otherwise given. . . . The individual is equally an arms-bearing citizen whether

<sup>6</sup> See *Dynes v. Hoover*, 20 How. 65 (1857); *Johnson v. Sayre*, 158 U. S. 109, 114 (1894); *Ex parte Milligan*, 4 Wall. 2, 139 (1866); *United States v. Sweeny*, 157 U. S. 281, 284 (1894); *United States v. Bainbridge*, Fed. Cas. 14, 497 (1816); *United States v. Blakeney*, 3 Gratt. (Va.) 405 (1847); *Commonwealth v. Gamble*, 11 Serg. & R. (Pa.) 93 (1824); *Commonwealth v. Morris*, 1 Phila. 381 (1852); *Ex parte Brown*, 5 Cranch (U. S. C. C.) 554 (1839); and the cases hereinafter discussed.

<sup>7</sup> 5 Phila. 259, 268 (1863).

<sup>8</sup> 45 Pa. St. 238 (1863).

<sup>9</sup> 26 Tex. 386, 396 (1862).

he goes into the service voluntarily, or otherwise. For surely the doctrine is not to be advanced that individuals, companies, or regiments of the 'well-regulated,' arms-bearing citizens 'necessary to the security of a free State,' which has been organized, armed, and disciplined as provided for by congress, and for whom a call is made by the Confederate States, in pursuance with the constitution, cease to be integral parts of the arms-bearing citizens of the State, because they prefer to volunteer their services directly to the Confederate government, and it is willing thus to accept them.

"It is said, however, that . . . the control of the State over its militia may be entirely destroyed; but would not the result be the same if an equal number of its militia were to volunteer into the service of the Confederate States? The truth of the matter is, that when the citizen goes into the army raised by Congress, either voluntarily or in obedience to the law requiring him to do so, he does this as a citizen, and not as a militiaman. Congress has not the right to raise armies in either mode, beyond the necessities of the Confederate government for carrying into effect its granted powers. But in either case the citizen, when placed in its service, is temporarily withdrawn from the control of the State as a militiaman. For the time being the right of the State, or, more properly speaking, the right of the State government over him, must yield to the more pressing and important demand for his services by the Confederate government to enable it to discharge the duties for which it has been authorized to raise and support armies."

And further on the court said:

"The origin of this grant of power to raise armies shows most conclusively that it was not intended to leave the Government dependent upon the will either of the citizen or the State to carry it into effect. It is given in our constitution, as it was originally in the constitution of the United States, and was placed in that for the purpose of correcting one of the leading defects in the articles of confederation, experience having proved it absolutely essential, not only to the safety, but to the very existence of the Confederacy."<sup>10</sup>

Then, inquiring as to what disposition the sovereignty of the people had made of its right to military service from all its citizens between the two agencies by which they proposed to administer their government, the court further said:

"We find that it has given to its Confederate agency, so to call it, the sole power to determine upon the questions of war and peace, and that it

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<sup>10</sup> Page 399.



has consequently made it the duty of that agent to protect the State itself, and its local agency from attacks from both domestic and foreign foes, and that it has clothed it with the power to do this, by authorizing it to raise and support armies, and to provide and maintain a navy, to the extent that in its judgment it should deem necessary. . . . These agencies, though possessing distinct powers, have to look for their performance to the citizens, and, consequently, as in many other grants of power to them, their action is concurrent over the same subject matter, and at times may thus present seemingly conflicting grants of power. What then is to be their construction? The answer is plain. The limited and subordinate must yield to the general and superior. Consequently, such as usually pertain to, or are indices of sovereign power must control, and be regarded as superior to those of a local and domestic character. Ordinarily there would be no appreciable conflict between these grants of power, as the number of citizens the Confederate government would require for its armies would be so inconsiderable with reference to the bulk of militia, left under control of the local government, as to be, for practical purposes, unimportant to the latter. But great emergencies like that which now exist, will sometimes arise when the Confederate government is forced to exercise the entire military power that has been granted to it; and there is consequently a call for the great bulk of the arms-bearing citizens into its armies, and a corresponding diminution of those under the immediate control of the State government under the laws governing the militia.”<sup>11</sup>

In *Burroughs v. Peyton*,<sup>12</sup> the Court of Appeals of Virginia said:

“It is true that the constitution does recognize the militia, and provides for using it, as well as regular armies, in the military service of the country. Well-regulated militia has (as is stated in one of the amendments) always been regarded as necessary to the security of a free state. It was therefore proper that provision should be made in the constitution for its organization, and for that authority to be exercised over it by the State governments, and Congress respectively. It was not probable that in the exercise of the power to raise armies, Congress would, under ordinary circumstances, materially diminish the number of the militia. But it cannot be true that, with a view to preserving the militia entire, it was intended to deny to Congress the right to take individuals belonging to it into the regular army. This construction would prevent Congress from obtaining from its ranks not only conscripts but volunteers also;

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<sup>11</sup> Page 403.

<sup>12</sup> 16 Gratt. (Va.) 470, 482 (1864).

but as the militia embraces the whole armsbearing population, it would render it necessary that the army should contain none but foreigners hired for the purpose, and having no interest in common with the people of the country. No one can imagine that such was the intention of the framers of the constitution.

"The true interpretation of the constitution in reference to this matter would seem to be that the power to use the whole military force of the country was conferred upon Congress, and it was left to their discretion to fix, as the varying necessities of the country might require, the relative proportion of regular troops and militia to be employed in the service. If it should appear at any time to be appropriate to increase the army, it might be done by taking men from the militia either as volunteers or as conscripts — the action in either case being upon the individual citizen, and not upon the militia as an organized body. As it was impossible to foresee how large an army the exigencies of the country might demand, the number of militiamen to be thus transferred to its ranks was wisely left to the discretion of Congress."

In *Ex parte Tate*<sup>13</sup> the Supreme Court of Alabama said:

"Until he [the militiaman] ceases to be a citizen, with the rights and duties which appertain to citizenship, he cannot exonerate himself, nor be exonerated by the legislative power, from the obligations which inherently attach to that relation. Protection is his right, and allegiance his duty, so long as he remains a citizen; and the highest duty of allegiance is to respond to the call of his country for soldiers, when her liberty, including his own, is threatened, and her existence endangered by an invading enemy."

In *Fitzgerald v. Harris*<sup>14</sup> the Supreme Court of Georgia, after holding that Congress could not grant irrevocable exemption from draft, used the following significant language:

"Even in war, when it becomes necessary to send into the field a larger portion of the population, it is greatly desirable that another portion be left at home. There are always men who can be more useful at home than others and more useful there than in the field. As in the raising of armies, the Congress is not bound to take the whole population, nor even the whole of a class (where resort is had to classification), in the exercise of a sound discretion, exemption may be granted as incidental to the general power, but they must be always revocable at the will of the Congress. No man or set of men can be placed without the pale of legislative control in this matter for a single day."

<sup>13</sup> 39 Ala. 254, 268 (1864).

<sup>14</sup> 33 Ga. (Supp.) 38, 54 (1864).



In *Barber v. Irwin*,<sup>15</sup> another case in which the constitutionality of the Confederate conscript law was brought into question and again held valid, it was objected, among other things, that the unlimited power of Congress to place all citizens capable of bearing arms in the Army of the Confederate States is incompatible with State sovereignty and may be so exercised as to deprive them of their right to enforce their police power or to execute the mandates of their courts. To this argument the court replied that:

"Public exigencies, and especially military exigencies, require that the Legislature be entrusted with ample powers. If the presumption, that no power susceptible of abuse could have been intended to be given, is to govern, in the construction of the constitution, the palpable result is, that our government is too weak to accomplish the ends for which it was instituted. In the language of Gov. Troup, so understood, 'it is the weakest and most contemptible Government on earth; it is neither fit for war nor peace.'"<sup>16</sup>

Adverting to the admission in argument that in order to meet invasion Congress, by calling out the militia, had the power to place in actual military service all men capable of bearing arms, even to the last man, the court commented as follows:

"Now, this done, what becomes of the sovereignty of the States, so jealously guarded, in construing the other clause? Where would be their police force; where their sheriff's *posse comitatus*? Why is the presumption so vigorously wielded against one power allowed to slumber when the other is invoked?"<sup>17</sup>

In *Jeffers v. Fair*<sup>18</sup> it was argued that the proceeding by which the plaintiff-in-error was held in custody was a virtual calling forth of the militia and violated the Constitution in that it took from the State the right of appointing officers of the militia so called forth. The court replied that:

"This argument rests upon the fact that the men now being enrolled for service in the army, have been previously enrolled in the States as militiamen. The simple and obvious reply is, that the status of the citizen is not merged in the militiaman; that the fact of enrolment with

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<sup>15</sup> 34 Ga. 27 (1864).

<sup>16</sup> Page 36.

<sup>17</sup> Page 37.

<sup>18</sup> 33 Ga. 347 (1862).

the militia does not exempt him from other duties and liabilities of citizenship.”<sup>19</sup>

The above cases demonstrate the principle of the draft provision of the Bill, and its soundness.

Coming back to the Bill, care should be taken not to confuse the authority to draft the militia as well as all other citizens under the power “to raise and support armies”<sup>20</sup> with the power “to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.”<sup>21</sup> The latter power is invoked by section 101 of the Bill which contemplates the call of the National Guard as such, that is, as organized militia, for the specified constitutional purposes. When in the active service of the United States under such a call, the militia serves as militia of the several States though subject, of course, for the time being, to the exclusive government by Congress. But the power to raise armies is invoked by section 111, providing for the draft of the members of the militia into the Army of the United States for war purposes; in such a case, they are not drafted as militia, nor do they serve as militia, but as members of the Army of the United States. Accordingly the section expressly declares that “all persons so drafted shall, from the date of their draft, stand discharged from the militia.” A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or reserve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? An organized militiaman is no less a citizen and is much better prepared, largely at Federal expense, to make an effectual contribution to the country’s cause in time of war.

Judged by Marshall’s canon or any other reasonable rule, Congress not only has the right to take those who are the best prepared to defend the Nation, but it also has the duty.

*S. T. Ansell.*

OFFICE OF THE JUDGE ADVOCATE GENERAL,  
WASHINGTON, D. C.

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<sup>19</sup> Page 353.

<sup>20</sup> Art. I, sec. 8, cl. 12.

<sup>21</sup> Art. I, sec. 8, cl. 15.



## INSANITY AND CRIMINAL RESPONSIBILITY

## II

FOR the purpose of comparing the scope of the proposed section with existing rules, the law in three prominent states (Massachusetts, New York, and Illinois) will now be examined.

*Massachusetts.* The Supreme Judicial Court in 1905 approved the following test of responsibility:

"In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, *or*<sup>81</sup> controlling mental powers, *or*<sup>81</sup> if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts."<sup>82</sup>

The same court in 1914 announced the following "working rule whereby the jury are to be guided" in cases where the defense is insanity:

"If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience, *and*<sup>81</sup> judgment, *and*<sup>81</sup> whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it."<sup>83</sup>

The later test is capable of two interpretations. It may be regarded as meaning (1) that there shall be lack of reason, conscience, and judgment in addition to the existence of an irresistible impulse, or (2) that, though reason, conscience, and judgment are still active, the impulse being irresistible cannot be restrained by them. As the conjunctive connective is used, the first would seem to be the proper interpretation.

<sup>81</sup> The italics are the present writer's.

<sup>82</sup> *Commonwealth v. Johnson*, 188 Mass. 382, 388, 74 N. E. 939 (1905).

<sup>83</sup> *Commonwealth v. Cooper*, 219 Mass. 1, 5, 106 N. E. 545 (1914).

However interpreted, it will be noted at once that the later test differs largely from the earlier. According to the earlier one there is no responsibility if there is either no will *or* no conscience *or* no power of control *or* no intellectual power. If, for instance, a defendant has normal will power and intelligence, nevertheless he would not be responsible if he has no conscience. Under the first interpretation of the later test the only defense would be irresistible impulse. Under the second interpretation reason, conscience, judgment, *and* power of control must all be lacking in order that there may be a defense. This is a condition which seldom occurs. A striking contrast to the last announcement of the Supreme Judicial Court is presented by the charge of the trial judge to the jury in the same case. He told them "the defendant could not be convicted if from mental disease he was unable to form a criminal intent," which test closely resembles the provision of the proposed section.

Both the tests announced by the court—the one in 1905 and the one in 1914—were taken verbatim from the famous charge to the jury by Chief Justice Shaw in the *Rogers Case*.<sup>84</sup> His statement of the law regarding insanity has been the object of great admiration and praise. So great a legal writer as Professor Greenleaf in his treatise on Evidence describes it as a "lucid exposition of the law,"<sup>85</sup> and this statement has remained unchallenged by the subsequent editors.

In view of the prestige which it enjoys and the position which it occupies as the basis of the present law in Massachusetts this charge of Chief Justice Shaw deserves careful analysis. The first part of the charge as it appears in the official report is as follows:<sup>86</sup>

1. "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

2. "But these are extremes easily distinguished, and not to be mis-

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<sup>84</sup> Commonwealth v. Rogers, 7 Metc. (Mass.) 500 (1844).

<sup>85</sup> 2 GREENLEAF, EVIDENCE, § 372, note.

<sup>86</sup> The numbering of the paragraphs is by the present writer.



taken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.

3. "On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

4. "If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

5. "The character of the mental disease, relied upon to excuse the accused in this case, is partial insanity, consisting of melancholy, accompanied by delusion."<sup>87</sup>

Before charging with special reference to the case the chief justice made several preliminary statements of a general character, which culminated in the announcement of the following principle:

"A person, therefore, in order to be punishable by law, or in order that his punishment by law may operate as an example to deter others from committing criminal acts, under like circumstances, must have sufficient memory, intelligence, reason and will, to enable him to distinguish between right and wrong, in regard to the particular act about to

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<sup>87</sup> 7 Metc. (Mass.) 500, 501 (1844).

be done, to know and understand that it will be wrong, and that he will deserve punishment by committing it." <sup>88</sup>

In the first paragraph, which is the one adopted as the sole test by the Supreme Judicial Court in 1905, the chief justice starts out by stating a general principle similar to that of the proposed section. If he had confined "criminal intent," which varies in different crimes, to that necessary for murder, which was the charge of the indictment in the case, the similarity would have been still greater.

This statement of a general principle of law, instead of being followed, as might be reasonably expected, by a discussion of the requisites of criminal intent, is followed by an enumeration of certain mental phenomena, an analysis of which discloses a considerable degree of confusion. First, lack of "will," "conscience," and "controlling mental power" are spoken of as resulting from a deficiency of "reason" and "mental powers." What is the distinction intended to be made between "will" and "controlling mental power"? As the lack of either of these is said to be a defense, the distinction is material. Is "reason" not a "mental power"? Can lack of "will" result from a deficiency of "reason"? There are further difficulties involved in the statement. In the next clause the obliteration of "intellectual power" by the "overwhelming violence of mental disease" is mentioned. Does "intellectual power" mean the same thing as "mental power," in the preceding clause? In one clause "deficiency of mental powers" is used, and in the next "mental disease." There is a well-recognized difference between "mental defect" and "mental disease." Since there is no indication that such a distinction was intended to be made, these terms were evidently not used advisedly in the charge. As appears from the first two sentences of the second paragraph, the tests of the first paragraph apply to the case of total insanity. According to these tests, one who has complete will power and intellectual power, but has no conscience, is totally insane.

In the second paragraph the chief justice is discussing what he calls "partial insanity," one of the characteristics of which he intimates is absence of delusion. In contradiction to this he describes, in the beginning of the fifth paragraph, partial insanity as consisting

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<sup>88</sup> BIGELOW & BEMIS, TRIAL OF ABNER ROGERS, 275.



of "melancholy accompanied by delusion." In the test of responsibility in case of partial insanity a new element, not appearing in the requirements where the insanity is total, is introduced, *viz.*, ability to distinguish between right and wrong with reference to the particular act. When "wrong" is first used it is impossible to determine from the context whether moral wrong or legal wrong is meant, but later "wrong" is joined with "criminal," and followed by "punishment," so legal wrong would seem to be there intended. In the last sentence of the second paragraph a new mental element, *viz.*, "memory," is introduced and made a test. It is difficult to see the relation which the second clause of this sentence bears to the first. According to the grammatical construction they are in apposition, but this cannot be since they are entirely different. Should the connective be "or" or "and"? The choice is important, as it greatly affects the scope of the rule. In this last clause the use of the terms "justice," "right," and "duty" indicates that there has been a transition from "legal wrong" to "moral wrong."

In the third paragraph two new elements are introduced, *viz.*, "understanding the nature and character of the act, and its consequences," and "mental power sufficient to apply that knowledge [that the act is wrong and criminal] to his own case." The joining of "criminal" and "punishment" to "wrong" in this paragraph indicates that moral wrong has been abandoned for legal wrong.

The fourth paragraph, the one adopted in 1914 by the Supreme Judicial Court as its "working rule," is apparently applicable in all cases. The Chief Justice, however, as appears from the first sentence of the fifth paragraph, was applying this rule to the case of "partial insanity." A comparison of the first and fourth paragraphs shows that, according to the tests laid down, a person whose intellectual and will powers are unimpaired but who has no conscience is totally insane and is not legally responsible, whereas a partially insane person, according to one interpretation of paragraph four, must be deprived of his reason, conscience, judgment, *and* power of control in order to have a defense, and according to the other interpretation must have had an irresistible impulse.

Following the paragraphs that have been discussed the Chief Justice laid down two new tests with special reference to delusion. This was said to be a defense (1) when "the person under its influence has a real and firm belief of some fact, not true in itself,

but which if it were true would excuse the act," (2) where the wrongful act was the result of "uncontrollable impulse." The first of these is the "mistake of fact" test, which is based on the incorrect premise that apart from the delusion the person is entirely sane.

The tests put to the jury by the Chief Justice, differing as they do among themselves, also differ from the rule announced in the preliminary statement. No distinction is here made between total and partial insanity, and the sole requirement is inability to distinguish between right and wrong with reference to the particular act, the word "punishment" indicating that "legal wrong" is meant.

The amount of practical value possessed by the charge of Chief Justice Shaw may be determined from the fact that the jury in the case, after hearing the charge and retiring for several hours, returned to the court room, and, according to the official report, asked the Chief Justice: "What degree of insanity will amount to a justification of the offense?"

The justification for using so much space in pointing out the inconsistencies and defects of this famous statement of the law relative to insanity is the fact that the reverence with which it has been and is regarded and its frequent citation have embarrassed clear thinking on the subject. Further than this, the Supreme Judicial Court of Massachusetts, as has been shown, still regards it as authoritative.

Notwithstanding the extremely narrow application of the "working rule" last announced by the highest court, it is highly probable that irresistible impulse unaccompanied by inability to distinguish between right and wrong, or the converse situation, would be held in a concrete case to constitute a defense.<sup>89</sup> The charge of the trial judge to the jury is likely to be broader than the rule of the upper court. In other words, the living law in this respect is more comprehensive than the formal law. As regards delusion, the test which would now probably be given to a jury in Massachusetts would be the "mistake of fact" rule laid down by Chief Justice Shaw.<sup>90</sup> According to the Massachusetts law insanity cannot reduce the degree of the offense charged in a case where it was not

<sup>89</sup> *Dicta* to this effect occur in *Commonwealth v. Cooper*, 219 Mass. 1, 5, 106 N. E. 545 (1914).

<sup>90</sup> Such is the view taken in the editorial note now under discussion. 30 HARV. L. REV. 179.



sufficient to relieve entirely from responsibility.<sup>91</sup> In both these instances the law would be changed by the adoption of the proposed statute.

Whether the law of Massachusetts relative to the criminal responsibility of the insane is represented by the entire charge of Chief Justice Shaw in the *Rogers Case*, or by the rule last announced by the Supreme Judicial Court, or by what the writer has ventured to suggest is the living law, it is submitted as a result of the foregoing discussion that each of these is less logical, less practical, and less comprehensive than the test of the proposed section.

*New York.* The New York statute on the responsibility of an idiot or lunatic is as follows:

"An act done by a person who is an idiot, imbecile, lunatic, or insane is not a crime.

"A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as:

1. "Not to know the nature and quality of the act he was doing; or,
2. "Not to know that the act was wrong."<sup>92</sup>

The two provisions of this statute seem to be in conflict with each other. According to the first, the mere fact that the defendant is an idiot, imbecile, or lunatic is a complete defense. Under the second, such person must satisfy the "lack of knowledge" requirement. The Court of Appeals of New York in interpreting this statute has in effect disregarded the first provision by regarding the test of the second as a definition of idiocy, insanity, and lunacy. This view of insanity prevailed before the enactment of the statute. In *Willis v. People*, 1865, the Court of Appeals adopted the following statement:

"A person is not insane who knows right from wrong and that the act he is committing is a violation of law and wrong in itself."<sup>93</sup>

In 1873 it was squarely decided that irresistible impulse was no defense.<sup>94</sup> The statute simply codified the previous law.

<sup>91</sup> *Commonwealth v. Cooper*, 219 Mass. 1, 106 N. E. 545 (1914).

<sup>92</sup> PENAL LAW, 1909, § 1120.

<sup>93</sup> 32 N. Y. 715, 719.

<sup>94</sup> *Flanagan v. People*, 52 N. Y. 467 (1873). In *People v. McElvaine*, 125 N. Y. 596, 602, 26 N. E. 929 (1891), the Court of Appeals suggested, probably unadvisedly,

The second provision of the statute has been strictly followed for all forms of insanity with the possible exception of delusion. In *People v. Silverman*, 1905, it is said:

"Whatever may be the opinion of physicians or medical experts on the subject, there is but one test of responsibility known to the law, that found in section 21 of the Penal Code, which is but a statutory declaration of the law, as it had long prevailed."<sup>95</sup>

In *People v. Taylor*, 1893, the Court of Appeals, while announcing the "right and wrong" rule of the statute, says:

"An insane delusion with reference to the conduct and attitude of another cannot excuse the criminal act of taking his life, unless it is of such a character, that if it had been true, it would have rendered the homicide excusable or justifiable."<sup>96</sup>

A similar statement was made in *People v. Ferraro*, 1900.<sup>97</sup> In *People v. Schmidt*, 1915,<sup>98</sup> it was held that the test of the statute applies to the case of delusion, and the "mistake of fact" test was not mentioned. The Court of Appeals in that case defined "wrong" in the statute to include moral as well as legal wrong, and held erroneous the instruction of the trial judge that "wrong" means "contrary to the law of the State." The court also announced that irresistible impulse is no defense in New York. This case is an authoritative announcement that the law in New York is in strict accord with the provision of the statute.

Under a rule as narrow as that in New York it is likely to happen, as it did in the *Thaw Case*, that the jury will acquit, on the ground of insanity, persons who do not come within the rule. It was not seriously contended in the *Thaw Case* that the defendant did not know that his act was both legally and morally wrong.

It is clear that the provision of the proposed section is more

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that lack of control is a relevant consideration: "On the whole case it seems quite clear to us that the defendant had sufficient intelligence and self-control to understand the nature and character of the act committed by him, and to refrain from its commission if found to be inconsistent with a due regard for his own safety or interest."

<sup>95</sup> 181 N. Y. 235, 240, 73 N. E. 980. A similar statement was made in *People v. Carlin*, 194 N. Y. 448, 455, 87 N. E. 805 (1909).

<sup>96</sup> 138 N. Y. 398, 406, 34 N. E. 275. The court in this case states that the New York rule has been criticized by eminent alienists because it does not take into consideration lack of self-restraint.

<sup>97</sup> 161 N. Y. 365, 378, 55 N. E. 931.

<sup>98</sup> 216 N. Y. 324, 110 N. E. 945 (1915).



comprehensive than that of the New York statute. It is submitted that the former is also more logical and more practical.

*Illinois.* The existing Illinois statute, which was enacted at least as early as 1827, reads as follows:

"A lunatic or insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged: *Provided*, the act so charged as criminal shall have been committed in the condition of insanity." <sup>99</sup>

This statute lays down an amazing proposition — that only those lunatics and insane persons who have no "lucid intervals" shall be exempt from punishment. The proviso of the statute is redundant and superfluous, for if the insane person had no lucid intervals any act done by him must necessarily have been done in a "condition of insanity." The statute prescribes no symptoms, but simply requires a state of lunacy or insanity without "lucid intervals."

The tests actually applied by the courts of Illinois have been entirely independent of the statute. In the first case before the Supreme Court, 1860,<sup>100</sup> the trial judge had charged the jury as follows:

"Before the jury can acquit the prisoner on the ground of insanity, they must believe, from the evidence, that at the time of the killing he was in a condition of insanity; that his insanity was of such a character that he did not understand the nature, quality, and character of the act he was committing; or that knowing it, he was acting under such an impulse of passion or insane desire to kill, as to exempt him from the dominion and control of reason. In order for the jury to acquit on the latter ground, they should be satisfied, from the evidence, that this insane desire was of a character that inclined the prisoner to acts of homicide, that is, that it was evinced in attempts at killing in more than a single instance, and must be made to appear in more than the single act of killing the deceased."

This charge was approved by the Supreme Court. The trial judge refused to charge, as requested by the defendant, that although the defendant may not have been so insane as to excuse him entirely, yet it might reduce the degree of the crime from murder to manslaughter. The Supreme Court held this instruction should have been given, saying:

<sup>99</sup> ILL. ANNOT. STAT. 1913, § 3977.

<sup>100</sup> *Fisher v. People*, 23 Ill. 283.

"Though such a state of mind would not excuse the homicide, it should reduce it to manslaughter, for deliberation would be absent, and that is essential to constitute murder."

The court made no reference to the statute.

Three years later, the Supreme Court in *Hopps v. State*, where the defense was insane delusion, after stating that the authorities were in great confusion, and that it is difficult to lay down a general rule, announced the following:

"Whenever it should appear from the evidence, that at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion, and caused by it, and by nothing else, justice and humanity alike demand an acquittal."<sup>101</sup>

According to the first part of this rule an uncontrollable impulse must concur with and be the product of the inability to distinguish between right and wrong. In addition to the fact that in most cases of irresistible impulse the power to know right from wrong is not destroyed, it is very doubtful if causal connection can in any case be established between these two symptoms. At best this test covers an extremely small class of cases. In contrast to this test, which according to its wording seems to be applicable to all cases, is the statement regarding delusion. It is difficult to see how these can be reconciled. The Supreme Court in the *Hopps Case* took no notice of their former decision and made no reference to the statute except the following:

"Our statute was designed to ameliorate the rigor of the old rule of the common law, in declaring that a person 'affected with insanity,' shall not be considered a fit subject of punishment, for an act done, which, under other circumstances or disposition of mind, would be criminal."

In *Dunn v. People*,<sup>102</sup> 1884, the trial court in one instruction said:

<sup>101</sup> 31 Ill. 385, 391.

<sup>102</sup> 109 Ill. 635, 643.



"If at the time of committing the alleged act defendant was able to distinguish right from wrong, then you can not acquit him on the ground of insanity,"

and in another instruction stated in effect that either inability to distinguish between right and wrong or uncontrollable impulse would be a defense. The Supreme Court approved both instructions and quoted the rule of the *Hopps Case* in support of them.

Two years later in the case of *Dacey v. People*,<sup>103</sup> the trial judge charged the jury in the words of the general test of the *Hopps Case*, and this was approved by the Supreme Court. Though the evidence showed delusional insanity, neither the trial court nor the Supreme Court made any reference to the special test for delusion laid down in the *Hopps Case*.

In *Hornish v. People*,<sup>104</sup> 1892, the trial judge charged in effect that either inability to distinguish between right and wrong or inability "to choose either to do or not to do the acts constituting such crime, and to govern his conduct in accordance with such choice" would be a defense. This was approved by the Supreme Court, who said it was in accord with the test of the *Hopps Case*. This test was approved in two subsequent cases in 1894<sup>105</sup> and 1895.<sup>106</sup>

In *O'Shea v. People*,<sup>107</sup> 1905, the trial judge in examining a witness stated that "insanity does not involve the question of right and wrong." This was held erroneous, the Supreme Court saying:

"Where insanity is interposed as a defense to crime, it involves the defendant's knowledge of right and wrong."

The *Hopps Case* was not cited. The Supreme Court in 1915<sup>108</sup> impliedly approved the test of the *Hopps Case*. This review of the Illinois cases leaves one in doubt as to what is the law in that state relative to insanity. None of the cases cite the provisions of the statute, so that may be disregarded. As the general test of the *Hopps Case* has been so many times approved by the Supreme Court, they would probably do so again. In practice some trial

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<sup>103</sup> 116 Ill. 555, 6 N. E. 165.

<sup>104</sup> 142 Ill. 620, 32 N. E. 677.

<sup>105</sup> *Lilly v. People*, 148 Ill. 467, 36 N. E. 95.

<sup>106</sup> *Meyer v. People*, 156 Ill. 126, 40 N. E. 490.

<sup>107</sup> 218 Ill. 352, 75 N. E. 981.

<sup>108</sup> *People v. Penman*, 271 Ill. 82, 110 N. E. 894.

judges charge that either inability to distinguish between right and wrong or irresistible impulse is a defense. There seems now to be no special rule for delusion, such as announced in the *Hopps Case*.

However it may be regarded, the law of Illinois relative to insanity is less logical, less practicable, and less comprehensive than the rule of the proposed section.

The merits of the proposed section, in comparison with the existing legal tests relative to the defense of insanity, may be briefly summarized.

I. The proposed section is based upon the fundamental principle of criminal jurisprudence, that a crime has not been committed when the necessary mental element is lacking. The direct relation of insanity to this mental element, which relation is logically apparent, was formerly well recognized in the law. The Roman law set forth clearly that the effect of insanity was to negative the wrongful state of mind.<sup>109</sup> At an early period in the English law Staundforde stated the same proposition.<sup>110</sup> This relation between insanity and the mental element of crimes was largely lost sight of when the courts commenced announcing and attempting to apply medical tests. Some judges and writers, however, continued to state that insanity negatives criminal intent.<sup>111</sup> The provision of the proposed section is more exact than this statement in that it recognizes the fact that the mental element of crimes is not a constant quantity, and narrows the issue to whether the mental element of the crime charged has been negated by the mental disease.

II. The proposed section embodies no medical or psychological theories and consequently will not be affected by changing

<sup>109</sup> *Furiosi . . . nulla voluntas est.* DIG. 50, 17, 40.

*Furiosus . . . doli capax non est.* DIG. 47, 10, 3, 1.

. . . *Et ideo quaerimus, si furiosus damnum dederit, an legis Aquiliae actio sit? Et Pegasus negavit; quae enim in eo culpa sit, quum suae mentis non sit?* DIG. 9, 2, 5, 2.

<sup>110</sup> *Ceo est quant un tua auter oue felonious volunte ou intente, quel chose home de non sane memorie, ne peut faire.* STAUNDFORDE, LES PLEES DEL CORON, Lib. 1, Cap. 9.

<sup>111</sup> "By reason of his incapacity, he cannot act *felleo animo*." HIGHMORE, LAW OF LUNACY, 197.

"At the trial where insanity is set up as a defense, two questions are presented:—First: Had the prisoner a mental disease? Second: If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent?" Ladd, J., in *State v. Jones*, 50 N. H. 369, 393 (1871). To the same effect are COLLINSON, LUNATICS, 471; COOPER, MEDICAL JURISPRUDENCE, 380; HARRIS, CRIMINAL LAW, 12 ed., 16.



views as to the nature and scope of mental disease. The difficulty with the existing legal tests on this subject is that they are based on medical theories,<sup>112</sup> many of which are obsolete and with which

<sup>112</sup> The "mistake of fact" rule as to delusion, announced by the Judges after McNaughton's case and usually followed today, which is based on the premise that except for the delusion the person is entirely sane, resulted from the testimony of Dr. E. T. Monro in McNaughton's Case. He was asked: "Is it consistent with the pathology of insanity, that a partial delusion may exist, depriving the person of all self-control, whilst the other faculties are sound?" (Answer) — "Certainly: monomania may exist with general sanity." 4 Rep. St. Tr. (N. S.) 919. This view of delusion was in perfect accord with the psychology of the time, which regarded each function of the brain as independent of the others. PATON, PSYCHIATRY, 119.

Doe, J., in *State v. Pike*, 49 N. H. 399, 437 (1870) and *Somerville, J., in Parsons v. State*, 81 Ala. 577, 584 (1886) state that the "knowledge of right and wrong" test is based on an early medical theory. The writer, though convinced that this statement is correct, has not been able to verify it completely. There is no doubt, however, that the inability to distinguish between right and wrong was regarded by the medical profession as a characteristic symptom of insanity. (See testimony of John Connolly, physician to the Hunwell Lunatic Asylum, in *Queen v. Oxford*, 4 Rep. St. Tr. (N. S.) 498, 540 (1840).) It was early laid down by the commentators that a lunatic was not responsible, *because* he was unable to know right from wrong.) "Those who are under a natural disability of distinguishing between good and evil, as ideots and lunatics are not punishable by any criminal prosecution whatsoever." 1 HAWK. P. C. 1.) As physicians testified that particular defendants were unable to distinguish right from wrong, this became the test of, rather than the reason for, irresponsibility.

The earlier tests were likewise based on contemporaneous medical views. Sir Matthew Hale's dissertation on the law of insanity shows clearly its medical origin. The following statement is an interesting illustration: "Again, this accidental *dementia*, whether temporary or permanent, is either the more dangerous and pernicious, commonly called *furor*, *rabies*, *mania*, which commonly ariseth from adust choler, or the violent inflammation of the blood and spirits, which doth not only take away the use of reason, but also superadds to the unhappy state of the patient, rage, fury, and tempestuous violence; or else it is such as only takes away the use and exercise of reason, leaving the person otherwise rarely noxious, such as is a deep *delirium*, *stupor*, memory quite lost, the phantasy quite broken, or extremely disordered." HALE, P. C. 31.

The theory that the existence of delusion is the test of insanity, which prevailed in the law during the early part of the nineteenth century, was in accordance with the views of the medical profession. In 1810 Dr. Robert Darling Willis stated the following definition of insanity before a committee of the House of Commons: "In insanity the mind is occupied upon some fixed assumed idea, to the truth of which it will pertinaciously adhere, in opposition to the plainest evidence of its falsity; and the individual is always acting under that false impression." Dr. Francis Willis, in a treatise published in 1823, quotes this definition and says: "An unsound mind is marked by delusion." TREATISE ON MENTAL DERANGEMENT, 43, 221.

A great variety of symptomatic tests of responsibility was early announced, as is shown by the following statement: "Thence has arisen so many ridiculous and untenable opinions, unsound and illogical propositions, unsafe and dangerous precedents. A regards motive as sufficient test; B requires knowledge of morality or immorality of

the scientific knowledge of the present sharply conflicts. The proposed section does not limit the defense to any particular form or symptoms of mental disease.

III. The proposed section does away with all legal definitions of insanity. For purposes of determining criminal responsibility, the law, in some jurisdictions, has prescribed the requisites of insanity.<sup>113</sup> Much of the confusion that frequently arises when insanity is set up as a defense is due to the conflict between the legal definition of insanity, and the conception of mental disease held by the medical experts.<sup>114</sup> The proposed section does not contain the word "insanity" and does not attempt to say what shall constitute such a mental condition.

IV. Under the proposed section the medical and legal professions will each perform their proper functions. Mental disease constitutes a medical problem, and the diagnosis and symptomatology of it should be determined by physicians. Criminal responsibility, on the other hand, is a legal question,<sup>115</sup> and the rules for determining such responsibility should be fixed by the law, and administered by the legal profession. Under the proposed section the medical witness will state his opinion regarding the mental condition of the defendant at the time of the alleged offense,<sup>116</sup> and the

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act; C demands a comprehension of its relations to the law; D argues from the presence or absence of self-restraint; E considers the existence of delusion essential; F associates delusion with act; G rejects the mental unless corroborated by the physical condition; H commingles insanity with crime; and ALL contribute somewhat to involve the question in almost inextricable perplexity. We might extend this list: to do so would be merely to repeat what we have already propounded." WILLIAMS, UNSOUNDNESS OF MIND, 205 (London, 1856).

<sup>113</sup> See the New York statute quoted *supra* for an example of this.

<sup>114</sup> "We believe that a want of harmony must ever exist between the legal and medical doctrines of insanity in its connexion with responsibility. The two cannot be identical, and for this reason: — Law demands a fixed rule — Medicine admits but a general principle. What would be thought of the physician who undertook in the definition of any, even the simplest, disease, to say, 'Certain symptoms must be present'? His theory would lead to a series of disappointments, his practice be a continuation of blunders! Yet, Law steps forward with her definition of unsoundness of mind; and, according to this definition, on which both the life and reputation of society may depend, one half mankind are mad, and half the mad are wise." WILLIAMS, UNSOUNDNESS OF MIND, 2.

<sup>115</sup> "Criminal responsibility means accountability for one's actions to the criminal law." From first report of this committee, 2 J. CRIMINAL LAW AND CRIMINOLOGY, 523.

<sup>116</sup> "The physician's duty in court cases is simply to discover the mental condition of the patient. This having been done, the question of the responsibility or irresponsi-



judge will then describe to the jury the mental element involved in the crime charged. The function of the jury will be to determine whether the defendant, as a result of the mental condition portrayed by the witness, had the particular state of mind described by the judge. It will not be necessary for the expert witness or the judge to use technical terms in performing their respective functions, and as a result the jury will have less difficulty than at present in reaching an intelligent and appropriate verdict.

V. The proposed section establishes the principle that mental disease, like intoxication and provocation, may lessen the degree of a crime.

VI. The proposed section prescribes a practical test. Under the present system the issue is beclouded by the introduction of special tests and unusual terminology. These have an inhibiting effect upon all persons concerned in the trial, so that they frequently lose sight of the real issue involved. Under the proposed section, the practice in a case where the defense is insanity will not differ from that of the ordinary case.

It may perhaps be argued that, as the proposed section does not contain a definite specification of mental symptoms, some courts may continue to apply their present rules in spite of the statute. This may be so. A study of the decisions under the Married Women's Property Acts and the uniform Negotiable Instruments Law shows that some courts persist in following their previous holdings no matter how the statute is phrased. The most that can be expected of any repealing statute is that it will guide an open-minded court to the indicated result. Many courts now recognize the illogical and unsatisfactory character of the present rules regarding insanity, which statutes or precedents compel them to follow, and will welcome the opportunity to be free of their restraint.

*Edwin R. Keedy.*

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bility, competency or incompetency, of a man in this mental state is a matter of law and to be decided by judge and jury." Dr. Chas. W. Burr, 48 J. AM. MEDICAL ASSOCIATION, 1852, 1855.

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THE EXPERIMENTAL ASPECT OF THE ADAMSON ACT. — When the railroad system of the country is about to be tied up for an indefinite period because of a strike by the trainmen for higher wages, both employer and employee being firmly resolved to make no further concessions, and the lack of adequate statistics precluding the resort to a more rational basis of settlement than the relative strength of the two parties, could Congress constitutionally enact a statute compelling the roads to pay an increased wage for a certain limited period during which a government commission might study the situation and gather facts upon which an intelligent decision as to the merits might be based? In upholding the Adamson Law,<sup>1</sup> the Supreme Court has virtually sustained the constitutionality of such an experiment. The Adamson Law, it will be remembered, contains three important provisions.<sup>2</sup> In the first place, as to trainmen engaged in interstate commerce after January 1, 1917, eight hours shall, "in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services." Secondly, the President shall appoint a commission of three to "observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months" and then render a report. Lastly, pending the

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<sup>1</sup> 39 STAT. AT L. 721, c. 436.

<sup>2</sup> See 30 HARV. L. REV. 63.



report of the commission and for a period of thirty days thereafter, employees subject to the Act are to be paid for the standard eight-hour workday not less than their former standard day's wage, with not less than pro rata for overtime.

The receiver of an interstate railroad sought an injunction against the enforcement of the Act by the United States District Attorney, on the ground that it was unconstitutional. The court below granted the injunction. The Supreme Court, however, by a five to four decision upheld the validity of the Act.<sup>3</sup> The divergency of views revealed by the opinions of the court, as well as by previous non-judicial discussions, shows how complex is the situation presented for analysis. The decision is clearly an authority for the proposition that in an emergency wages of trainmen may be fixed by statute for a short period in order to avoid a great strike.<sup>4</sup> But this proposition does not cover all phases of the situation. It fails to take into account the fact that a commission is created to study the new arrangements, and that the duration of the wage increase is coincidental with the period of the labors of the commission. These facts point strongly to an experiment which was to be carried on under the observation of the impartial commission. This view is strengthened by the fact that neither side was able during the course of the controversy to produce any comprehensive set of facts or figures bearing upon the subject in dispute. Moreover, three of the dissenting justices expressly took the point that the Act was invalid because it provided for an experiment and threw the cost on the roads. In the light of all this it seems fair to say that the decision does support the constitutionality of an experiment such as was defined in the opening sentence above.

How then is it constitutional to require the railroads to conduct such an experiment? The affirmative power is of course derived from the commerce clause.<sup>5</sup> The ultimate purpose of the information sought is to facilitate the conduct of commerce. That trainmen's wages, the immediate means regulated, are substantially and directly connected with interstate commerce would seem to have been forcefully demonstrated by the course of events last August.<sup>6</sup> The real difficulty, however, is with the due process clause of the Fifth Amendment. For plainly the increase in wages is a taking of property amounting to a large sum. Also there is the limitation upon the liberty of both employer and employee to contract as to the terms of employment. But to come under the ban of the

<sup>3</sup> *Wilson v. New*, Oct. Term, 1916, No. 797.

<sup>4</sup> *Cf. People v. New York, etc. R. Co.*, 28 Hun (N. Y.) 543.

<sup>5</sup> Congress has a large so-called inquisitorial power to investigate matters over which it may legislate or act. It must of course have power to summon witnesses and compel the production of papers, documents, etc., in order that it may exercise its legislative function intelligently. See 21 HARV. L. REV. 431. By analogy, however, it seems probable that this power does not extend far beyond the use of such means as have commonly been used by courts of law to elicit evidence. Therefore this power alone is inadequate to sustain the experimental aspect of the principal case. *In re Chapman*, 166 U. S. 661; *Kilbourn v. Thompson*, 103 U. S. 168; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 193; CUSHING, LEGISLATIVE ASSEMBLIES, 2 ed., 253.

<sup>6</sup> It is sufficient to bring the regulation of a thing under congressional power to show that this connection with interstate commerce exists, without the thing itself being actually engaged in interstate commerce. Thus the Federal Safety Appliance Act has been held validly to apply to intrastate trains when merely moving over tracks also used by interstate trains. *Southern Ry. Co. v. United States*, 222 U. S. 20.

Fifth Amendment the taking must occur without due process. That is, after a balancing of all the interests involved on either side the court must be able to say that no reasonable man could declare that balance or proportion to be reasonable or permissible.<sup>7</sup> We have seen what interests of the railroad are being infringed; what interests of the public are being aided which will counterbalance these? We have seen that there were no statistics available that could throw sufficient light upon the problem of wages. The unilluminated points were not only numerous and complex, but of great importance; thus, how high should the wages run as a matter of fairness, as determined by comparison to wages paid in other kinds of work requiring a similar grade of skill and reliability; what scale of pay was necessary to secure a proper grade of trainmen; were the present wages insufficient to enable the men to live up to the desired standard of living; what were the facts as to their present standard of living; how much would the increase cost the roads, and to what extent could the increased outgo be taken care of by compensating economies, etc. *A priori* reasoning and calculating had failed. A properly conducted experiment would yield the necessary information. In three possible ways this would be of great assistance in helping to solve the wage problem. It would give Congress a basis upon which to act intelligently if either the question of a permanent wage regulation or of government ownership of the roads arises.<sup>8</sup> Secondly, it would furnish the material upon which public opinion might form an intelligent judgment. The tremendous pressure exercised by public opinion upon such a question as this, when once it is aroused, shows the imperative need of bringing the proper facts before the country. And thirdly, the information would be of great aid as between the parties themselves in putting the matter upon a basis of reason rather than of force. The accurately conducted experiment is the foundation of our knowledge of the natural sciences today; we are just beginning to realize its value in the social sciences.<sup>9</sup> Thus many of the more progressive factories and even stores are today conducting, as a regular part of their business, experiments and investigations to determine how the relations between employer and employee may be bettered.

This experiment, therefore, subserved useful ends; it was not an unreasonable or arbitrary thing. Even conceding this, however, it has sometimes been objected that it was bad because it made the railroads bear the entire expense. But where the nature of a business renders its

<sup>7</sup> See J. B. Thayer, "The American Doctrine of Constitutional Law," 7 HARV. L. REV. 129, 148.

<sup>8</sup> Congress in its regulation of interstate carriers has gone far in requiring complete reports of all facts concerning the carrier's business, even imposing a system of uniform bookkeeping to facilitate this. Thus in one case a company operating an interstate line of steamboats, and also incidentally an intrastate amusement park, was compelled to include the latter in its bookkeeping scheme and in its annual reports. Obviously the expense of all this is a not inconsiderable taking of property. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194.

<sup>9</sup> In a recent Missouri case where the rates charged by a gas company were too high, but it was not clear just what would constitute a reasonable rate, the state commission lowered the rates by a certain amount as a test, and continued the case under observation. *State v. Public Service Commission*, 191 S. W. 412. While the power to lower to a reasonable rate was clearly possessed in this case, yet it was expressly being used in an experimental way. See also WIGMORE, EVIDENCE, § 445.



regulation necessary, the total cost of regulation may be imposed directly upon that business. Thus, when South Carolina created a railroad commission, it assessed the whole expense of maintaining that body upon the roads operating within the state, and this was upheld as constitutional by the Supreme Court.<sup>10</sup> So the cost of inspection of mines may be put upon the owner.<sup>11</sup> The fact that the Adamson Law called for action involving expenditure directly by the roads, instead of for acts by government agents the cost of which would be shifted to the roads, should be immaterial.

Of course the amount of property taken under the Adamson Law can only be justified by reference to the particular and peculiar nature of the situation under which it was enacted. Yet weighing all the interests on either side we cannot say that the congressional decision that such measures were necessary was clearly unreasonable. Its constitutionality even as an experiment must therefore be sustained.

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STATUTORY PRINCIPLES IN THE COMMON LAW. — There is a present tendency among the laity to criticise almost any court action or decision.<sup>1</sup> Apparently this dissatisfaction rests in good part, if not mainly, on the restricted scope accorded legislation by the courts.<sup>2</sup> In this regard, the criticisms have much justification. For the treatment of legislation by the courts has often been influenced by a distinct hostility felt by them against the intrusion of statutes into the common law.<sup>3</sup> Partially, however, the treatment has its cause in an apparent misapprehension as to the true function of legislation in our scheme of jurisprudence. For statutes have been considered, not an integral part of our organic legal whole but rather as rules to be applied in certain cases because so ordered by the legislature — rules that are somehow distinct

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<sup>10</sup> *Charlotte, etc. R. Co. v. Gibbes*, 142 U. S. 386. So also where all electric conducting companies were required to file plans and reports with a commission for supervision, and the total cost put upon the companies. *People v. Squire*, 145 U. S. 175.

<sup>11</sup> *Chicago, etc. Coal Co. v. People*, 181 Ill. 270, 54 N. E. 961. So also *People v. Harper*, 91 Ill. 357 (inspection of grain elevators); *Louisiana State Board of Health v. Standard Oil Co.*, 107 La. 713, 31 So. 1015 (inspection of coal oil); *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455 (quarantine inspection of ship); *Launer v. City of Chicago*, 111 Ill. 291 (daily reports from pawnbrokers); *State v. Cassidy*, 22 Minn. 312 (tax on liquor dealers to support an inebriates' hospital). These cases show that causation in fact without culpability is sufficient to allow the shifting of the burden to the causing agent. Cf. also *New York, etc. R. Co. v. Bristol*, 151 U. S. 556 (entire cost of converting grade crossing into non-grade crossing put upon the railroad).

<sup>1</sup> The recurrent agitations for the recall of judicial decisions, and the proposed requirements for the judiciary in North Dakota (that is, that three of the five members of the Supreme Court shall be "*bona fide farmers*"), are manifestations of this dissatisfaction.

<sup>2</sup> A typical outburst occurred in the *NEW REPUBLIC*, January 1, 1916, in connection with the interpretation of the Massachusetts Workman's Compensation Act. In that case, however, the indignation was clearly unjustified. See 29 HARV. L. REV. 336.

<sup>3</sup> "There are great numbers of others [laws] the enforcement of which, or attempts to enforce which, are productive of bribery, perjury, subornation of perjury, animosity and hate among citizens, useless expenditure, and many other evils." CARTER, *LAW, ITS ORIGIN, GROWTH AND FUNCTION*, 3. See Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383, 387.

and separated from our general body of laws.<sup>4</sup> This isolation of statutes from the rest of law prevents the establishment of the principle of a statute and allows only of a mechanical application of its wording.<sup>5</sup> The result is the much criticised limited scope accorded statutes.

Whatever may be the individual judge's view as to the nature of law, the basis of its effectiveness, and other theories<sup>6</sup> which might induce favorable or unfavorable treatment<sup>7</sup> of statutes, it is of course indisputable that in practice our juristic system must rest equally upon statute and common law. The recent past has seen a distinct systematization of our common law.<sup>8</sup> Its loose leaves have been and are being carefully indexed under general principles. But if all our statutes are to be treated as exceptions in the law, as incapable of creating principles, it will follow that by filling the gaps left by the wording of the statutes with contrary common law principles, we shall recreate the lack of unity we have just been remedying.

It will be argued that to do otherwise, *i. e.* to extend the principle expressed by the statute to cases not specifically covered by it, is judicial legislation, and not the function of the courts. Indeed, this was one of the objections raised in a recent English case<sup>9</sup> to such action. A submarine had been negligently run down by the steamship Amerika. The Admiralty sought to recover, among the items of damage, the amount due the families of the drowned sailors in pensions. In spite of the fact that Lord Campbell's Act had abrogated<sup>10</sup> the common law rule that a

<sup>4</sup> Thus the Supreme Court has said of the Lord Campbell's Acts in America: "The common law, however, was modified by a statute which, as amended, became the statute under consideration here. By this statute the courts were given jurisdiction over certain actions of this description, while the common law was left to control all others. A discrimination was thus introduced into the law of the state." *Moody, J., in Chambers v. Baltimore & Ohio R. Co.*, 207 U. S. 142, 149.

<sup>5</sup> The courts have been much freer in overlooking the words of a statute in order to restrict it, than in the converse case. Equity and the Statutes of Frauds have afforded many examples. In an interesting New York case a statute of wills was similarly treated, preventing a beneficiary who murdered the testator from taking, although the wording of the statute indicated no such exception. *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188.

<sup>6</sup> Theories of jurisprudence vary greatly as to the nature of law, etc. So Sir Frederick Pollock is quoted: "... on the other hand, the greater a lawyer's opportunities of knowledge have been and the more he has given to the study of legal principles, the greater will be his hesitation in face of the apparently simple question, what is law?" *Carter, supra*, 9. In view of the diversity of ideas on these theories, it would seem necessary to treat these problems in a practical way and deduce theories rather from the result.

<sup>7</sup> Theories of natural law, for instance, have occasionally been responsible for weird decisions. See 29 *HARV. L. REV.* 521.

<sup>8</sup> Note, for instance, the effect of the work of Thayer and Wigmore, on rules of evidence, or the coherent growth of the law of quasi-contracts under Ames' doctrine of unjust enrichment. The law of torts is likewise gaining continuity, while Morris Cohen remarks: "Today we have not only a general theory of liability, but there is a marked tendency to make the law of torts and the law of contracts branches of the law of obligations." See Cohen, "The Place of Logic in the Law," 29 *HARV. L. REV.* 622, 624.

<sup>9</sup> *Admiralty Commissioners v. S. S. Amerika*, [1917] A. C. 38. The court based its decision on the alternative that as pensions were "compassionate" they were not items of damage anyway. But *cf.* *United States v. Cornell Steamboat Co.*, 202 U. S. 184.

<sup>10</sup> There was further statutory legislation favoring a different decision, for the English Workmen's Compensation Act, 1906 (6 *EDW. VII.*, c. 58, § 7, (1) (f)), provided that



death was not civilly actionable, to the extent of giving remedies to the husband, wife or legitimate child, the court refused to depart from the old rule. "It would be legislation pure and simple," remarked Earl Loreburn, while Lord Sumner quoted with approval the language of Lord Watson in earlier cases that the rule (Lord Campbell's Act)<sup>11</sup> allowing "actions for *solatium* and damages . . . at the instance of husband, wife or legitimate child, in respect of the death of a spouse, a child or a parent . . . does not rest upon any definite principle . . . but constitutes an arbitrary exception from the general law which excludes all such actions, founded in inveterate custom and having no other ratio to support it."<sup>12</sup> In other words the Act supplied a rule applicable only to certain cases, and any extension would be judicial legislation and accordingly improper.

If statutes were self-operative, or language a perfect medium for expressing thought, the attitude of the House of Lords might be justified. But statutes "do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as law.*"<sup>13</sup> If the intention of a statute is clear, the court's work is simple. But what the exact intention<sup>14</sup> of a statute may be, whether it is expressive of a limited remedy, or whether it is expressive of dissatisfaction with a principle which it is desirous of overthrowing, is seldom self-evident from a reading of the act. In such case the court must use its own judgment.<sup>15</sup> In this it will be obviously affected by the circumstances of the

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an owner of a ship, having paid relatives under the Act for seamen killed by another boat's negligence, may sue such boat for the compensation so paid. Thus another statute recognized that the principle of the case was no longer existent.

<sup>11</sup> Bramwell, B., remarked of the recital of the Act: "... loose recital in an incorrectly drawn section on which the courts had to put a meaning from what it did not rather than did say." *Osborn v. Gillett*, L. R. 8 Ex. 88, 95.

<sup>12</sup> As far back as 1854, a travesty was anonymously published on the courts' method of interpreting statutes. It was supposed that a statute had been passed allowing of double issues in pleading, but the statute was restricted by the courts to pleas and not extended to replications. The language the author has put in the mouth of the judge (Sur. Bar.) bears a striking resemblance to the court's language in the principal case: Sur. Bar. — "This, Mr. Crogate, was a necessary consequence of the application of the established principles of pleading to the statutory privilege of pleading several matters. The Act of Parliament, in allowing this privilege, left special pleading in other respects as it previously existed; and consequently such plea was treated as if it were the only one on the case, and the court dealt with it upon the same principles that were applicable when the defendant was confined to a single plea." Crogate (the defeated suitor) — "And a pretty jumble you must make of it; for if I can make out your meaning, it seems to be this: that the Act of Parliament having altered your special pleading system, root and branch, and altogether put an end to your fine plan of chopping and lopping all questions, till you bring them to a single point; you still went on with your foolish quibbling rules, just as if you had still only one point to try." See Crogate's Case; A dialogue, In ye Shades.

<sup>13</sup> See GRAY, NATURE AND SOURCES OF LAW, § 366.

<sup>14</sup> "The principle of communication by words is wholly the same as that of signs; one means is complete, the other incomplete, but they work in the same way, neither gives the thought itself, however exact the expression of it may be; it gives only the invitation and the point of departure for it to reconstruct itself." 2 IHERING, *GEIST DES RÖM. RECHTS*, 444.

<sup>15</sup> "However clearly interpretation may recognize the real thought of the lawgiver, it can recognize it as establishing law only under the supposition that in the statement given by the legislator, an expression, if not a complete expression, of his real thought

passing of the act, and kindred indications. But it will come to its decision chiefly on its own feeling<sup>16</sup> of the desirability of the legislation, mirroring the current tendencies of the time in economics, politics and morality. Just as the court must decide the limitations and exceptions of a common law principle, so must it decide similar questions in the case of such statutes. Such an attitude towards statutes is by no means strange to the law. A striking example are the decisions<sup>17</sup> under the Statute 4 Edward III (1330), c. 7, which allowed the survival to executors of actions of trespass. The English courts, in applying the statute, extended it to administrators and included cases which did not lie in trespass. For it was said,<sup>18</sup> "The statute of 4 Edw. 3, being a remedial law, has always been expounded largely; and though it makes use of the word trespasses only, has been extended to other cases within the meaning and intent of the Statute." The Privy Council in a case<sup>19</sup> up from Canada, proceeded in a similar fashion. The Canadian law, by an Act similar to the English Sergeant Talfourd's Act, gave the courts discretion as to whether on separation the mother or father should have the custody of children below a certain age. But in dealing with children above the age specified by the Act, Lord Hobhouse nevertheless exercised his discretion, remarking, ". . . the course of legislation shows distinctly a growing sense that the power formerly accorded by law to fathers of families was excessive. . . . But it is impossible to measure by arbitrary limits of age the change of view which includes positive legislation. That change must also affect the question what is required for the welfare of the older children, etc. . . ."

Doubtless there is danger in such freedom of treatment. While uniformity is desirable in the law, the tremendous value of the experience of the past must not be overlooked.<sup>20</sup> Our common law principles have

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can be found. Therefore its principal, if not sole activity will consist in quantitative extension and limitation of the statute." 1 WINDSCHEID, PAND., § 22. "It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body, the sense and reason of the law are the soul." Eyston v. Studd, 2 Plowd. 459 (a).

<sup>16</sup> "The dependence of the statutes upon the will of the judges for their effect is indicated by the expression often used, that interpretation is an art and not a science; that is, that the meaning is derived from the words according to the feeling of the judges, and not by any exact and foreknowable processes of reasoning." GRAY, *supra*, § 374.

<sup>17</sup> The Statute of 4 Edw. III, c. 7 (1330) contains a recital that "in times past executors have not had actions for trespass alone to their testators, as of the goods and chattels of the same testators carried away in their life." So it enacted "that executors in such cases shall have an action against trespassers." Yet the courts have applied the statute to administrators; to actions for conversions of goods; to an action against a sheriff for making a false return, etc. See GRAY, *THE NATURE AND SOURCES OF LAW*, § 378.

<sup>18</sup> Wms. Saunders, 217 b.

<sup>19</sup> Smart v. Smart, [1892] A. C. 425.

<sup>20</sup> A splendid plea for respect for the past, as a counterbalancing agency to the modern forces of "anti-intellectualism," is made by Morris R. Cohen, in "The Place of Logic in the Law," 29 HARV. L. REV. 622. "They who scorn the idea of the judge as a logical automaton are apt to fall into the opposite error of exaggerating as irresistible the force of bias or prejudice." He counsels a happy medium: "We urge our horse down the hill and yet put the brake on the wheel—clearly a contradictory process to a logic too proud to learn from experience. But a genuinely scientific logic would see in this humble illustration a symbol of that measured straining in opposite



undergone to some degree the survival of the fittest — they have borne the test of time, while our statutes are too often born of emotions of the moment. But anachronisms do exist in the law. By the very nature of things our common law of today must represent the results of the economics of yesterday. When therefore a principle of the common law is obviously out of tune with the present, when indications, such as the popularity of remedial acts in other jurisdictions,<sup>21</sup> the prevalence of similar acts on analogous points in the same jurisdiction,<sup>22</sup> the probability that the principle was the result of procedural difficulties now swept away,<sup>23</sup> and the vindication of the change by the test of time<sup>24</sup> — when all these indications point the same way, it cannot be dangerous to let courts which have directed the growth of principles of law in the past, continue to obtain a systematic growth by treating such statutes as declaratory of a principle of law, and not merely a remedy for a class.<sup>25</sup>

PROOF OF CONTEMPORANEOUS PAROL CONDITIONS IN THE LAW OF BILLS AND NOTES. — It is laid down in discussions of the law of bills and notes that "If a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted."<sup>1</sup> It should not be necessary at this time to set forth that this is only the court-room application of a rule of law that such a verbal agreement, if proved, is immaterial.<sup>2</sup> But stated even so, the variants of the general rule are so numerous as practically to call for a new classification, a demand which Dean Wigmore's synthesis ably fulfills.<sup>3</sup> For the

directions which is the essence of that homely wisdom which makes life livable." Mr. Justice Holmes likewise gives indications of similar thought. In refusing to reverse a case on the ground that the plaintiff had refused to allow examination by the defendants' physician, the common law having no precedent on the point, he says: "It will be seen that we put our decision not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case." *Stack v. New York, N. H. & H. R. Co.*, 177 Mass. 155, 159, 58 N. E. 686, 687.

<sup>21</sup> Lord Campbell's Acts are existent in practically all jurisdictions today.

<sup>22</sup> The somewhat analogous idea that actions of tort died with the wronged party has, as shown above, been swept away by 4 EDW. III, c. 7. The English Workmen's Compensation Act, 1906, § 7, shows the same tendency. See note 10.

<sup>23</sup> This is apparently the court's justification for the present decision. This argument that the rule, having had a basis when promulgated, was therefore good law, and so must be good law now, appears to be a nonsequitur. The language of Lord Parker that the House should not disturb a rule which, "however anomalous it may appear to the scientific jurist, is almost certainly explicable on historical grounds," is hardly soul-satisfying.

<sup>24</sup> Lord Campbell's Act was passed in 1846 (9 & 10 VICT. c. 93).

<sup>25</sup> An Illinois case brings out well the idea of treating a statute as a principle, together with a hesitancy to reach such result rashly. In *Groth v. Groth*, 7 Chicago L. J. 359, the court allowed the husband temporary alimony on a suit of divorce by the wife. This result had its basis in Married Women's Acts which had apparently laid down the principle of equality between man and wife. But the court justifies such conclusion drawn from the statute on the ground that not only today, but in Grecian times such equality existed, and it was only the temporary results of feudalism that had clouded the true light.

<sup>1</sup> 1 DANIEL, NEGOTIABLE INSTRUMENTS, 6 ed., § 80.

<sup>2</sup> WIGMORE, EVIDENCE, § 2400, (1). See THAYER PRELIMINARY TREATISE ON EVIDENCE, 390.

<sup>3</sup> WIGMORE, EVIDENCE, § 2443. Dean Wigmore divides the terms of the instru-

purposes of the present note,<sup>4</sup> however, Dean Wigmore and the general rule are at one. Contemporaneous parol agreements independent of the instrument and conditioning the maker's liability thereon, are excluded in both statements of the law.<sup>5</sup> And the difficulty arises from the fact that neither statement of the law is an adequate statement of the situation. A well-established line of decisions freely admits as against immediate parties the proof of agreements fixing certain conditions to the instrument.<sup>6</sup> And no summary excluding all collateral conditions can be adequate.

Dean Wigmore of course recognizes the existence of this line of decisions and excepts it from the general rule on the ground usually taken by the courts and the text writers, *viz.*, that "a condition precedent to the existence of the obligation, *i. e.* an escrow," is always available.<sup>7</sup> But it is difficult to see wherein this differentiation is effective either in application to the given case or in reasonableness. Although there may be a theoretical difference between a delivery in escrow to the payee, and a delivery to the payee to take effect *in praesenti* with a condition precedent to the obligor's liability, there is no difference in the legal effect of the two situations. The fact that in most jurisdictions<sup>8</sup> the delivery is anomalously allowed to be made in escrow to the payee cannot change the rule of escrow delivery in general, *i. e.* that the delivery of a deed in escrow creates an obligation presently,<sup>9</sup> etc. In either case there is an obligation outstanding which the parties have made dependent on a contingency. And in either case the payee can cut off the obligor's defense, based on the condition, by indorsement to a *bona fide* indorsee for value.<sup>10</sup> And yet the Parol Evidence Rule is made to apply in the one case and to be ineffective in the other.

In other words a line is drawn between parallel situations to the

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ment into terms expressed or variable, and terms fixed or implied. The expressed terms are not open to qualification; the terms implied by law may be qualified provided the transaction is such that the negotiable instrument form is peculiarly convenient for certain features, however inconvenient for others.

<sup>4</sup> The present note is not concerned with cases where the instrument and the contemporaneous agreement are mutual and dependent and therefore to be construed together as one contract. *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451. See note to *American Gas, etc. Co. v. Wood*, 90 Me. 516, in 43 L. R. A. 449. There is no definite rule establishing a test for the "one-contract" interpretation, and it is often difficult to determine when the court will construe the instrument and the agreement together. See 43 L. R. A. 449, note, § III (b).

<sup>5</sup> Dean Wigmore excludes contemporaneous parol conditions qualifying absolute instruments on the ground that, though the unconditional nature of a negotiable instrument is a term implied by law and hence variable under his formula (see note 3, *supra*), nevertheless if a condition was desired there was no prime necessity for the negotiable instrument form and the doors of his definition are closed. See WIGMORE, EVIDENCE, § 2444 (2). This seems to be a determined effort to fit the law to the formula.

<sup>6</sup> *Seymour v. Cowing*, 4 Abb. App. Dec. (N. Y.) 200; *Beach v. Nevins*, 162 Fed. 129, annotated in 18 L. R. A. (N. S.) 288.

<sup>7</sup> See WIGMORE, EVIDENCE, § 2444, n. 6 end. The same distinction is taken by the cases. *Niblock v. Sprague*, 200 N. Y. 390, 93 N. E. 1105; *Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985; *Shine v. Merville*, 1 Oh. App. 33, and cases under the Negotiable Instruments Law generally.

<sup>8</sup> *Burke v. Dulaney*, 153 U. S. 228. See 1 DANIEL, 6 ed., § 68 a; NEGOTIABLE INSTRUMENTS LAW, § 16.

<sup>9</sup> *Butter & Baker's Case*, 3 Coke 25 a; WARREN, CASES ON PROPERTY, 213.

<sup>10</sup> *Gillette v. Hodge*, 170 Fed. 313.



exclusion of the true agreement of the parties on one side of the line. The distinction is made, as suggested above, on the purely academic ground of the differentiation between a completed and an obstructed legal act. Where the instrument is delivered in escrow to the payee there is at present no delivery, and hence no binding obligation, and hence no application for a rule which protects from qualification a binding legal instrument.<sup>11</sup> It may be admitted that such a distinction as that between completed and obstructed legal acts is valuable for purposes of analysis. It may be admitted that the distinction would be justified on that ground alone if it were applicable to the cases in any satisfactory manner. But, as is usually true of distinctions that do not distinguish, an application to the cases results in a hopeless confusion. If delivery in escrow to the payee, such as is generally allowed in the United States,<sup>12</sup> were true delivery in escrow, or if the parties expressly attached their condition to the delivery, the problem would be simple. But, unfortunately, escrow delivery to the payee bears no ear-mark and the parties themselves seldom do more than insert a defensive condition without specifying its application. The result is that the court must decide in the usual case on which side of an arbitrary line a floating condition belongs.

And the decisions are not altogether unimaginative. A parol agreement, accompanying the manual delivery of a note and providing for two renewals and a retransfer of the note thereafter on a stipulated contingency, has been held to constitute a conditional delivery.<sup>13</sup> A parol agreement, contemporaneous with the manual tradition of a note, and providing that the note was not to be enforced unless the saloon fixtures for which it was given were disposed of, was held to attach to the maker's liability, not to the delivery.<sup>14</sup> A parol agreement that the maker's liability on the note should be contingent on his receiving a sum due him was held to fall without the proscriptions of the Rule.<sup>15</sup> But a parol agreement that payment was to depend on the maker's realizing on a sale of bonds, was held inadmissible.<sup>16</sup>

The general conclusion to be drawn from an examination of recent cases on the point is that it is well nigh impossible to decide from any given statement of facts whether or no the Parol Evidence Rule should apply. And it follows from such a conclusion that the criterion for the application of the Rule must be fatally indecisive and inept. The remedy seems almost too obvious to miss. Indeed it lies in the very source of the mischief. If delivery in escrow to the payee is to be allowed at all, then it must be open to the parties to fix any condition they desire as the condition on which delivery is to take place. And if this may be done there is no reason why the courts should not construe any condition that may be laid down prior to the obligor's liability as a condition going to

<sup>11</sup> *Beach v. Nevins*, 162 Fed. 129, in 18 L. R. A. (N. S.) 288.

<sup>12</sup> See note 8, *supra*.

<sup>13</sup> *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841.

<sup>14</sup> *Ebling Brewing Co. v. Feldman*, 114 N. Y. Supp. 910.

<sup>15</sup> *Newgass v. Shulhof*, 128 N. Y. Supp. 664.

<sup>16</sup> *Carnegie Trust Co. v. Kleybolte & Co.*, 74 Misc. 246, 134 N. Y. Supp. 69. See also *Warner v. Bonds*, 111 Ark. 238, 163 S. W. 788; *Cochran v. Burdick*, 7 Ala. App. 274, 61 So. 29; *Alexander v. Righter*, 240 Pa. St. 22, 87 Atl. 427; *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585; *George v. Williams*, 27 Colo. App. 400, 149 Pac. 837.

the delivery. Whatever decision they reach is, in the ordinary case, the result of construction, and such construction as that suggested would give fullest effect to the policy suggested by the recent recognition of delivery in escrow to the payee.

**TORT JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.**—Section 16 of the Act to Regulate Commerce, as amended June 29, 1906,<sup>1</sup> provides that "if . . . the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled. . . ." The Interstate Commerce Commission is thus invested with jurisdiction of claims for all injuries which are caused by violations of the Act. The act complained of, however, must have been in violation of the statute at the time it was committed, and not merely because of some subsequent order of the Commission or change in conditions.<sup>2</sup> That this so-called "reparation" section amounts to nothing more or less than an investiture with jurisdiction over a certain number of torts (which usually were also torts at common law) was at one time clearly recognized by the Commission.<sup>3</sup> Such a recognition might be advisable now, in view of recent hastily considered decisions<sup>4</sup> of the Commission awarding damages for injuries caused by negligent misrepresentation — which generally are not torts at common law.<sup>5</sup> And it should also be remembered that the Commission's jurisdiction is not exclusive of that of a common-law court, provided the plaintiff is able to sustain his cause of action in the latter without the aid of a finding by the Commission.<sup>6</sup>

<sup>1</sup> 34 STAT. AT L. 584, 590.

<sup>2</sup> *New Pittsburgh Coal Co. v. Hocking Valley R. Co.*, 26 Int. Com. Rep. 121; *In re Wool, Hides and Pelts*, 25 Int. Com. Rep. 675.

<sup>3</sup> "Proceedings for reparation before the Commission for indemnitory damages are purely statutory and correspond to actions at law sounding in tort . . . If an injury is sustained on account of a violation of law, the proceeding is in its nature *ex delicto*, and therefore carries with it none of the features or incidents of an action *ex contractu*. In the very nature of the thing no protest is necessary where an injury is inflicted by the commission of a tort. The violation of the law produces the injury and completes the offense, and the person injured does not have to perform any conditions to entitle him to recover for the damage sustained." *Southern Pine Lumber Co. v. Southern Ry. Co.*, 14 Int. Com. Rep. 195, 197.

<sup>4</sup> *Healy & Towle v. Chicago & Northwestern Ry. Co.*, 43 Int. Com. Rep. 835; *cf. Rutland & Rutland v. Chicago, Rock Island & Pacific Ry. Co.*, 19 Int. Com. Rep. 108; *Wolverton v. Union Pacific R. Co.*, 31 Int. Com. Rep. 23, 24; *Brittain v. Nashville, Chattanooga & St. Louis Ry.*, Unreported Opinion A-581.

<sup>5</sup> See Jeremiah Smith, "Liability for Negligent Language," 14 HARV. L. REV. 184; *cf. SALMOND, TORTS*, 3 ed., 450.

<sup>6</sup> *Cf. WATKINS, SHIPPERS AND CARRIERS OF INTERSTATE AND INTRASTATE FREIGHT*, 2 ed., 601. See also *Michigan Hardwood Manufacturers' Ass'n v. Transcontinental Freight Bureau*, 27 Int. Com. Rep. 32, 37: "In giving the Commission jurisdiction over reparation, it was the manifest intent of Congress to provide shippers with a method of obtaining an award of damages accruing by virtue of the violation of the Act, without resort to the expensive and tedious processes of the law."

For the effect of the award of damages by the Commission, and the means of enforcing it, as provided by the Act, see *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, 724.



"Reparation" is a curious misnomer for this jurisdiction, which is, as has been pointed out, purely to give damages for torts; and it should be observed that section 16 consistently speaks of "awarding damages," and nowhere uses the word "reparation." The widespread use of that word is not only incorrect but also unfortunate, for it tends to confuse this jurisdiction with other powers of the Commission which are in their nature more or less equitable. Such confusion is all the more likely, since the Commission has consistently made its award of damages purely discretionary.<sup>7</sup> The exercise of the discretion, however, depends not upon the equitable balance of convenience, but upon the public interests involved.<sup>8</sup> Thus, a plaintiff having a clear case for damages was nevertheless denied, because to award them to him would, in ultimate effect, disturb the equality of rates between districts.<sup>9</sup> So also damages are not always awarded in an uncontested case, because of the possibility that thus collusively a rebate may be obtained.<sup>10</sup>

The Commission's award is for damages plus interest,<sup>11</sup> in accordance with the better rule in actions at law for torts which are in the nature of injuries to property.<sup>12</sup> And exemplary damages will not be given,<sup>13</sup> perhaps because of the anomalous nature of such damages, but more probably because the Act contains explicit provisions in other sections for penalties for its violation. An assignee of a claim will be awarded damages.<sup>14</sup> Since the Act expressly establishes a limitations period, there has been much dispute whether laches should bar the claimant prior to the expiration of the statutory period.<sup>15</sup> It would seem that laches should be no bar.<sup>16</sup>

Section 16, it should be noticed, provides only for an award of damages against "the carrier." This provision seems to have been violated by the Commission's action in sometimes (not always) taking into account undercharges by the carrier in making its awards.<sup>17</sup> The carrier is thus enabled to secure damages from the undercharged shipper, in the guise

<sup>7</sup> Despite the fact that section 16 uses the mandatory "shall."

See the cases cited in LUST, SUPPLEMENTAL DIGEST NO. 1 OF DECISIONS UNDER THE INTERSTATE COMMERCE ACT, 519.

<sup>8</sup> *Joynes v. Pennsylvania R. Co.*, 17 Int. Com. Rep. 361.

<sup>9</sup> *Youngstown Sheet & Tube Co. v. Pittsburgh & Lake Erie R. Co.*, 27 Int. Com. Rep. 165.

<sup>10</sup> Thus, *Elden v. Southern Pacific Co.*, 38 Int. Com. Rep. 530: "A mere willingness to pay reparation without evidence that the rate charged was unreasonable is not sufficient upon which to base an award of reparation."

<sup>11</sup> *International Agricultural Corporation v. Louisville & Nashville R. Co.*, 29 Int. Com. Rep. 391.

<sup>12</sup> See SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES, 2 ed., 137 *et seq.*

<sup>13</sup> *Eichenberg v. Southern Pacific Co.*, 28 Int. Com. Rep. 584.

<sup>14</sup> *Jublitz v. Southern Pacific Co.*, 27 Int. Com. Rep. 44.

<sup>15</sup> See *Kindelon v. Southern Pacific Co.*, 17 Int. Com. Rep. 251, 252; 1 DRINKER, THE INTERSTATE COMMERCE ACT, 440; 25 HARV. L. REV. 665.

<sup>16</sup> 25 HARV. L. REV. 665.

<sup>17</sup> See the cases in LUST, SUPPLEMENTAL DIGEST NO. 2 OF DECISIONS UNDER THE INTERSTATE COMMERCE ACT, 802.

*Cf.* in this connection *Manufacturers' Ry. Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 28 Int. Com. Rep. 93, especially at p. 108: "An award of reparation is due only from a carrier to a shipper, and not to one carrier, as a carrier, from another." There is apparent no reason for such an exercise of the Commission's discretion. Section 16 says only "any party complainant" may recover.

of set-off or counterclaim. It is apparently the case, however, that this limitation of jurisdiction to suits against carriers is an inadvertent one, since section 16 obviously intends to allow an award of damages for any violation of the Act; and since there are many sections of the Act which can be violated by others than carriers, whose violation is equally deserving of an award of damages.<sup>18</sup>

The Commission has awarded damages for many different torts. "Unjust discrimination" and "undue preference" cases have arisen frequently, and damages have been awarded.<sup>19</sup> These injuries, aside from their status under the technical common law of carrier and shipper, or carrier and passenger, are certainly comprehended within the modern common-law definition of a tort as any injury inflicted intentionally and without justification.<sup>20</sup> In an early case<sup>21</sup> the Commission decided that one such discrimination (here the ejection of a negro from a car) was a trespass. It is obvious that the discrimination might equally well take the form of an assault or a battery, and probably of a libel or a slander. Over such torts as these the Commission would seem to have jurisdiction, provided always that they are committed in violation of the Act. That, indeed, should be clearly recognized to be the only limit to the Commission's jurisdiction,<sup>22</sup> although it might be well to decline to exercise the juris-

<sup>18</sup> For example, section 10.

<sup>19</sup> See *Eichenberg v. Southern Pacific Co.*, 14 Int. Com. Rep. 250, 271; *Meeker & Co. v. Lehigh Valley R. Co.*, 21 Int. Com. Rep. 129, 137. In the latter case the award was approved by the United States Supreme Court, s. c., 236 U. S. 412. See *1 DRINKER, supra*, for discrimination, whether of facilities or of charges, pp. 433-434, 435; for preference among localities, p. 435.

<sup>20</sup> 29 HARV. L. REV. 559; 30 HARV. L. REV. 292. It might here be observed that this finding of justification comes singularly close to the "discretion" which the Interstate Commerce Commission exercises.

<sup>21</sup> *Councill v. Western & Atlantic R. Co.*, 1 Int. Com. Rep. 339. The Commission was stopped from awarding damages in this case only by the doctrine which it then held, that the Seventh Amendment required the intervention of a jury in such cases as these. See *Heck & Petree v. The East Tennessee, Virginia & Georgia Ry. Co.*, 1 Int. Com. Rep. 495, 502; *Riddle, Dean & Co. v. New York, Lake Erie and Western R. Co.*, 1 Int. Com. Rep. 594, 607. Happily this doctrine was soon abandoned, following the Amendment of March 2, 1889, which provided for a trial by jury on suits on the Commission's awards. See *WATKINS, supra*, 601.

<sup>22</sup> Cf. *1 DRINKER, supra*, 388: The Interstate Commerce Commission "cannot award damages for defective service, or for failure to make schedule time, or for breach of contract, or for conversion of chattels" (citing cases). This statement is, of course, incorrect; the Commission may, in a proper case, give damages for any of these things. The truth is that the Commission has unwisely used broad language with great frequency. Thus: "The commission's jurisdiction over claims for reparation does not extend to claims for loss, damage, or delay to shipments in transit, such claims being cognizable in the courts." *Atlas Portland Cement Co. v. Louisville & Nashville R. Co.*, 32 Int. Com. Rep. 487, 488.

As regards the breach of contract claim, see *Bichel v. Atchison, Topeka & Santa Fe Ry. Co.*, 19 Int. Com. Rep. 499. Here plaintiff purchased from defendant a coupon book of tickets, with a provision that the coupons could be redeemed only within eighteen months. After more than eighteen months had elapsed, plaintiff sued; this provision was held void, and damages were awarded to the amount of the unused coupons. Cf., however, *Larkin Co. v. Erie & Western Transportation Co.*, 24 Int. Com. Rep. 645; and see *McArthur Brothers Co. v. El Paso & Southwestern Co.*, 34 Int. Com. Rep. 30, in which case an award for breach of contract was refused, rightly, because the breaking of the contract was not a violation of the Act. It is, of course, obvious that there are many contracts breach of which is in violation of the Act. But see *WATKINS, supra*, 329.



diction in some cases of minor injuries.<sup>23</sup> Damages have frequently been awarded to a shipper who has been overcharged, whether directly<sup>24</sup> or indirectly,<sup>25</sup> since such overcharge is prohibited by the Act, if direct, and if indirect is effected by methods prohibited by the Act.<sup>26</sup> Among such indirect methods of effecting an overcharge is the negligent misrepresentation as to cost of transportation, referred to above.<sup>27</sup> And damages have even been given by the Commission in the still more extreme case of a misrepresentation (here a failure to post a new and higher tariff, relied on by plaintiff to his indirect loss) that was neither intentional nor negligent.<sup>28</sup> The failure to post the tariff, however, was, regardless of its cause, a violation of the Act, and hence the Commission was right in holding the carrier for any damage caused thereby.

The Commission is no doubt wise in declining to let its tort jurisdiction crystallize into the common-law classifications of torts. Such a refusal is in accordance not only with the purpose of section 16, but also with the growing tendency to abolish all classifications of torts.<sup>29</sup> But, nevertheless, it is desirable that the Commission realize clearly what it is doing, in the light of the common law, when it awards damages in a given case.

CONTRACTS TENDING TOWARD MONOPOLY. — The prevailing economic theories tell us that a monopoly is injurious to the public interest and to be avoided. By monopoly apparently is meant a real monopoly, an exclusive control of a certain business by one group of persons — a situation such that all competition is permanently excluded.<sup>1</sup> A monopoly prevents the salutary action of competition upon prices, and makes the desire of the monopolist the chief and perhaps the only determinant of price. Further, it closes the field of the particular business to all others

<sup>23</sup> See *Joynes v. Pennsylvania R. Co.*, 17 Int. Com. Rep. 361, 365 *et seq.* This case shows a strong tendency on the part of the Commission to limit its awards to cases where the tort has what might be termed an "interstate rate savor," analogous to the "maritime savor" test for an admiralty court's jurisdiction in some cases.

<sup>24</sup> "The Act entitled shippers to just and reasonable transportation charge, and if these carriers have imposed upon these complainants rates in excess of this they have thereby damaged the complainants to the extent to which reparation should be allowed." *In re Advances on Live Stock*, 28 Int. Com. Rep. 332, 335. See also *Michigan Hardware Manufacturers' Ass'n v. Transcontinental Freight Bureau*, *supra*.

<sup>25</sup> Damages given for higher rates collected because of misrouting: see *Kile & Morgan Co. v. Deepwater Ry. Co.*, 15 Int. Com. Rep. 235; because of misquotation concerning route, rate or privileges: *Kiel Woodenware Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 18 Int. Com. Rep. 242; *Stone & Meyers Co. v. Toledo, St. Louis & Western Ry. Co.*, Unreported Opinion A-52; *Maldonado & Co. v. Southern Pacific Co.*, Unreported Opinion A-18; *Rutland & Rutland v. Chicago, Rock Island & Pacific Ry. Co.*, *supra* (but *cf. Faribault Furniture Co. v. Chicago Great Western R. Co.*, 25 Int. Com. Rep. 40, 41); because of furnishing unnecessarily expensive equipment: *Calvi v. Chicago, Milwaukee & St. Paul Ry. Co.*, Unreported Opinion 461; *Moline Plow Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, Unreported Opinion 419.

<sup>26</sup> For these methods, see note 25, *supra*.

<sup>27</sup> See note 4, *supra*.

<sup>28</sup> *Rutland & Rutland v. Chicago, Rock Island & Pacific Ry. Co.*, *supra*.

<sup>29</sup> See the references in note 20, *supra*; also *Jeremiah Smith*, "Tort and Absolute Liability — Suggested Changes in Classification," 30 HARV. L. REV. 241, 260.

<sup>1</sup> See ELY, MONOPOLIES AND TRUSTS, for a full discussion of the question.

and from this aspect also is contrary to the public interest.<sup>2</sup> Accepting this view, it follows that where any transaction tends, however slightly, toward such a condition, the law is deterred from recognizing it. The extent of that deterrence varies directly with the extent of the tendency toward monopoly.

Whether or not a contract or combination should be held illegal, as in restraint of trade, can be correctly determined only by a balance of the social interests in favor of the transaction against the tendency toward monopoly inherent in the particular case.<sup>3</sup> For instance, a contract by a single individual not to engage in a certain business, without more is clearly illegal.<sup>4</sup> Opposed to the inertia engendered by the general policy to allow freedom of contract, is the consideration that *one person* is prevented from competing in this business. This, it is clear, tends toward monopoly, very slightly perhaps, but nevertheless surely, — and heavily enough to turn the evenly balanced scale against the contract.<sup>5</sup>

Where, however, there is some affirmative policy on the other side, which outweighs the evil of the tendency toward monopoly, such a contract should be upheld. In the sale of a business, where a covenant not to engage in that business is given by the seller to the buyer, and such covenant is no broader than necessary to make the sale complete, the affirmative considerations in favor of permitting a person to sell his business freely and for the best price, and the general policy in favor of freedom of alienation, easily prevail. The cases generally are in accord that, upon the sale of a business, a restriction coterminous with the business sold is valid.<sup>6</sup> 275

On the other hand, again, there are many cases where the tendency toward monopoly is so very strong, where the situation approaches so closely a real monopoly, that the deterrent interests must prevail.<sup>7</sup> Such a case is presented by a combination of business units, when the power and the intent to exclude are coexistent.<sup>8</sup>

The courts, unfortunately, have not always recognized the peculiar necessity in these cases of the balancing process suggested above. Where most clearly they should particularize and examine the facts and circum-

<sup>2</sup> It is not our intention, nor indeed our province here, to go into the soundness of these conceptions, as economic principles. They are almost universally accepted, and the law would be failing in its purpose, were it to practise an economics of its own, adverse to the tenets of contemporaneous business faith.

<sup>3</sup> We shall discuss here only the cases which tend toward the ultimate evils stated *supra*, through the medium of a monopoly. The same principles of balance should of course govern where some other method is employed. See 30 HARV. L. REV. 68, where the cases dealing with price maintenance contracts are discussed. 275

<sup>4</sup> *Colgate v. Bacher*, Cro. Eliz. 872; see *Prugnell v. Gosse*, Aley's Rep. 67; *Mitchell v. Reynolds*, 1 P. W. 181, 196.

<sup>5</sup> The considerations against pauperism and against depriving the community of a useful servant lack vitality in the present economic system and so need not be considered. The tendency toward monopoly and its resultant evils is, in the present order, the only potent social objection to the legal recognition of restrictive contracts, or combinations of business units.

<sup>6</sup> *Mitchell v. Reynolds*, 1 P. W. 181; *Roberts v. Lemont*, 73 Neb. 365, 102 N. W. 770; *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507, 43 Atl. 723.

<sup>7</sup> There would seem to be no affirmative policy, as we see things now, which could counterbalance the evil results of a real monopoly.

<sup>8</sup> See *Dunbar v. Am. Tel. & Tel. Co.*, 238 Ill. 456, 87 N. E. 521.



stances of the instant case, they frequently indulge in a recitation of the meaningless rule of thumb that a general restraint is void and a partial restraint valid if reasonable, and declare the contract illegal because it savors of an interference with competition, where an intelligent weighing of the interests would lead to a directly opposite result. A recent Alabama case is open to just this criticism. The plaintiff, a dry-cleaning company, contracted with five laundry companies in the city of Birmingham, one of which was the defendant, that the latter should announce to their customers that they were acting as collection and delivery agents for the plaintiff company and should collect soiled goods and make return deliveries of cleaned goods. The laundry companies promised in addition to collect only for the plaintiff company and not to go into the dry-cleaning business in the locality. The plaintiff company agreed to pay the laundry companies twenty-five per cent of the returns on the dry-cleaning business which they brought in, and not to go into laundry business in the locality. There were other laundry concerns, and other dry-cleaning companies operating in this particular commercial community. The defendant company failed to perform and suit was brought to enjoin them from breaking their contract. The court held that the injunction should be denied, and in what must perhaps be taken as a *dictum*,<sup>9</sup> though a very strong one, declared the arrangement to be illegal as in restraint of trade.<sup>10</sup>

Let us analyze the case, first considering it as a mere contract between strangers. We have, then, merely five laundry companies contracting to act as agents for the collection of goods exclusively for a certain dry-cleaning company, and agreeing not to go into the dry-cleaning business.<sup>11</sup> An agreement by an agent not to go into the principal's business is certainly a reasonable protective requirement from the standpoint of the principal. The contract here, then, may be said to be fairly necessary in order that the laundry companies should get the agency. The policy in favor of enabling people to make such dealings with each other is very strong.<sup>12</sup> On the other side, this contract was one of five of a similar nature, so that it was part of an arrangement whereby five companies would be prevented from going into this business. There is no exclusion of others here, — the field is left open, and indeed the facts show that there were other dry-cleaning businesses in the locality, so that there is not even a temporary exclusive possession of the field.<sup>13</sup> The tendency

<sup>9</sup> The court held that, even though the contract was enforceable at law, yet it was sufficiently against public policy to lead them in their discretion to refuse the injunction. This proposition is difficult of support. They took the additional ground that the practical difficulties were too great here for equity to enforce the contract, and refused to enforce the negative agreement as a means of bringing about the performance of the affirmative. This, of course, is aside from our point. For a discussion of the principles involved in this latter proposition, see *Lumley v. Wagner*, 1 De G. M. & G. 604.

<sup>10</sup> *American Laundry Co. v. E. & W. Dry-Cleaning Co.*, 74 So. 58.

<sup>11</sup> For the effect of the agreement on the other side, by the dry-cleaning company not to go into the laundry business, see *post*, note 19.

<sup>12</sup> See *Hitchcock v. Coker*, 6 Ad. & E. 438; *U. S. v. Addystone Pipe & Steel Co.*, 85 Fed. 271, 281.

<sup>13</sup> Even though there were such a temporary exclusive possession, the affirmative considerations mentioned *supra* would prevail.

toward a real monopoly is very slight, merely the deterrence of five companies not in the business from entering the business. This cannot fairly be said to overcome the affirmative considerations.<sup>14</sup>

It might well be urged, also, that the laundry company in question was selling a part of its good-will. The laundry business is closely akin to the dry-cleaning business, and the good-will of a laundry company may well include a share of good-will as to dry-cleaning. If this is so, as the contract is clearly not broader than necessary to effect the complete sale of such good-will, the affirmative considerations are strengthened.

The transaction here, however, may be considered from a different angle. Although the court does not consider the fact, the evidence shows that the dry-cleaning company was owned by the principal stockholders of the laundry companies. This brings in a new element, — combination. As to the tendency toward monopoly the case remains the same.<sup>15</sup> But the affirmative considerations arising from the contract of agency, and from the sale of good-will, are replaced by the social interest in combinations.<sup>16</sup> Larger commercial units are to be favored because of their greater efficiency and ability to meet the needs of our complex economic system. Further, they tend strongly toward stability, the desideratum of every commercial community. Still further, they make against a condition of too much competition, one of the recognized evils of the competitive system.<sup>17</sup> Viewing the transaction as a combination of the stockholders of the laundry companies, the case for the contract can only be strengthened.<sup>18</sup> In so far then as the court refused the injunction sought

<sup>14</sup> The agreement to collect exclusively for the dry-cleaning company adds nothing against the contract. It in no way excludes others from the dry-cleaning field. There certainly were ways of collecting goods to be dry-cleaned other than the medium of laundry companies. Even if not, there were other laundry companies. To the extent then of preventing these five laundry companies from collecting for any other dry-cleaning company, it hampered competition in the dry-cleaning business, and that is all. The tendency of this toward monopoly is too slight to be of any real force.

This differs from the case of an exclusive agreement with a public service company, where by force of the fact that no one could get into the business of the public service company without a franchise, and that, as the field was adequately looked after by the existing company, a franchise probably could not be obtained, a real monopoly is created by such an exclusive contract. See *Union Trust & Savings Bank v. Kinloch Long Distance Tel. Co.*, 258 Ill. 202, 101 N. E. 535.

It might also be urged that the agreement prevented these five companies from competing with other concerns to collect for other dry-cleaning companies, and in this way tended toward a monopoly in the collection business, but this, like the similar tendency in the dry-cleaning business, is too slight to be given any real consideration.

<sup>15</sup> Nothing appears in the facts to show that the dry-cleaning company occupies a predominant position in the business in the particular community, which the authorities, correctly or not, apparently have come to consider an important factor. See *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 58 N. E. 525. See *post*, note 18, for a consideration of the bearing of mere size upon the question.

<sup>16</sup> It would seem clear that where the stockholders of the two companies are the same, the policy favoring the free creation of agencies and that favoring the free alienation of acquisitions cease to apply.

<sup>17</sup> See *N. W. Salt Co. v. Electrolytic Alkali Co.*, [1914] A. C. 461, 469; *Ontario Salt Co. v. Merchant's Salt Co.*, 18 Grant U. C. 540.

<sup>18</sup> It seems a fair assertion that nothing short of the situation in *Dunbar v. Am. Tel. & Tel. Co.*, *supra*, note 8, where the combination was powerful enough by the use of unfair methods of competition, — local price cutting, etc. — to exclude all others from the field, and where the intent to so act was present, should prevail against the con-



on the grounds that the contract was illegal, the decision cannot be justified.<sup>19</sup>

From the above discussion it must be apparent that the success of any attempt to balance the interests for and against a contract or combination depends absolutely upon a true valuation of the weight to be given the various considerations *in the particular case*. This, in turn, requires a determining body, able to go into the details of the business under consideration, and having its finger always upon the pulse of the commercial situation. It is obvious that a court is not, nor can be, such a body from its very nature. The seeker for an entirely satisfactory method of handling the problem must advocate that some such body should hold the scales.

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DEMURRAGE CHARGES ON PRIVATELY OWNED RAILROAD CARS. — The United States Supreme Court has recently upheld the provision of the Uniform Demurrage Code<sup>1</sup> imposing a charge upon privately owned

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siderations in favor of combination. A great many cases appear to have taken the position that mere size, a predominant position in the business, should be enough to make a combination illegal. Whether these cases hold that such size so tends toward monopoly that *per se* it makes the combination illegal, or that the size is *prima facie* evidence of intent to exclude and that therefore unless there is rebutting evidence you have the situation of the Dunbar case, or whether they go upon a third tack and are attempting to determine the boundaries of the policy in favor of combinations, and to fix the limits of this policy, it is difficult to discover from an examination of the cases. Upon whichever of these grounds the cases rest, it would seem that one of two answers can be given to them, — either that the proposition is fallacious, which is the case in the first and second alternatives, or that the courts are not capable of going into the intricacies of business facts necessary to an accurate determination of the question and so should not make the attempt, which is the case in the first and third alternatives.

Where a combination is formed agreeing to a set price and has a predominant position in the business, there is some ground for presuming that the intention of the parties is to exclude others, and as they have the power to do so, for holding the combination illegal. But mere size, even added to a purpose to fix prices, but not setting a hard and fast price, does not justify this presumption.

<sup>19</sup> The agreement by the dry-cleaning company not to go into the laundry business presents an even weaker case for illegality than that by the laundry companies, so it adds nothing against the contract.

<sup>1</sup> The Uniform Demurrage Code was adopted in 1909 by the National Convention of Railway Commissioners, and, in the same year, endorsed by the Interstate Commerce Commission, which recommended that its rules be made effective on interstate commerce throughout the country. "These rules provide that after two days' free time 'cars held for or by consignors or consignees for loading' or unloading shall (with certain exceptions not here material) pay a demurrage charge of \$1 per car per day. Private cars are specifically included by the following note: 'NOTE. — Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.'

"(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)'" Brandeis, J., in *Swift & Co. v. Hocking Valley Ry. Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 376. See *In re Demurrage Investigation*, 19 Int. Com. Rep. 496.

railroad cars held overtime "on carrier's" tracks.<sup>2</sup> The defendant, Swift & Co., occupied, under a license from the plaintiff, the Hocking Valley Railway Co., a certain siding appurtenant to their local warehouse. The railroad brought this action below to recover a demurrage charge, imposed under the Uniform Demurrage Code, on cars owned by Swift & Co. which the packing company held on this siding longer than the prescribed forty-eight hour free period. The Supreme Court, in affirming a judgment for the plaintiff, upheld the charge as one imposed upon privately owned cars on "public" tracks.<sup>3</sup> Such charges have been repeatedly sustained by inferior federal tribunals.<sup>4</sup>

The car-distribution cases<sup>5</sup> have disposed of the private car owners' arguments that their cars are entirely without the purview of the present interstate commerce regulation, and that they should be allowed to enjoy, unrestricted, the advantages gained by their own foresight and expenditure. The principal case carries us a step further, in demanding an affirmative charge on private property rather than denying to the owner of private cars the use of carrier's equipment. But the case that because they are private cars they are to be left entirely to private manipulation, has been squarely met. Granting this, it is objected that the charge is contrary to the Act to Regulate Commerce, is unreasonable, a denial of due process of law, and void. In answer to this are urged two considerations: First, the railroad may impose a fair charge<sup>6</sup> on cars standing on their tracks longer than the free period allowed, for the use and occupation thereof.<sup>7</sup> Second, the charge operates as a penalty, tending to secure the prompt return of the cars and so to prevent congestion of terminal facilities, leaving them open for the use of other shippers.<sup>8</sup> These considerations alone seem to give a sufficient justification for the charge. And it has been so considered.<sup>9</sup>

<sup>2</sup> Swift & Co. v. Hocking Valley Ry. Co., *supra*.

<sup>3</sup> The decision of the court is based squarely on this interpretation. It is, of course, unprofitable to quarrel with a finding of fact. But the opinion leaves something to be desired as to the precise ground upon which the finding was based. The question of "public" or "private" track is, of course, one of fact. But it seems that it is a fact, like the fact of negligence or proximate cause, which requires the application of legal standards to given facts. There is no inherent distinction, no magic and conclusive difference, in this connection, between a railroad track the title to which is in an individual, and one owned by a railroad corporation. The material differences seem to be these: (1) If the track is privately owned, demurrage cannot be charged as a fee for use and occupation; (2) nor can it be imposed as a regulation tending to keep terminal facilities open to the public. These distinctions have been recognized by the Commission. See *Re Demurrage Charges on Tank Cars*, 13 Int. Com. Rep. 378, 381; *Cudahy Packing Co. v. Chicago, etc. Ry. Co.*, 12 Int. Com. Rep. 446, 447. Further than this, there is no valid distinction. So it is suggested that a track owned in fee by a railroad, but occupied by a private corporation under a lease giving the exclusive right of use, comes under the description of a "private" track for demurrage purposes.

<sup>4</sup> See *Re Demurrage Charges on Tank Cars*, *supra*; *Cudahy Packing Co. v. Chicago, etc. Ry. Co.*, *supra*; *National Refining Co. v. St. Louis, etc. Ry. Co.*, 237 Fed. 347, affirming 226 Fed. 257.

<sup>5</sup> See *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; *R. R. Comm. of Ohio v. Hocking Valley Ry. Co.*, 12 Int. Com. Rep. 398.

<sup>6</sup> There was no question raised as to the charge being unreasonable in amount.

<sup>7</sup> This reason is taken in *Re Demurrage Charges on Tank Cars*, *supra*.

<sup>8</sup> The decision in *Cudahy Packing Co. v. Chicago, etc. Ry. Co.*, *supra*, is based on this ground.

<sup>9</sup> See cases cited *supra*, note 4.



A far more interesting and difficult problem is presented by that provision of the Uniform Demurrage Code imposing a charge on privately owned cars held overtime on privately owned tracks so long as they are under lading. It is contended in objection that after such cars have been removed from the interchange tracks and placed upon private tracks, they are no longer in "railroad service," but are private property in the possession of the owner, to be used as he sees fit; that the railroads have no interest in the tracks upon which the cars then stand; that they have ceased to pay rental or mileage for the use of the cars; that they are in no way responsible for the cars, and can have no interest in them until they are again placed on the interchange tracks and tendered for shipment; that they cannot require the owner to place his cars again in the railroads' service; and that if the owner so elects he may unload the car, notify the carrier, and then reload the car and use it for storage purposes as long as he sees fit, and that no possible benefit comes to either the carrier or the public through this unnecessary labor.<sup>10</sup>

As to the first objection, it accomplishes nothing to prove that the cars are not within "railroad service" as we ordinarily employ that term. It is used in the Code merely as a convenient phrase to describe a certain situation. Whatever the phrase used, the question still remains: Can the railroad charge demurrage against private cars in this situation?

The other arguments against the charge present two propositions: First, that a private owner of private property while on his own land may do with it what he pleases. To this need be made no further answer. Second, that the charge is arbitrary, not in return for any service rendered, and useless alike to the carrier and the public. If sound, this objection must be fatal.

It is true that the railroad cannot charge for use and occupation of its tracks, nor justify the charge on the ground that it will keep terminal facilities open to the public. But it is submitted that the charge may be upheld, first, because it tends to prevent an unjust advantage from accruing to those who own their own cars over those who do not;<sup>11</sup> and second, because the railroads impose the charge as a condition to accepting privately owned cars.<sup>12</sup>

There are two substantial possibilities wherein owners of private cars may receive an advantage over other shippers. First, in unloading, they may team directly from the car as the product is sold, while another shipper must either unload the entire car first, and re-handle it in delivery lots later, or pay demurrage. A demurrage charge on the private car owner puts them on the same basis. Either may let the car stand and pay demurrage charges, or may unload at once. Second, in receiving carriers' equipment, one owning private cars may use his cars, fill them and set them on his own siding, treat them as storage cars and not cars

<sup>10</sup> These are the principal objections urged by the complainant in *Proctor & Gamble Co. v. Cincinnati, etc. Ry. Co.*, 19 Int. Com. Rep. 556, 557.

<sup>11</sup> See *Proctor & Gamble Co. v. Cincinnati, etc. Ry. Co.*, 19 Int. Com. Rep. 556.

<sup>12</sup> This right of the railroad has been repeatedly asserted in the cases. See *Cudahy Packing Co. v. Chicago, etc. Ry. Co.*, *supra*; *Re Demurrage Charges on Tank Cars*, *supra*; *Proctor & Gamble Co. v. Cincinnati, etc. Ry. Co.*, *supra*; *Proctor & Gamble Co. v. Cincinnati, etc. Ry. Co.*, 188 Fed. 221.

in commerce, and demand his share of railroad-owned cars, to the prejudice of other shippers. This is another aspect of the very evil the car-distribution cases sought to correct. The argument taken that the demurrage charge would not prevent this discrimination because the shipper could unload the cars, notify the carrier, and then re-load, and use them for storage purposes as long as he cared to, and call for his share of the carriers' equipment, excluding his own from consideration, is not fatal.<sup>13</sup> A regulation need not fail because it is not a perfect panacea for the evil it seeks to correct. It is sufficient that it in fact tends toward a substantial improvement — places some substantial obstacle against this evil. The very fact that the shipper must go through this "useless labor" is a practical answer to the objection. By imposing the charge the shipper, as a practical matter, is very likely to return the cars promptly to railroad service.

Further, there seems no sufficient answer to the proposition that the carrier, since he is under no common-law or statutory duty to receive private cars when tendered, may impose upon his acceptance the condition that the shipper pay this demurrage charge. This condition may properly be implied from the fact that the railroad in its tariff published with the Interstate Commerce Commission regarding the use of privately owned cars includes both the rental they will pay the owner, and the charge they will impose as demurrage. The shipper cannot accept a part and reject the remainder. Nor is this an unreasonable condition. It enables the railroad to count with a degree of certainty upon the continued use of privately owned cars, and to regulate its own equipment upon this basis, for the better service to the general shipping public.

To the objection that the charge is contrary to the Act to Regulate Commerce, it may be answered that "surely any arrangement for the use of private cars which causes, or results in, undue preference or unjust discrimination is repugnant to the underlying principle, as well as in conflict with the terms, of the act."<sup>14</sup> It may be suggested, further, that Swift & Co., by placing their cars in railroad service, have entered, with the carrier, into the joint business of supplying interstate railway facilities, and, as such, have come definitely within the scope of the Act.

## RECENT CASES

**BILLS AND NOTES — DISCHARGE OF INDORSERS — EXTENSION AGREEMENT WITH THIRD PARTY.** — The holder of a note indorsed for accommodation deposited the note after maturity as collateral for an unmatured obligation owed to a third person. Section 120 of the Negotiable Instruments Law provides for the discharge of an indorser "by any agreement binding on the holder to extend the time of payment or to postpone the holder's right to enforce the instrument." The holder later sues an accommodation indorser. *Held*, that he may recover. *Brosemer v. Brosemer*, 162 N. Y. Supp. 1067 (Sup. Ct., Oswego Cty.).

<sup>13</sup> This objection prevailed in *Proctor & Gamble Co. v. Cincinnati, etc. Ry. Co.*, 188 Fed. 221; but the court upheld the charge on the second ground indicated above.

<sup>14</sup> Quoted from the opinion of the Commission in *Proctor & Gamble Co. v. Cincinnati, etc. Ry. Co.*, 79 Int. Com. Rep. 556, 558.

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At common law a binding agreement between the holder and the maker of a note for an extension of time discharged the indorsers. *Siebeneck v. Anchor Savings Bank*, 111 Pa. St. 187, 2 Atl. 485. The basis of the rule was that the rights of the indorsers were prejudiced, in that they could not by payment of the note acquire the right to proceed immediately against the maker. For they were subrogated to the rights of, and so subject to the same defenses as, the holder. But this reason does not apply when the agreement is between the holder and a third party; hence the indorsers were not discharged. *Wright v. Independence Nat. Bank*, 96 Va. 728, 32 S. E. 459. See 2 DANIELS, NEGOTIABLE INSTRUMENTS, 5 ed., § 1324. Probably, the provision of the Negotiable Instruments Law was intended to enact the common-law rule; for there seems to be no more reason for the discharge of the indorsers where the agreement is with a third party than where there is merely delay by the holder in bringing an action against the maker. Where there is reasonable basis for doubt, a statute, whose language purports to change the common law, should be strictly construed; and especially is this true where the statute is part of a uniform law, in general declaratory of the common law. 2 LEWIS' SUTHERLAND STATUTORY CONSTRUCTION, 2 ed., 860 *et seq.* But here the words of the statute seem too plain to be construed as enacting the common-law rule. The principal case seems to limit the express words of the statute.

CARRIERS — BILLS OF LADING — LIABILITY OF CONSIGNOR FOR FREIGHT. — A railroad carried fruit consigned to a purchaser who contracted with the vendor to pay freight. Title passed to the purchaser on shipment. The railroad issued its bill of lading in the usual form providing for delivery to consignee, he paying freight. The carrier delivered the goods, through error collecting from the consignee only part of the freight due. It sought further payment from the consignee; but it never sued him, although he was solvent. The railroad now sues the shipper for the balance due. *Held*, that it may not recover. *Yazov & M. V. R. Co. v. Zemurray*, 238 Fed. 789 (C. C. A., 5th Circ.).

In general, the consignor, under a contract of shipment, is liable for the freight, irrespective of an attempt by the carrier to collect from the consignee. *Shepard v. De Barnales*, 13 East 565; *Wooster v. Tarr*, 90 Mass. 270; *Grant v. Wood*, 21 N. J. L. 292; *Gilson v. Madden*, 1 Lans. (N. Y.) 172; *Collins v. Union Transportation Co.*, 10 Watts (Pa.) 384; *Spencer v. White*, 23 N. C. 236; ABBOTT, SHIPPING, 683. Most of these cases proceed on the ground that the consignor is the true owner and so ultimately liable. See *Grant v. Wood*, *supra*; *Spencer v. White*, *supra*; *Barker v. Havens*, 17 Johns. (N. Y.) 234, 237. But *cf. Wooster v. Tarr*, *supra*. Normally the owner is ultimately liable. But he is not necessarily so. Ultimate liability must depend on the agreement between the consignor and consignee. Whether the carrier may hold the consignor for freight should depend upon the agreement between the consignor and the carrier. This often involves the question whether the usual clause in the bill of lading, "consignee paying freight," is intended to benefit the consignor or not. See *Spencer v. White*, *supra*, 238. The intent must be gathered from all the circumstances; and where the consignee is known to be ultimately liable, the construction should be like that in the principal case, that the utmost effort be made to collect from the consignee before the consignor can be held. See *Barker v. Havens*, *supra*. This result is commendable in that it casts the burden on the right party in the first instance without circuity of action, and secures protection to consignor and carrier alike. *Cf. Thomas v. Snyder*, 39 Pa. St. 317.

CHOSSES IN ACTION — GIFT — PAROL EXTINGUISHMENT OF A DEBT. — The deceased had advanced money to the defendant who executed and delivered to him a promissory note. Before his death deceased refused to accept payment and told defendant to keep the money for himself. The executrix now

seeks to enforce the claim. *Held*, that she may recover. *Sullivan v. Shea*, 162 Pac. 925 (Cal.)

In most jurisdictions a creditor may extinguish his claim, without consideration, only by a release under seal, or in the case of a specialty by the surrender or destruction of the instrument itself. *Weber v. Couch*, 134 Mass. 26. Even under the somewhat anomalous New York rule a written, though gratuitous, receipt for payment is the only other alternative. *Gray v. Barton*, 55 N. Y. 68. Accordingly, the court in the principal case held that there had been no extinguishment. A declaration of trust of a *chose* in action in favor of a stranger is, however, binding, though oral and without consideration. *Ex parte Pye*, 18 Ves. Jr. 140. No reason suggests itself why the trust may not as readily be declared in favor of the obligor of the *chose*. The claim would then be virtually extinguished since the *cestui-obligor* would be protected in order to prevent circuitry of action. But in the principal case the deceased's intention was to extinguish an obligation; not to create a trust. Formerly courts were inclined to treat an imperfect gift of a chattel as a perfect declaration of trust. *Morgan v. Malleson*, L. R. 10 Eq. 475. To do so imposes a duty upon the donor which he never intended to assume. Modern decisions have abandoned the doctrine. *Richards v. Delbridge*, L. R. 18 Eq. 11. However in the case of land an imperfect conveyance will be supported whenever possible as a bargain and sale, or covenant to stand seised. *Roe v. Tranmer*, 2 Wils. 75. For by virtue of the Statute of Uses the final result is precisely the one intended. A case like the principal case, where there is a gift of a *chose* to an obligor, occupies an intermediary position. *Cf. Flower v. Marten*, 2 Myl. & C. 459. By distorting the intended extinguishment into a trust no additional burden would in fact be imposed upon the deceased's estate. Yet the result would differ from, however closely it might resemble, that which deceased had attempted to effect. It is submitted, therefore, that the somewhat anomalous rule of *Ex parte Pye* need not, and consequently should not, be extended to upset a long-settled doctrine of the common law; and that the principal case is sound.

CONFLICT OF LAWS — JURISDICTION OF COURTS: PERSONAL JURISDICTION — SERVICE: SERVICE BY PUBLICATION AS A DENIAL OF DUE PROCESS. — The defendant was domiciled in Texas, but had left the state, not intending to return. A judgment on a note was rendered in Texas against him after service by publication. He seeks to have the judgment reversed for want of due process of law. *Held*, that the judgment is reversed. *McDonald v. Mabee*, U. S. Sup. Ct., Oct. Term, 1916, No. 135.

A state cannot in general extend the effect of its process outside its borders so as to acquire jurisdiction. *Ralston's Appeal*, 93 Pa. St. 133. Thus, service by publication does not give jurisdiction for a personal judgment against a non-resident. *Penmoyer v. Neff*, 95 U. S. 714; *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6. But service by publication will give a state court jurisdiction of a person domiciled within the state. *Becquet v. MacCarthy*, 2 B. & Ad. 951; *Henderson v. Staniford*, 105 Mass. 504. Due process of law, however, requires not merely jurisdiction of the defendant but reasonable notice to him. *Rollef v. Holly*, 176 U. S. 398. Service by publication of a resident of a state who is not within the state has been considered sufficient. *Henderson v. Staniford*, *supra*; *Fernandez v. Casey*, 77 Tex. 452, 14 S. W. 149. And apparently in these cases it was not considered material whether or not the defendant intended to return to the state. But where there is no such intention to return, the chances are that publication will not actually notify the defendant. Consequently the rule of the principal case that such publication is not reasonable notice seems justifiable.

CORPORATIONS — CORPORATIONS *DE FACTO* — CHARTER AMENDMENT EFFECTED AFTER ATTEMPT AT UNAUTHORIZED CONSOLIDATION. — An insurance



company attempted to consolidate with a non-insurance company. Later the insurance company abandoned insurance by an amendment of its charter. The statute allows consolidation except between an insurance company and a company not engaged in insurance. ALABAMA CODE, § 3481. A stockholder of the sometime insurance company seeks to dissolve the consolidation. *Held*, that it be not dissolved. *Alabama Fidelity, etc. Co. v. Dubberly*, 73 So. 911 (Ala.).

A *de facto* corporation can be formed as well by the consolidation of two or more corporations as by original creation. See *George Lumber Co. v. Dougherty*, 214 Fed. 958; *Leavenworth v. Chicago, etc. Ry. Co.*, 134 U. S. 688. One of the requisites of a *de facto* consolidation is the legal possibility of a *de jure* one. *American Trust Co. v. Minnesota, etc. R. Co.*, 157 Ill. 641, 42 N. E. 153; *Kavanagh v. Omaha Life Ass'n*, 84 Fed. 295. But the fact that a company is prohibited from consolidating because it is an insurance company does not make its consolidation legally impossible. See *Continental Trust Co. v. Toledo, etc. R. Co.*, 82 Fed. 642, 650. Cf. *Blackburn v. State*, 3 Head (Tenn.) 690. Rather, the change of one of the consolidating corporations into an insurance company or, as was done in the principal case, the change of the insurance company into something else, was only a condition precedent to *de jure* consolidation, and does not prevent a *de facto* consolidation. Particularly is this true when the condition precedent was subsequently performed and the only defect was the inversion in time of the legal steps. Cf. *Toledo, etc. R. Co. v. Continental Trust Co.*, 95 Fed. 497, 506 ff. Therefore, if the other requisites for a *de facto* consolidation are present in the principal case, the court seems right in declaring that there is such a consolidation.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — DISREGARDING THE CORPORATE FICTION — GARNISHMENT OF DEBT OWED CORPORATION IN ACTION AGAINST STOCKHOLDER. — The defendant formed a corporation in which he took forty-eight of the fifty shares. He was sole manager of its business and used its income for his own household expenses, rendering no accounts whatever. In garnishment proceedings against the defendant, the plaintiff sought to attach a debt owed to the corporation, on the ground that the corporation was merely a cloak to cover the incorporator's transactions. *Held*, that the attachment will be allowed. *McIlhenny v. Lampton*, 45 Wash. L. Rep. 22.

Courts are not inclined to read into incorporation statutes any requirement of good faith on the part of incorporators. See *Attorney-General v. American Tobacco Co.*, 55 N. J. Eq. 352, 369, 36 Atl. 971, 978; *Windsor Co. v. Carnegie Co.*, 204 Pa. St. 459, 464, 54 Atl. 329, 331. Cf. *Brundred v. Rice*, 49 Oh. St. 640, 32 N. E. 169. See 20 HARV. L. REV. 222. Hence any fraudulent motive on the part of the defendant in forming the corporation would seem not to prevent its valid formation. Nor could the defendant's conveyance of property to the corporation be considered a fraudulent conveyance, for exchange of an incorporator's assets for shares of stock is a sale for a consideration. See *Foster & Sons v. Commissioners of Inland Revenue*, [1894] 1 Q. B. 516. It may be suggested that the "corporate fiction" should be disregarded. But a corporation and its shareholders are distinct legal entities. *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 34 S. W. 209; *Gallagher v. Germania Brewing Co.*, 53 Minn. 214, 54 N. W. 1115; *Salomon v. Salomon & Co.*, [1897] A. C. 22; *Hall's Safe Co. v. Herring-Hall Marvin Safe Co.*, 146 Fed. 37. See 20 HARV. L. REV. 223; *supra*, 83. The property of the corporation cannot normally be attached to recover a debt against a shareholder. *Williamson v. Smoot*, 7 Martin (La.) 31. There is, however, a growing tendency to disregard the "fiction" of corporate entity, whenever in the opinion of the court greater justice can be secured thereby. *U. S. v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247; *Bank v. Trebein*, 59

Oh. St. 316, 52 N. E. 834. See 3 COOK, CORPORATIONS, 7 ed., § 663. It is submitted that justice can be done in the principal case without doing violence to so fundamental a conception of the law of corporations. It would have been more logical to have attached the shares owned by the defendant debtor, and in that way to have secured control of the corporation and its assets, including the particular debt in question. Such a procedure would have had the added advantage of being fair to any possible creditors of the corporation, whose interests are entirely disregarded by the mode of procedure actually sanctioned. If the incorporator is thereby enabled to prefer the creditors of his corporation, as against his personal creditors, it is simply the logical working out of an incorporation law which enables the individual to secure the advantages of corporate organization.

CORPORATIONS—STOCKHOLDERS—INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS—EFFECT OF FAILURE TO PAY STATUTORY PERCENTUM OF SUBSCRIPTION.—The defendant subscribed for one hundred shares of the stock of a corporation without complying with the statutory provision that "10% upon the amount subscribed" should be paid to the directors. N. Y. CONSOL. LAWS, ch. 59, § 53. The defendant thereafter acted as a director of the corporation and received dividends for a period of years. The corporation became bankrupt; and the trustee seeks to recover the amount unpaid on defendant's stock. *Held*, that the trustee may recover. *Jeffery v. Selwyn*, 115 N. E. 275 (N. Y.).

The statute involved is a common one and has been often interpreted, but no trace of uniformity is discernible in the decisions. See 1 COOK, CORPORATIONS, 7 ed., §§ 172-175. The easy holding is that a failure to pay the required ten percentum renders the subscription void. *Van Schaick v. Mackin*, 129 App. Div. 335, 113 N. Y. Supp. 408. The result, however, is very unsatisfactory when the corporation is in the hands of a representative of the creditors. The opposite extreme is reached by the cases holding that the corporation may enforce the subscription even when the rights of creditors are in no way involved. *Pittsburg, etc. R. Co. v. Applegate*, 21 W. Va. 172. The objection to such interpretation is that little effect is thereby given to the statute. A middle ground may be supported. The purpose of the statute was obviously to benefit creditors by assuring them of tangible assets and *bona fide* stockholders. 1 MORAWETZ, CORPORATIONS, 2 ed., § 72. The desired pressure on the stockholder to pay and the corporation to require payment can be reached in the absence of creditor's claims by refusing to allow a recovery by either party against the other when the ten percentum has not been paid. There is no hardship because the parties are *in pari delictu*. This result has been reached in New York. *N. Y., etc. R. Co. v. Van Horn*, 57 N. Y. 473. When the corporation is in the hands of a representative of the creditors, however, to allow, as the principal case does allow, recovery by the representative furthers rather than defeats the legislative purpose.

CORPORATIONS—STOCKHOLDERS—RIGHTS INCIDENT TO MEMBERSHIP—RIGHT TO HAVE A FAIR ELECTION OF OFFICERS.—The minority shareholders in a corporation succeeded in electing their candidate by voting through proxies. It had been an unbroken custom to cast votes personally. *Held*, that a new election must be ordered. *In re Real Estate Owners, etc. Ass'n*, 56 N. Y. L. J. 2004 (N. Y. Sup. Ct., Spec. Term).

There is no inherent right in a member of a corporation to cast his vote by proxy. *Commonwealth v. Brighthurst*, 103 Pa. 134. See *Phillips v. Wickham*, 1 Paige (N. Y.) 590, 598; 1 MORAWETZ, CORPORATIONS, 2 ed., § 486. However, this privilege may be conferred by the articles of incorporation or even the by-laws. *People v. Crossly*, 69 Ill. 195; *Market St. Ry. Co. v. Hellman*, 109 Cal.



571, 42 Pac. 225. See 2 COOK, CORPORATIONS, 7 ed., § 610. And in New York this right is granted by statute. N. Y. CONSOL. LAWS, 1901. Hence, if the court has power to invalidate the election in the principal case, it is not because of anything improper in the mere casting of the votes by proxy. But, if for any reason the shareholders have not had a fair opportunity to vote in a regularly conducted meeting, the election may be set aside. *In Re Argus Printing Co.*, 1 N. D. 434, 48 N. W. 347; *In Re Townsend*, 24 Misc. 80, 53 N. Y. Supp. 289. Similarly, where, as in the principal case, there is a fraud and surprise on the majority shareholders, another election may be ordered. *People v. Albany, etc. R. Co.*, 55 Barb. (N. Y.) 344. In the absence of statute, *quo warranto* is the proper proceeding to try title to a corporate office; and in the ordinary case equity will not interfere. See *People v. Albany, etc. R.*, *supra*; *Mozley v. Alston*, 16 L. J. Eq. (N. S.) 217. But, if the election is fraudulently conducted, equity will sometimes take jurisdiction to prevent irreparable injury. *Johnston v. Jones*, 23 N. J. Eq. 216. But see *Hart v. Harvey*, 32 Barb. (N. Y.) 55. However, the remedy in this type of cases is largely statutory. See 2 COOK, CORPORATIONS, 7 ed., § 619. The New York statute is fairly typical. It provides that the Supreme Court shall exercise general supervision over corporate elections and afford any relief the occasion demands. N. Y. CONSOL. LAWS, 1994.

EMINENT DOMAIN — WHEN PROPERTY IS TAKEN — DAMAGE TO LAND ON STREAMS TRIBUTARY TO STREAMS IMPROVED. — The government erected a lock and dam in the Cumberland River, which caused the plaintiff's land, which is situated on an unnavigable tributary of the Cumberland River, to be frequently overflowed. *Held*, that the plaintiff is entitled to compensation. *United States v. Cress*, U. S. Sup. Ct., Oct. Term, 1916, No. 84.

In another case, the facts were similar to those in *United States v. Cress*, except that instead of flooding the plaintiff's land, the water was backed up upon a mill dam, so that there was not enough fall to turn the mill wheel. *Held*, that the plaintiff is entitled to compensation. *United States v. Kelly*, U. S. Sup. Ct., Oct. Term, 1916, No. 718.

The federal government has power to control navigable streams so far as may be necessary in regulating commerce among the states and with foreign nations. CONSTITUTION, Art. I, § 8. See *Scott v. Lattig*, 227 U. S. 229, 243; *Gibson v. United States*, 166 U. S. 269, 272. But this power is limited by the Fifth Amendment which prohibits the taking of private property for public use without just compensation. See *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 336. For a taking there must be an appropriation of an interest in the land itself as contrasted with mere consequential damage such as an interference with access to a stream. *Gibson v. United States*, *supra*; *Scranton v. Wheeler*, 179 U. S. 141. See 14 HARV. L. REV. 451. If the land is permanently flooded, it is a taking of the fee simple. *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166; *United States v. Lynah*, 188 U. S. 445. See LEWIS, EMINENT DOMAIN, 3 ed., § 80. If the flooding is only occasional, a lesser interest analogous to an easement is taken. *McKenzie v. Mississippi, etc. Boom Co.*, 29 Minn. 288. It is also a taking when the improvements interfere with the use of a mill. *Gibson v. Fischer*, 68 Iowa, 29, 25 N. W. 914; *Barclay R. & Coal Co. v. Ingham*, 36 Pa. St. 194. It would seem that the rights of riparian owners along unnavigable tributaries are as great as the rights of owners of land along the stream improved.

EVIDENCE — DOCUMENTS — CARBON COPIES AS DUPLICATE ORIGINALS. — Plaintiff offered in evidence a carbon copy of a typewritten letter which he had sent to the defendant. No notice to produce the original had been given. *Held*, that the carbon copy is admissible. *Edmunds v. Atchison, etc. Ry. Co.*, 162 Pac. 1038 (Cal.).

It is well settled that a letter-press reproduction of a writing is not a duplicate original and cannot be offered in evidence without accounting for the original. *Foot v. Bentley*, 44 N. Y. 166. See 1 ELLIOTT, EVIDENCE, § 208. But reproductions made by a printing-press have been held to be duplicate originals; and each of such documents has been regarded as primary evidence of the contents of any other. *Rex v. Watson*, 2 Stark. 116, 129. Where the question has arisen, courts have generally taken the view that a carbon copy of an ordinary communication is a duplicate original and may be introduced without explaining the non-production of the other original. *Hubbard v. Russell*, 24 Barb. (N. Y.) 404; *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 112 N. W. 252; *Cole v. Elwood Power Co.*, 216 Pa. St. 283, 65 Atl. 678. *Contra*, *State v. Teasdale*, 120 Mo. App. 692, 97 S. W. 995. It is submitted that whether documents are duplicate originals or not should depend, not on the mechanism by which they are produced, but on the effect intended to be given to the different documents by the parties. See *Cleveland, etc. R. Co. v. Perkins*, 17 Mich. 296. Although a carbon copy is made simultaneously with the typewritten letter, there is but one original, — that which is mailed and is intended as the written communication between the parties. See *Andrews v. Wirral Rural Council*, [1916] 1 K. B. 863, 872. And it would seem that this is true even though the document sent has no particular legal significance in itself. See *contra*, 19 HARV. L. REV. 123.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — APPLICATION TO AUTOMATIC COUPLER ON SINGLE ELECTRIC CAR. — Section two of the Safety Appliance Act forbids any interstate common carrier to "permit to be . . . used on its line any car not equipped with couplers . . . which can be uncoupled without the necessity of men going between the ends of the cars." An interurban interstate electric railway operated single cars without automatic couplers of the kind required. The United States sues for the penalties provided. Held, that it may not recover the penalties. *International Ry. Co. v. United States*, 238 Fed. 317.

The purpose of the Act was to keep men from going between cars that were being coupled. Although penal in form, the Act has been held to be chiefly remedial; and, as such, it has been liberally construed so as to accomplish its purpose. See *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1, 17. Congress by amendment, and the courts by construction, have combined in requiring couplers wherever and only where danger might be incurred. See *Pennell v. Philadelphia & Reading Ry. Co.*, 231 U. S. 675, 679; *United States v. Chicago, etc. Ry. Co.*, 149 Fed. 486, 488. Thus, the word "car" in section two includes locomotives. 32 STAT. AT L. 943, § 1; *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1. But the courts have held that this does not usually include the front end of the locomotive. *Wabash R. Co. v. United States*, 172 Fed. 864. See *Campbell v. Spokane, etc. R. Co.*, 188 Fed. 516, 518. However, if the front end is used for shunting, it must be properly equipped. *Chicago, etc. Ry. Co. v. United States*, 196 Fed. 882. Likewise, "car" includes tenders. 32 STAT. AT L. 943, § 1; *Philadelphia & Reading Ry. Co. v. Winkler*, 4 Pennewill (Del.) 387, 56 Atl. 112. But the courts have held that the end of the tender coupled to the locomotive is not included. *Pennell v. Philadelphia & Reading Ry. Co.*, 231 U. S. 675. Safety does not require the coupling on cars which are run singly. Therefore, the decision in the principal case seems clearly right.

INTERSTATE COMMERCE — DEMURRAGE — UNIFORM DEMURRAGE CODE — PUBLIC AND PRIVATE TRACKS — DUE PROCESS. — The defendant, Swift & Co., occupied under a license from the plaintiff, the Hocking Valley Railway Co., a siding appurtenant to the Swift warehouse. The Uniform Demurrage Code provides for imposing a charge on all privately owned cars detained under lading longer than the forty-eight-hour free period, whether on private or car-



rier's tracks. Swift & Co. held their own cars under lading on this siding over forty-eight hours, and refused to pay the demurrage charge. This action was brought by the railway company to recover these charges. *Held*, that the plaintiff recover. *Swift & Co. v. Hocking Valley Ry. Co.*, U. S. Sup. Ct., Oct. Term, 1916, No. 376.

For a discussion of the case, see NOTES, p. 756.

LANDLORD AND TENANT — SURRENDER BY OPERATION OF LAW — WHETHER TENANT CAN RECOVER AN EXCESS OVER RENT RESERVED RECEIVED BY LANDLORD. — A clause in a lease provided that, if the premises should become vacant, the lessor was authorized to enter, re-rent the land, and apply the proceeds to the rent due from the lessee. The lessee vacated the premises and stopped paying rent. He offered to surrender to the lessor; but the latter would not accept. The lessor leased the premises for a greater amount than the original rent. The lessee seeks to recover the excess. *Held*, that he may not recover. *Whitcomb v. Brant*, N. J. Ct. Err. & App. (not yet reported).

A surrender of an estate puts an end to the tenant's liability on the lease, unless by an express contract the tenant has made himself liable. *Richardson v. Gordon*, 188 Mass. 279, 74 N. E. 344. See 1 TIFFANY, LANDLORD AND TENANT, 1179. Where the consent of both landlord and tenant cannot be implied there can be no surrender by operation of law. *Auer v. Penn*, 99 Pa. St. 370; *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639. But the court in the principal case conceives that the abandonment of the premises and failure to pay rent terminated the privity of estate, and that the lessee, being in default, cannot recover in quasi-contract. But privity of estate is not terminated merely by breach of covenant; in fact, the landlord has no power thereupon to evict a tenant unless a provision giving him such a right is inserted in the lease. *Vanatta v. Brewer*, 32 N. J. Eq. 268; *De Lancey v. Ganong*, 9 N. Y. 9. In the principal case the landlord expressly refused to exercise such a right. It must appear, therefore, that the lessee is still owner of the leasehold estate, and that the lessor, having collected the proceeds under an authorization by the lessee, is bound to account to him for them. 2 TIFFANY, LANDLORD AND TENANT, 1341.

LEGACIES AND DEVISES — PAYMENT — INTEREST BY WAY OF MAINTENANCE. — A widow bequeathed her leasehold residence to her daughter, contingent, however, upon the daughter's marrying or reaching twenty-one. At the death of the testatrix the daughter was an infant. She had not been receiving support from her mother. The question arises to whom the rents and profits of the residence belong until the daughter attains twenty-one or marries. *Held*, that the residuary legatees are entitled as against the daughter. *In re Eyre*, 142 L. T. 280.

A general legacy, contingent or vested, payable at a future date carries interest, not from the death of the testator but only from the time it is payable. *Heath v. Perry*, 3 Atk. 101. On the other hand, a specific legacy, if vested, carries interest from the death of the testator, even though the enjoyment of the principal is expressly postponed. See 2 ROPER, LEGACIES, 4 ed., 1250. A contingent specific legacy, however, does not bear interest until the happening of the contingency. See 2 WILLIAMS, EXECUTORS, 10 ed., 1170. An exception to this rule as to contingent specific legacies and general legacies arises on bequests from a parent to an infant child, in which cases the courts usually allow the child interest in the interim by way of maintenance. The basis of this exception is commonly said to be a rule of presumed intention of the testator — the court "will not presume the father . . . so unnatural as to leave a child destitute" meanwhile. *Inclendon v. Northcote*, 3 Atk. 430, 438. In accordance with this view of presumed intention no gift of income will be implied where

there is a separate provision for maintenance. *Wynch v. Wynch*, 1 Cox Ch. 433. In some cases, however, the exception has the earmarks of a flat rule of policy regardless of expressed intention, a policy in favor of the child being supported. Thus, when the testator directed the interest to be accumulated until the legatee reached twenty-one, one court, nevertheless, implied a gift of income for maintenance. *Mole v. Mole*, 1 Dick. Rep. 310. But whatever the scope of the exception, the principal case seems clearly not to fall within it; for the fact that the child had not been dependent upon the mother for support precludes the necessity or probable intention of a gift of the intermediate income.

**LIMITATION OF ACTIONS — ACCRUAL OF ACTION — CONSTRUCTION OF STOCKHOLDERS' LIABILITY STATUTE.** — A Minnesota statute provides that on petition by the receiver of an insolvent corporation the court may levy assessments upon stockholders if the corporate assets are shown to be insufficient to discharge the corporate indebtedness. GEN. STAT. 1913, § 6645 *et seq.* In 1907 a corporation was declared insolvent and a receiver appointed. In 1915 the receiver petitioned for a hearing and obtained an assessment. Later the same year he sues a stockholder upon the assessment, and is met with a defence of the six year Statute of Limitations. *Held*, the action is barred by the Statute of Limitations. *Shearer v. Christy*, 161 N. W. 498 (Minn.).

The general principle seems clear that the Statute of Limitations does not begin to run upon a claim until suit may be brought to enforce it. *Staninger v. Tabor*, 103 Ill. App. 330; *In re Hanlin's Estate*, 133 Wis. 140, 113 N. W. 411. Where some condition beyond the control of the plaintiff must first be satisfied, the statute does not run until such condition is fulfilled. *Harriman v. Wilkins*, 20 Me. 93. See 1 WOOD, LIMITATIONS, 4 ed., § 122 a. But where the preliminary act or condition precedent to direct prosecution of the claim is within the plaintiff's control, the statute begins to run as soon as such act may reasonably be accomplished. *Shelburne v. Robinson*, 8 Ill. 597; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877; *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051. *Contra*, *Hildebrand v. Kinney*, 172 Ind. 447, 87 N. E. 832. In the principal case the court proceeds upon the basis that the right of action against the stockholder arises as soon as the receiver is appointed. Other courts, however, in construing this Minnesota statute have held that the right of action does not arise until the insufficiency of corporate assets is adjudicated and the assessment is levied by the court. *Bernheimer v. Converse*, 206 U. S. 516; *Hale v. Cushman*, 96 Me. 148, 51 Atl. 874. Similar provisions in other states have likewise been interpreted as giving rise to a right of action only when the assessment is levied. *Goss v. Carter*, 156 Fed. 746; *Mister v. Thomas*, 122 Md. 445, 89 Atl. 844; *Shipman v. Treadwell*, 208 N. Y. 404, 102 N. E. 634. And statutes making stockholders of insolvent corporations liable on unpaid subscriptions have received a similar construction. *Hawkins v. Glenn*, 131 U. S. 319; *Gillin v. Sawyer*, 93 Me. 151, 44 Atl. 677. It would seem that neither of these views is desirable. On the one hand, the creditors should be protected; on the other, the stockholder should not have liability hanging over him indefinitely until the receiver may choose to get an assessment levied. It is the policy of the law to wind up insolvent estates speedily in the interest both of the creditor and of the stockholder. Under such a statute the receiver may bring proceedings against the stockholders as soon as the corporate assets have been so marshalled that the propriety of an assessment can be demonstrated to the court with fair certainty. Limitations should, therefore, begin to run as soon as this step might reasonably be accomplished.

**MANDAMUS — ACTS SUBJECT TO MANDAMUS — TEMPORARY POSSESSION OF PUBLIC OFFICE PENDING RESULT OF CONTEST.** — The defendant, governor



of Arizona, ran for reelection, opposed by the plaintiff. The secretary of state canvassed the returns and duly issued to the plaintiff a certificate of election. The defendant, disputing the result of the election, refused to surrender office at the expiration of his term, and instituted statutory contest proceedings. The plaintiff seeks a writ of *mandamus* to obtain possession of the office and property pertaining thereto, pending the result of the contest. *Held*, that the plaintiff is entitled to the writ. *Campbell v. Hunt*, 162 Pac. 882 (Ariz.).

A certificate of election duly executed by the proper authority affords a *prima facie* title to a public office. See *Kerr v. Trego*, 47 Pa. St. 292, 296. This may be disputed and the election contested in *quo warranto* or statutory proceedings. See *Frey v. Michie*, 68 Mich. 323, 327, 36 N. W. 184, 186. These being the proper actions, it is generally held that the title to office cannot be litigated in *mandamus*. *People ex rel. Wren v. Goetting*, 133 N. Y. 569, 30 N. E. 968. See 24 HARV. L. REV. 313. Cf. *Pipper v. Carpenter*, 122 Mich. 688, 81 N. W. 962. The claimant *prima facie* entitled may properly invoke this remedy, however, to compel a prior incumbent to surrender possession of the office and its appurtenances. *Couch v. State ex rel. Brown*, 169 Ind. 269, 82 N. E. 457; *State ex rel. Voss v. Quinn*, 86 Neb. 758, 126 N. W. 388. There will indeed be no relief while an appeal is pending from a judgment against the plaintiff in *quo warranto* or contest proceedings. *Swartz v. Large*, 47 Kan. 304, 27 Pac. 993; *Allen v. Robinson*, 17 Minn. 113. But if no such judgment has been rendered, the writ of *mandamus* is granted although other proceedings are pending. *People ex rel. Cummings v. Head*, 25 Ill. 325; *Crowell v. Lambert*, 10 Minn. 369. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., § 74. The writ does not affect the merits of the ultimate contest, but merely the right to immediate possession. *State ex rel. Jones v. Oates*, 86 Wis. 634, 57 N. W. 296. This result is sound, in view of the importance of possession of an office. For the plaintiff has no adequate remedy, if he must await the result of the more dilatory contest before securing possession. It is, moreover, strongly to the public interest that the candidate legally declared elected should take office at once. Otherwise, a prior incumbent could retain possession in violation of the wishes of the electorate merely by instituting a contest, the settlement of which might be indefinitely delayed. See MCCRARY, ELECTIONS, 4 ed., § 302.

MASTER AND SERVANT — EMPLOYER'S LIABILITY — ASSAULT BY FELLOW SERVANT. — The defendant retained in his employ a workman known to be vicious, lawless and quarrelsome. This workman murdered the plaintiff's intestate, while both were engaged in the common employment. U. S. COMP. STAT. 1916, §§ 8657-8665, make negligence the basis of an employer's liability. *Held*, that the plaintiff may not recover. *Roebuck v. Atchison, etc. Ry. Co.*, 162 Pac. 1153 (Kan.).

A master must exercise due care for the safety of his servants in providing a place in which, and appliances with which, to work. *McCombs v. Pittsburgh, etc. Ry. Co.*, 130 Pa. 182, 18 Atl. 613. The master must also, in employing servants, have regard to the safety of the fellow servants. Thus, he is under a duty not to employ, or retain in his employ, workmen whom he knows or should know to be so careless or incompetent in the performance of their duties as to subject their fellows to risk of injury. *Baltimore & Ohio R. Co. v. Henthorne*, 73 Fed. 634; *Laning v. New York, etc. R. Co.*, 49 N. Y. 521. But the courts generally hold that the employer has no duty to guard against injury caused by an act which is not done in pursuance of the servant's duty. See *Palos, etc. Co. v. Benson*, 145 Ala. 664, 39 So. 727. Thus the employer has been held not liable for an assault by one servant upon another, committed out of the scope of the offender's duty. *Palos, etc. Co. v. Benson*, 145 Ala. 664, 39 So. 727; *Campbell v. Northern Pacific R. Co.*, 51 Minn. 488, 53 N. W. 768; *Crelly v.*

*Telephone Co.*, 84 Kan. 19, 113 Pac. 386. Likewise recovery has been denied where the servant was injured in the course of rough play or "initiation" of fellow-employees. *Reeve v. Northern Pacific R. Co.*, 82 Wash. 268, 144 Pac. 93; *Medlin Milling Co. v. Boutwell*, 104 Tex. 87, 133 S. W. 1042. But in these cases the master had no reason to expect the harmful act to happen and no reason to expect the servant to be dangerous. In the former case, to hold the master would be to make him absolutely liable; to hold him in the latter case would be to restrict too narrowly the field of available servants. However, it is not putting too great a burden on an employer to subject him to a duty not to employ a servant known to be personally dangerous. *Missouri, etc. Ry. Co. v. Day*, 104 Tex. 237, 136 S. W. 435. See *McNicol's Case*, 215 Mass. 497, 500, 102 N. E. 697, 698.

**MORTGAGES — PRIORITIES — PRIORITY OF NOTES SECURED BY THE SAME MORTGAGE.** — The holder of four notes, maturing in successive years and secured by one mortgage, assigned the two notes first maturing to the plaintiff and later assigned the other two to the defendant. The plaintiff claims priority in the proceeds of the security. *Held*, that all the notes share *pro rata* in the proceeds. *Georgia Realty Co. v. Bank of Covington*, 91 S. E. 267 (Ga.).

The assignment of a note secured by a mortgage gives to the assignee the protection of the mortgage, although the mortgage itself is not assignable. *Romberg v. McCormick*, 194 Ill. 205, 210, 62 N. E. 537, 539. But where several notes, secured by the same mortgage, are assigned to different persons, the right of these holders *inter se* to the mortgage security has been much disputed. Some authorities give priority in order of time of the assignments. *Knight v. Ray*, 75 Ala. 383; *Gordon v. Fitzhugh*, 27 Gratt. (Va.) 835. A more common rule gives priority to the holders of the notes first maturing. *Flower v. Elwood*, 66 Ill. 438; *Horn v. Bennett*, 135 Ind. 158, 34 N. E. 321. But the weight of authority is in accord with the principal case, making the holders share *pro rata* in the security regardless of the maturity of their notes or the time of assignment. *Perry's Appeal*, 22 Pa. St. 43; *Studebaker v. McCurgur*, 20 Neb. 500, 30 N. W. 686; *Orleans Co. Nat. Bank v. Moore*, 112 N. Y. 543, 20 N. E. 357. Even under this latter rule, some cases hold that an assignor who retains some of the notes is deferred to his assignee. *Appeal of the Fourth Nat. Bank*, 123 Pa. St. 473, 16 Atl. 779. *Contra*, *Wilcox v. Allen*, 36 Mich. 160. But this holding, if justifiable, is due to the fact that the assignor holds the mortgage in trust for his assignee to the extent of the latter's interest. *Snyder v. Parmalee*, 80 Vt. 496, 68 Atl. 649. And the same principle might apply with the same result under the earlier assignment or earlier maturity rule. *Parkhurst v. Watertown Steam-Engine Co.*, 107 Ind. 594, 8 N. E. 635. The *pro rata* rule seems the most equitable, as the mortgage is intended to cover all the notes equally. This rule is also the most satisfactory in that it takes care of the cases which the earlier assignment and earlier maturity rules do not cover, *viz.*, where the assignments of the notes in one case and the maturity in the other come at the same time.

**MUNICIPAL CORPORATIONS — ESTOPPEL — PUBLIC RIGHTS IN PUBLIC LAND BARRED BY EQUITABLE ESTOPPEL OF THE CITY.** — A plat filed in 1882, operating as a statutory dedication of a street terminating on a lake, was accepted by the city; but the street was never opened for public use. In 1900 another plat of the same property was accepted from another party by the city officials. This plat indicated the street as ending short of the water's edge. The defendant, acting in good faith, erected coal docks on a part of the street indicated on the first plat but not on the second, and paid city taxes levied on his property. The city now asserts title to the land. *Held*, that the city is estopped. *City of Superior v. Northwestern Fuel Co.*, 161 N. W. 9 (Wis.).

While the usual statute of limitations operates against the private interests



of municipal corporations, it is generally held not to apply where public functions are involved. Accordingly city streets, being easements vested in the public, are not subject to the statute. *Simplot v. Chicago, etc. Ry. Co.*, 16 Fed. 350, 361; *Heddeston v. Hendricks*, 52 Ohio St. 460, 40 N. E. 408. Cf. *Boone Cty. v. Burlington, etc. R. Co.*, 139 U. S. 684; *Gregory v. Knight*, 50 Mich. 61, 14 N. W. 700. See 2 ELLIOTT, ROADS AND STREETS, 3 ed., § 1188; 17 HARV. L. REV. 273. Sometimes, however, the interest of the individual may be stronger than that of the public. Accordingly, many courts have adopted doctrines of equitable estoppel which, unlike the statute, can take into consideration the merits of the individual case, especially the element of good faith. See DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1194. Some courts have denied the city's claim upon the ground of long-continued non-user by the public and acquiescence in the adverse user. *Schooling v. City of Harrisburg*, 42 Ore. 494, 71 Pac. 605. But, though the public may in such cases theoretically know its rights, it does not in fact; and so its inaction is not a representation on which the adverse claimant should rely. Where, however, the public, through its officials, makes affirmative representations, the elements of estoppel may well be present. The difficulty, however, is that the adverse claimant theoretically knows, as one of the public, that the public has title. See 2 ELLIOTT, § 1189. But often he may have no actual notice. It would be sacrificing substance to form, if his technical notice should defeat his right to rely upon the city's positive representations. The argument that, as an indictable trespasser, he has not clean hands falls by the same reasoning. But his claim to equitable relief must be strong. He must have acted *bona fide*, and have made expensive, permanent improvements. The city must have made some particular representations such as taxation of the property, as in the principal case, so that it would be inequitable for it to assert its title. The test of this in each case, it is submitted, should be whether on all the facts, the city's acts reasonably justified an inference that his title was recognized. Then if the city's acts were within its general authority, the public is estopped. *People v. Wiebolt*, 233 Ill. 572, 84 N. E. 646; *Weber v. Iowa City*, 119 Ia. 633, 93 N. W. 637.

RESTRAINT OF TRADE — CONTRACT NOT TO ENGAGE IN A CERTAIN BUSINESS. — The plaintiff company contracted with five laundry companies in the city of Birmingham, one of which was the defendant, that the latter should announce to their customers that they were acting as collection and delivery agents for the plaintiff company and should collect and deliver soiled goods to the plaintiff and make return deliveries of the cleaned goods. The laundry companies promised in addition to collect only for the plaintiff company and not to go into the dry-cleaning business in the locality. The plaintiff company agreed to pay the laundry companies twenty-five percent of the returns on the dry-cleaning business which they brought in and not to go into the laundry business in the locality. There were other laundry concerns and other dry-cleaning companies operating in this particular commercial community. The defendant company failed to perform and suit was brought to enjoin them from breaking their contract, *Held*, that the injunction be denied. *American Laundry Co. v. E. & W. Dry Cleaning Co.*, 74 So. 58.

For a discussion of the principles involved, see NOTES, p. 752.

RULE AGAINST PERPETUITIES — VALIDITY OF ESTATES EXPECTANT UPON ESTATES TOO REMOTE. — A will bequeathed residuary personalty to trustees in trust to pay the interest to three persons for life with cross remainders, and "after the death of the three" to pay over and divide the whole among several other persons. It is provided in N. Y. CONSOL. LAWS, ch. 41, § 11, that an attempt to suspend the absolute ownership of personalty during more than two lives in being is void; and this renders invalid the trust during the

three lives. There is an application to determine the validity of the ultimate gift over. *Held*, that it is valid and accelerated. *In re McQueen's Will*, 163 N. Y. Supp. 287.

In the principal case the direction to pay "after the death" of the life tenant, literally construed, would make the gift over contingent upon the survival of the legatees. But this phrase has become a common one to introduce vested remainders. *Napper v. Sanders*, Hut. 118. See LEAKE, PROPERTY IN LAND, 2 ed., 245. In general where a gift is made by a direction to divide and pay at a future time, the gift is considered contingent. See *Fulton Trust Co. v. Phillips*, 218 N. Y. 573, 583, 113 N. E. 558, 560. But where, as in the principal case, the postponement is wholly for the benefit of the estate in order to let in intervening life estates, the deferring of payment does not prevent the vesting of the legacy. *Packham v. Gregory*, 4 Hare 396; *Evans v. Scott*, 1 H. L. Cas. 43, 57; *Fuller v. Winthrop*, 85 Mass. 51, 60. In the principal case there is no gift over, if the remainderman fails to survive the life tenant. Hence construing the bequest as contingent would result in a partial intestacy, obviously contrary to the purpose of a residuary clause. Thus at common law, the remainder in the principal case would be vested. And under the New York statutes, it is clear that the legatees have a vested interest. See 4 N. Y. CONSOL. LAWS 4164, 4935. England holds that, where there is a vested estate expectant upon a remote gift and this vested estate is a life estate, it is void. *Beard v. Westcott*, 5 B. & A. 801. See MARSDEN, RULE AGAINST PERPETUITIES, 288. The testator is to hold to intend that if part fails, all should fail. See *Monypenny v. Dering*, 2 De G., M. & G. 145, 182. The intimation in this country is that otherwise valid gifts of whatever dignity are good, unless to allow them to stand would really involve making a new will for the testator. See *Barrett v. Barrett*, 255 Ill. 332, 338, 99 N. E. 625, 627. It is submitted that the valid limitations should be entirely unaffected by the void. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 252 *et seq.*; 1 JARMAN, WILLS, 6 ed., 352; LEWIS, LAW OF PERPETUITY, 661; 29 HARV. L. REV. 341. It seems proper, therefore, to hold the ultimate remainder in the principal case good, especially since there is nothing in the will to show any intent of the testator to the contrary. And payment of the valid bequest should be accelerated since a vested remainder is, by definition, ready to take effect whenever and however the preceding estate terminates. *Cf. Greet v. Greet*, 5 Beav. 123; CHALLIS, REAL PROPERTY, 2 ed., 179.

STATUTES — STATUTORY PRINCIPLES IN THE COMMON LAW. — The steamship *Amerika* negligently ran into and sank a submarine of the English navy. The English government sues, among other things, for the pensions due the drowned seamen. Lord Campbell's Act and the English Workmen's Compensation Act have allowed actions for death in many cases but not specifically for the present situation. *Held*, that there can be no recovery for death unless the case falls within the express language of the statutes. *Admiralty Commissioners v. S. S. Amerika*, [1917] A. C. 38.

For a discussion of the principles involved, see NOTES, p. 742.

TRIAL — PROCEEDINGS IN CAMERA — RIGHT OF COURT MARTIAL TO HEAR CRIMINAL CASE IN CAMERA. — An Irish rebel was tried at a court martial. The trial was held in camera, because it was feared that admission of the public might result in disturbances or intimidation of the witnesses. Rule of Procedure 119 *c* provides that hearings must be held with open doors. A writ of *habeas corpus* is brought on the ground that the court had no jurisdiction to try the case. *Held*, that the writ be dismissed. *King v. Governor of Lewes Prison*, 61 Sol. J. 294.

It is the immemorial usage of the common law to try all prisoners in open court, to which spectators are admitted. 1 BISHOP, CRIM. PROC., § 957. And



it is no doubt owing to the prevalence of this usage and to the habits of thought resulting therefrom that there is such a dearth of judicial decisions upon the question of the principal case. But while the accused has the right to a public trial, the court has the power in proper cases to put a reasonable limit to the number of persons that may be admitted to the courtroom and to exclude those whose presence and conduct tend to interfere with the due and orderly progress of the trial. *People v. Swafford*, 65 Cal. 223, 3 Pac. 809; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257. See COOLEY, CONSTITUTIONAL LIMITATIONS, 6 ed., 379. And the right of a court to try a case with closed doors has been recognized in a limited class of cases; dealing with lunacy, wards of the court, and secret processes. *Ogle v. Brandling*, 2 Russ. & M. 688; *Mellor v. Thompson*, 31 Ch. D. 55. But this power has been strictly limited to cases where it would not be possible to administer justice in open court. See *Scott v. Scott*, [1913] A. C. 417, 445; 27 HARV. L. REV. 88. In the United States the constitutional provision for a speedy and public trial has been very strictly enforced. *People v. Murray*, 89 Mich. 276, 50 N. W. 995; *People v. Hartman*, 103 Cal. 242, 37 Pac. 153. The principal case seems to fall clearly within the exception as laid down in *Scott v. Scott*, since a public hearing would have endangered the administration of justice, and the English rules of courts martial expressly provide that trials may be held with closed doors. MANUAL FOR COURTS MARTIAL FOR 1917, § 92.

WILLS — CONSTRUCTION — GIFT TO A CLASS ON A CONTINGENCY: CONTINGENCY NOT IMPORTED INTO DETERMINATION OF THE CLASS. — A will bequeathed a fund to the testator's daughter for life, with the provision that upon her death "leaving issue her surviving" her share should be divided between "the issue" of the said daughter on their severally attaining their respective ages of twenty-one. There was a gift over if the daughter died without leaving issue surviving her. The daughter died, predeceased by children who had attained twenty-one, and survived by others who also attained twenty-one. The question was whether the representatives of the deceased children took. *Held*, that they did. *In re Walker, Dunkerly v. Hewerdine*, [1917] 1 Ch. 38.

As a general rule of the construction of wills, if there is a gift to a class on a contingency, the time of the happening of the contingency is not imported into the determination of the class. *Hickling v. Fair*, [1899] A. C. 15. See THEOBALD, WILLS, 7 ed., 593; 2 JARMAN, WILLS, 6 ed., 1390. So, if a gift is made to children who reach twenty-one on the contingency that the parent die leaving issue her surviving, and the contingency occurs, all of the children who reach twenty-one at any time will take, and not those only who survived. *Boulton v. Beard*, 3 D. M. & G. 608. The suggestion has been made that the rule is inapplicable where there was a gift over on failure of the contingency. See THEOBALD, WILLS, 7 ed., 593. Thus, where in the above case it is further provided that, if the parent die leaving no issue surviving, there will be a gift over, and the parent dies leaving issue, only those children who survive would take. See *Wilson v. Mount*, 19 Beav. 292. No reason appears for such a limitation on the rule: the gift over merely provides against a possible intestacy. So the principal case seems right in holding that here, too, all the children who fall within the primary meaning of the words describing the class shall take, and not only those who survive. *In re Orlebar's Settlement Trusts*, L. R. 20 Eq. 711. The principal interest in the case lies in the good illustration which it affords of the ease with which the fixed English rules of general application solve difficult questions of construction in wills in which the testator expressed no intention with regard to the precise event which actually happened. For a full treatment of this matter, see 30 HARV. L. REV. 372.

**WILLS — EXECUTION — ATTESTING WITNESSES: ESTABLISHMENT OF LOST WILL WHERE ATTESTING WITNESSES UNKNOWN.** — In an action to establish a lost will, adequate evidence was given of the contents and that the will was duly attested, but there was no evidence as to the names of the attesting witnesses. *Held*, that probate be granted. *In re Estate of Phibbs*, 33 T. L. R. 214.

A lost will may be established upon satisfactory proof of its due execution, of its destruction or loss, and of its contents. *Podmore v. Whalton*, 3 Sw. & Tr. 449. See *In re Hedgepeth's Will*, 150 N. C. 245, 250, 63 S. E. 1025, 1027. Proof of execution is a necessary preliminary to further proceedings. *Voorhees v. Voorhees*, 39 N. Y. 463. In the case of a lost will, just as when the document is actually produced, to prove execution the attesting witnesses must be called if accessible. See *In the Matter of Page*, 118 Ill. 576, 8 N. E. 852. If they are dead or beyond the jurisdiction of the court, other evidence may be used to prove execution. *Bailey v. Stiles*, 2 N. J. Eq. 220. See *Harris v. Tisereau*, 52 Ga. 153, 163. But when the witnesses are unknown it has been said that probate must fail, since it is impossible to call them or to show their inability to testify and thus to lay the foundation for the admission of other evidence. *Collyer v. Collyer*, 4 Dem. Surr. (N. Y.) 53, 60. On the contrary, however, it would seem that this fact in itself should be sufficient explanation of absence to warrant use of other evidence, since the circumstances permit nothing more. The court indeed might be led to greater strictness in determining the sufficiency of evidence. But relief should not be refused, if, as in the principal case, the other evidence of due execution is satisfactory. See *Dan v. Brown*, 4 Cow. (N. Y.) 483. Cf. *Jackson v. Vail*, 7 Wend. (N. Y.) 125.

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## BOOK REVIEWS

**THE LAW OF INTERSTATE COMMERCE AND ITS FEDERAL REGULATION.** By Frederick N. Judson. Third Edition. Chicago: T. H. Flood and Company. 1916. pp. xxix, 1066.

The application of the Commerce Clause divides with the issues raised by the limitation imposed upon state legislation by the Fourteenth Amendment the present energies of constitutional law. Judicial, as well as legislative, law-making in rich abundance calls for a revision of the conventional assumptions as to the scope of federal regulation in the field of interstate commerce. Great areas of industrial activities, hitherto left either unregulated or made the prey of conflicting state regulations, have felt the impact of the national power. The Adamson Law and the Child Labor Law and the Bone Dry Law raise legal questions of intense excitement because they touch so widely and so intimately the processes of our national life. But the courts as well as Congress have caused ferment. In the Shreveport decision (*Houston & Texas Ry. v. United States*, 234 U. S. 342) the Supreme Court in fact merely applied old provisions of the Interstate Commerce Act to a new situation. In effect, however, the court, by the Shreveport doctrine, has given the strongest impulse to the movement to make the federal government supreme in the whole domain of railroad rate regulation, affecting both intrastate or interstate shipments. (See e. g. the recent report of the Interstate Commerce Commission in *Memphis v. C. R. I. & P. Ry. Co.*, 43 Int. Com. Rep. 121.) Similarly, in working out the relation of foreign corporations to interstate commerce, and the resulting limitation upon state regulation of such corporations, we are getting a new body of judicial law, reversing in result and sometimes in terms earlier notions of constitutional law. (See e. g. *Western Union Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *Harrison v. St.*



*Louis & San Francisco Co.*, 232 U. S. 318.) To endeavor to integrate this field of law, to correlate the constitutional problems implicit in the legislation from the Ash Pan Act to the Webb-Kenyon Act, presents one of the most fascinating opportunities for a legal writer, no less than one of the most pressing needs towards a coherent development of the law. We are in danger of the anarchy of isolated decisions. To be sure, it is particularly true in the field of constitutional law, as we have been told by the most philosophic mind on the bench, that "lines are pricked out by the gradual approach and contact of decisions on the opposing sides" (219 U. S. 104, 112). But it is precisely the function of law writers to trace these lines, to indicate their direction, to seek to influence their course.

To quarrel with an author for not doing what he has not attempted to do is like preferring champagne to roast beef. Besides, a third edition is its own justification; as much so as is the size of the circulation of the *Saturday Evening Post* — but no more so. Not being, usually at least, a work of art one may ask of a law book — to what end? Mr. Judson is right. In the four years that have elapsed since his second edition much water has run under the interstate commerce mill. But Mr. Judson now, as heretofore, has contented himself with being a faithful chronicler rather than a participant in the development of the law. One wonders, however, if Mr. Judson is not partly attempting the impossible and partly needlessly duplicating. To attempt to cover in one book, even of 1000 pages (with its useful reprints of recent federal legislation), vital constitutional questions and general problems of law, together with a detailed commentary on such case-breeding legislation as the Interstate Commerce Act and the Sherman Law, is bound to result in compromises preventing the book from being either a critical study of underlying problems or a faithful digest of all the decisions. Why attempt it? We should have from Mr. Judson analysis, not merely enumeration of cases, when dealing with such subjects as what is commerce, concurrent powers as to interstate commerce, exclusion of foreign corporations, etc., etc. These are questions on which a mind stored with Mr. Judson's experience ought to have much to say. Division of labor in the field of law writing is inevitable. The detailed treatment of decisions of the Interstate Commerce Commission should be left to writers who make that field their special subject, as Mr. Drinker has so admirably done. Similarly does the Trade Commission call for separate treatment, such as it has already received at the hands of several competent writers. It is impossible for Mr. Judson to keep the profession supplied with the latest decisions. That task is now done with oppressive competence by Shepard's Citations and all its voracious tribe. A man who now speaks, and who spoke as early as Mr. Judson did, so shrewdly on the recognition of a separate body of administrative law in dealing with the field that he touches ought to give himself to the profession more generously.

FELIX FRANKFURTER.

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TRUST LAWS AND UNFAIR COMPETITION. Report by the Federal Bureau of Corporations, Hon. Joseph E. Davies, Commissioner. Government Printing Office, 1915. pp. 812.

This is a book which every lawyer dealing with important business questions should possess. Prepared originally for the assistance of Congress during the debates which led to the establishment of the Federal Trade Commission, it furnishes — what nowhere else exists — a complete survey of the trust laws of every country in the world, and in so doing constitutes a real contribution to legal literature.

The discussion may be divided naturally into two principal divisions. The first deals with voluntary restraints of trade, where competition among the

members of the combination is suppressed by mutual consent. The second deals with involuntary restraints of trade — where strangers to the combination are coercively excluded from the field by unfair competition.<sup>1</sup> Both voluntary and involuntary restraints are discussed from the point of view of

- (1) The common law of English-speaking countries;
- (2) The federal anti-trust acts and their interpretation;
- (3) The state anti-trust acts and their interpretation;
- (4) The statutes and decisions of every important foreign country.

The discussion of voluntary restraints is valuable as a compilation of leading cases, illustrating principles which, on the whole, are well established and familiar. It is interesting also in its exposition of the laws of foreign countries, many of which, reversing the policy of the United States, encourage rather than forbid cartels and other voluntary combinations.

The discussion of unfair competition constitutes by far the most important portion of the book. It collects and classifies a vast amount of material which no textbook, encyclopedia or digest has ever classified before. The reader will be astonished at the wealth of precedents — sometimes decided under general principles of tort, sometimes under statutes against monopolizing or restraint of trade and sometimes under statutes like those of Germany forbidding trade conduct "against good morals" — all of which, properly considered, are cases of unfair competition.

This is a field in which the law is undergoing rapid development and the general principles are only beginning to be understood. The distance already traversed may be illustrated by the case of *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25. In that case the House of Lords held that the use of "fighting ships" by the members of a combination of steamship lines for the purpose of ruining a rival line was not actionable — the decision proceeding apparently upon the ground that competition justified any injury, however unconscionable and oppressive, so long as the means employed were not "unlawful *per se*." This test of illegality has long since been abandoned. New wrongs have taken their place among the ancient categories of tort, — such as the use of fighting brands, local price cutting, persistent selling below cost, intimidation of customers, systems of exclusive contracts, and other business methods which, however lawful under some circumstances, may become unlawful when used, not for normal business reasons, but for the purpose of destroying a competitor. Upon the facts of the *Mogul Steamship* case, almost any court would reach a contrary conclusion with regard to "fighting ships" today. *U. S. v. Hamburg American Line*, 216 Fed. 971. Competition alone no longer serves to justify a wilful injury. It must be fair competition or the justification fails.<sup>2</sup>

This difference in point of view marks the change within a generation from the purely individualistic conception of competition to a conception of competition as a necessary evil, justified only in so far as it possesses social utility — only in so far as its methods are calculated to promote initiative, to release the maximum of human energy and to make business survival dependent upon superior efficiency in public service.

The object of the report is chiefly to collect all the existing material on the

<sup>1</sup> Of course involuntary restraints of trade may be imposed by persons who are not engaged in trade at all or are not engaged in competition with those whose trade is restrained, — as in the case of boycotts by labor unions (*Loewe v. Lawlor*, 208 U. S. 274, 301), or conspiracies by agents of a foreign nation to prevent shipments of war munitions from this country to belligerents abroad (*U. S. v. Rintelen, Buchanan et al.*, U. S. Dist. Ct., S. D. N. Y., June 29, 1916). Such cases are unusual, however, and the report of the Bureau of Corporations does not discuss them at any length.

<sup>2</sup> Of course this statement refers only to the substance, and disregards procedural questions as to whether the burden of proving unfairness may not lie upon the plaintiff in some cases.



subject. It does not attempt to reach definitive solutions. The time is not yet ripe to do so. But the material is there, awaiting the gradual synthesis which will create out of it a consistent theory of competitive relations — a theory which will avoid “the ferocious extreme of competition” on the one hand, and its complete cessation on the other. Such a theory will mark a great step forward in the readjustment of our legal system to the needs of a complex industrial civilization.

THURLOW M. GORDON.

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SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF WILLS AND ADMINISTRATION. By Joseph Warren. Cambridge. Published by the Editor. 1917. pp. xi, 879.

An outstanding feature of Professor Warren's collection of cases is the fact that the larger part of the volume — to be precise, four hundred and eighty-eight out of the eight hundred and seventy-nine pages — is devoted to the subject of administration. This is an innovation upon the usual practice of case-book editors, who, following the line of least resistance, emphasize the less difficult topics of the form, execution and revocation of wills. Yet every lawyer recognizes that the law of executors and administrators is not less important than the other portion of testamentary law. Professor Warren's book, because of its emphasis upon this comparatively neglected field, ought to receive special recognition by teachers and students.

While the evolution of our law of wills has been relatively neat and orderly, there is hardly a branch that has had less logic and method in its historical development than that of administration. The accidental and historical distinctions between law and equity, between real and personal property, and between the jurisdictions of state and church courts, have here left their mark deeply impressed. The resulting intricacy, which made the title “executors and administrators” a favorite one with the authors of mediaeval abridgments, has rendered it necessary that the subject be practically reconstructed in modern times. The editor has given full recognition to this fact by selecting for the most part modern material as a basis for the study of the subject. Thus, a long chapter is devoted to the very modern subject of inheritance taxes (pages 503-579), and the matters of survival of claims and the performance of the contracts of executors and administrators are surprisingly well treated by means of recent English and American cases, including even so recent a case as *Quirk v. Thomas*, [1916] 1 K. B. 516.

Valuable notes throughout the book supplement the text without affecting its usefulness as a case book for the use of students. A good example of such a note, referring not only to reported cases but to abundant statutory material, may be found at pages 283 to 285, where the editor refers to the American statutes giving to the pretermitted heir or the posthumous child a protection which was denied by the extreme liberty of testation authorized by the English law.

The excellent character of the typography and the generally agreeable form of the volume deserve special commendation. It is believed that an index might have rendered the book useful to the practitioner without detracting from its value for the purpose for which it was primarily intended.

ORRIN K. McMURRAY.

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TELEGRAPH AND TELEPHONE COMPANIES. Second Edition. By S. Walter Jones. Kansas City, Missouri: Vernon Law Book Company. 1916. pp. xxiv, 1065.

The publication of a new edition of this standard work, issued originally a decade ago, is timely in view of the extensive development of the law appli-

cable to these two utilities, and especially to the telephone, since it first appeared. A considerable number of new sections have been added, and the footnotes have been expanded to include all the important cases on the subjects treated. The author also discusses the general subject of electric law in order to make clear the relations of telegraph and telephone companies with the public and the utility commissions and with other utilities using the public highways for poles and wires.

The increase in the number of electrical power companies having central generating stations and providing for the distribution of current by means of lines constructed on public highways, extending long distances from the central stations, has given rise in recent years to numerous instances of electrical interference between high tension lines and lines of telegraph and telephone companies, which latter are operated by a comparatively weak current. Public utility commissions the country over are devoting much time to investigations of interference conditions for the purpose of formulating rules for the construction and maintenance of power lines which will permit their operation in the neighborhood of other utilities using the same highways with as little injury to the latter as possible. The cases in courts of last resort affecting this important matter are not numerous, but these are cited and discussed.

This book is admirably written, the citations being full and well arranged, and the index adequate. The reasoning and principles underlying the decisions are thoroughly analyzed.

The arrangement of the material is all that could be desired, provided one accepts the theory that a single legal treatise should cover the law applicable to both telegraph and telephone companies. That arrangement of the two subjects is customary, due perhaps to the fact that both utilities afford means of communication by wire, and each utility makes use of poles, wires, public rights of way, and the electric current. But there is a clear distinction in the character of the service rendered to the public by these utilities. The telephone company furnishes the necessary facilities to enable members of the public themselves to communicate with one another by the use of their own voices. The telegraph company, on the other hand, not only affords the mechanism of communication, but itself undertakes the duty of promptly and correctly transmitting a message, which the sender delivers to the company in writing, to a distant point where the message is transcribed by an employee of the telegraph company and delivered to the addressee. Obviously, since the rights of patrons and the duties owed to them by the two utilities are so essentially distinct in fact, legal questions arise in the operation of the one which are quite different from those involved in the business of the other. There are a large number of decisions covering the liability of telegraph companies for delay or error in the transmission of messages which can never arise in connection with the operation of the telephone. The telegraph business in America is handled by a very few corporations. There are many thousands of telephone companies serving over eleven million patrons. It would be a great convenience if attorneys for telephone companies were able to turn to a treatise devoted solely to telephones, unincumbered by a mass of discussion relating to another industry and relating to questions with which they have no occasion to deal. The same would also be true in regard to the law of telegraphs. The two subjects have been considered together in existing encyclopaedias, but they should be separated in future publications of that kind. At least one of the publishers of selected cases now indexes telegraphs and telephones separately.

This treatise stands alone in its field, and its usefulness to the profession has been generally recognized.

HAROLD L. BEYER.



HANDBOOK OF THE LAW OF TORTS. By H. Gerald Chapin. St. Paul: West Publishing Co. 1917 (Hornbook Series). pp. xiv, 695.

The professed purpose of the Hornbook Series is to provide elementary treatises on all the principal subjects of the law. The series now numbers thirty-four, and in a number of instances a Hornbook has reached its third edition. One of the earliest of these publications was the valuable work of Professor Jaggard on Torts (1895). No second edition of Jaggard has appeared; perhaps it has been found desirable, in the interests of symmetry in the series, that Torts should be dealt with in one volume instead of two, as was the case with Jaggard on Torts.

Professor Chapin has written a book which accomplishes excellently the objects of the Hornbook Series, namely, a brief statement of leading principles, a more extended commentary on those principles, and a citation of authorities. But this necessarily implies limitations upon the scope of the books; a full discussion of principles is not possible. However, a handbook cannot be expected to fulfill all purposes; it cannot be at the same time an elementary treatise and an exhaustive exposition. A handbook serves the practising lawyer by placing at his disposal a condensed statement of principles, supported by references to the more important decided cases. To the student it offers an opportunity for a review of the subject with the additional light thrown upon it by a statement of it in terms sometimes differing from those with which he has become familiar in the class-room. In so far as he has been permitted by the limitations of space imposed upon him, Professor Chapin offers useful discussions of principles and authorities.

In addition to this textbook, the author has edited a small case-book on Torts. The textbook contains references in special type to the authorities contained in the case-book, and as these references occur on almost every page of the textbook, the case-book should form a convenient companion volume to the Hornbook.

JENS I. WESTENGARD.

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THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland, K. C. Twelfth Edition. New York: Oxford University Press, American Branch. London: Humphrey Milford. 1916. pp. xxv, 454.

When any treatise on the Elements of Jurisprudence has passed into a twelfth edition, it is, by sheer force of that fact alone, entitled to the most profound respect. In such a case the disposition of the reviewer must be either frankly humble or frankly bold. If he be of humble turn, he will make perfunctory note that the author has here "aimed at producing a text which may be regarded as practically final"; and he will duly agree that, so far as it is within human power, Doctor Holland has accomplished his aim. After many years of vision and revision he has given us a treatise that is correct to a detail, profound and searching in its analysis, and elevated into line with the latest pertinent decisions and legislation.

Now, if he be of more adventurous disposition, he will yield to the temptation to regret that in this book practically no consideration is accorded to current studies in the science of law, particularly to recent French writings on Jurisprudence. He will be tempted to go further and register an objection to the sterile abstractions which seem to be the inevitable product of the Analytical School. According to the logical process of inclusion and exclusion, it may be accurate, but it is in no wise helpful, to define the state as "a numerous assemblage of human beings, generally occupying a certain territory, amongst whom the will of the majority, or of an ascertainable class of persons, is by the strength of such a majority, or class, made to prevail against any of their number who oppose it" (p. 46). On the other hand, according to these same

canons, it may be inaccurate to describe the state as an extensive fellowship of men, normally gathered together within a limited territory: wherein certain persons, to whom the rest defer, administer the affairs of government that all may have life, and that more abundantly. But such a paraphrase of the author's definition, for all its likely faults, is more human, more helpful, and more hopeful than its original.

Lastly, your adventurous reviewer will be led to advance the hope that some day another Maitland will come to write in English a book on the science of law that shall embody insight, imagination, and literary power. It is a far call back to Thomas Hobbes — our mountain-peak of all these qualities. But until the second advent of a Maitland, let us not fail to recognize the high merit of Doctor Holland's Book: it *is* a definitive work of its necessary and valuable type.

WHITNEY SHEPARDSON.

POSSESSORY LIENS IN ENGLISH LAW. By Lancelot Edey Hall. London: Sweet and Maxwell, Limited. pp. 88.

This is a statement of English authorities on possessory liens. It is compact, logically arranged, accurate, and usually adequate on elementary propositions.

An English writer is not perplexed and stimulated by conflicting decisions as is an American writer. If he finds that the English courts have decided a point, and such decision is within the bounds of reason, there does not seem to be any particular occasion for considering the matter further. The American writer is likely to find that the same point has been decided differently by two courts of last resort, and that both decisions are well within the bounds of reason. If he has an intellectual conscience he is thereupon driven to independent thinking. Dr. Hall gives meagre evidence of independent thinking. There is about his book the charm of a Blackstonian finality and complacency.

E. H. WARREN.

THE LAW APPLIED TO MOTOR VEHICLES. By Charles J. Babbitt. Second Edition by Arthur W. Blakemore. Washington: John Byrne and Company. 1917. pp. cxxvi, 1262.

BREACHES OF ANGLO-AMERICAN TREATIES: A STUDY IN HISTORY AND DIPLOMACY. By John Bigelow. New York: Sturgis and Walton Company. 1917. pp. ix, 248.

THE PSYCHOLOGY OF SPECIAL ABILITIES AND DISABILITIES. By Augusta F. Bronner. Boston: Little, Brown and Company. 1917. pp. 269.

CASES ON THE LAW OF PRIVATE CORPORATIONS, SELECTED AND SUPPLEMENTED WITH NOTES. By Daniel Frederick Burnett. Boston: Little, Brown and Company. 1917. pp. xxix, 828.

CASES AND OTHER AUTHORITIES ON LEGAL ETHICS. By George P. Costigan, Jr. American Casebook Series. St. Paul: West Publishing Company. 1917. pp. xxvii, 616.

STANDARDS OF AMERICAN LEGISLATION. An Estimate of Restrictive and Constructive Factors. By Ernst Freund. Chicago: The University of Chicago Press. pp. xx, 327.

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## THE NEW ENGLISH WAR CABINET AS A CONSTITUTIONAL EXPERIMENT

SOME few among the numerous readers of the HARVARD LAW REVIEW may have noted the creation in England on December 11, 1916, of a so-called War Cabinet consisting of only five persons, namely, Mr. Lloyd George (the Prime Minister), Mr. Bonar Law (the Chancellor of the Exchequer), Lord Curzon (the Lord President of the Council), Mr. Henderson and Lord Milner, who sit in the Cabinet but hold no definite office. My aim in this article is to show that this War Cabinet of five persons is a new and very interesting attempt to form a new kind of Cabinet government which, it is hoped, may turn out specially adapted to the conduct of the war, and thereby ensure the victory of Great Britain and her Allies. This experiment in constitutional government deserves the attention of persons still interested in the development of the English Constitution. They are, I fear, both in England and in the United States, not only a limited but a constantly decreasing class of students. To this small body I myself assuredly belong. It is impossible for me to conceal from your readers that I am both in age and in my mode of thought an old Mid-Victorian who still believes that the possession of a good constitution does somewhat contribute to, though it cannot ensure, the prosperity of a nation, and that changes in the old and at one time admired Constitution of England are worth being studied by the citizens of the American Commonwealth. Let me add that in this article it is my wish to write in the spirit of a constitutionalist and not of an English politician.

Whoever wishes to understand the constitutional experiment now



being carried out in England will do well to consider, first, the nature of Cabinet government as analysed by Bagehot in 1867; secondly, the peculiar characteristics of the present War Cabinet, and especially its difference from the old Cabinets on which is based Bagehot's account of Cabinet government; and, lastly, the possible effects of the new form of Cabinet government.

#### CABINET GOVERNMENT AS ANALYSED BY BAGEHOT<sup>1</sup>

The originality of Bagehot's book lies in one fact: he *therein* gives a picture of the English Constitution as it actually existed and worked — one may say lived — before his eyes some fifty years ago. He thereby discovered once and for all two conclusions which had escaped the attention of historians, such as Hallam, and are absolutely inconsistent with the constitutional doctrines of so high an authority as Blackstone. The one conclusion is that "the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers"; the second is that this fusion of the Government and the Legislature is achieved through the existence of the Cabinet. Let me therefore sum up the leading features of Bagehot's now universally accepted doctrine as to the nature, the appointment, the functions, the power of the English Cabinet and as to the beneficial effect of Cabinet government. But let my readers carefully bear in mind that Bagehot's masterly description of Cabinet government is based upon his subtle observation of Cabinets as they existed during the Mid-Victorian, we might almost say during the Palmerstonian, era, extending from say 1846 to 1866. The lessons to be learned from the events of these twenty years are supplemented in Bagehot's case by careful study of parliamentary history, at any rate from 1830. But for the full appreciation of Bagehot's genius and the right application of his teaching it must not be forgotten that in 1867, when his work was published, he naturally failed to note some constitutional changes which then were only just coming into view, and inevitably could not anticipate events, such for example as the immense development of the Party

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<sup>1</sup> See BAGEHOT, *THE ENGLISH CONSTITUTION*, ed. 1878, No. 1, *The Cabinet*, pp. 1-32; No. 5, *The House of Commons*, pp. 130-175; No. 6, *On Changes of Ministry*, pp. 176-218; No. 8, *Prerequisites of Cabinet Government*, pp. 254-271.

system, or one may say of the "Machine," which has taken place in England since his death.<sup>2</sup>

The Cabinet, according to Bagehot, consists of all the highest officials who hold office during the King's pleasure, and are technically appointed by and dismissible at the pleasure of the King. They are the heads of all the great departments of government, such as the Lord Chancellor, the Secretaries of State, *e. g.* for Foreign Affairs, the Chancellor of the Exchequer, and the like. It is true that occasionally a member of the Cabinet might hold no definite office. All the members of the Cabinet are Privy Counsellors. They all, according to Bagehot's description, are members of one or other House of Parliament. At the head of the Cabinet stands the Prime Minister.<sup>3</sup> As some Minister must always be responsible for acts done by the King, the exercise of the Royal Prerogative for practical purposes lies in the hands of the Cabinet. The Cabinet therefore is the true English Executive.<sup>4</sup>

This being granted, the matter of supreme importance is the mode in which the Cabinet is appointed. Technically the members of the Cabinet are each and all nominated, as they are also dismissible, by the King; they are the "King's servants." But in reality they are, as Bagehot insists, selected by the Prime Minister or, in other words, by the statesman authorised by the King to form a Cabinet. They are always selected from the leading members of either House of Parliament, and are of necessity persons of influence in one or other of the Houses, who can, with the Prime

<sup>2</sup> In 1872 his introduction to the second edition of his book clearly shows his perception that the changed circumstances of the time were rendering some parts of his work obsolete.

<sup>3</sup> In Bagehot's time the Prime Minister had, as such, no legally recognised title. He was really unknown to the Constitution. He was ordinarily the First Lord of the Treasury, an office which left him free to devote himself to his duties as Premier. But he might, as in the case of Pitt, as also of Gladstone, hold the office of Chancellor of the Exchequer, which would increase both his labours and his power.

<sup>4</sup> Bagehot, in parts of his book with which I am not here concerned, is careful to show the real and important influence of the Crown, though probably his language a little underrates the power of the King, and still more overlooks the increase in that power which may arise from changing circumstances, *e. g.* the increasing feeling throughout the British Empire of Imperial unity.

The Cabinets of fifty years ago generally consisted of about fourteen or fifteen persons. The number of Cabinet Ministers varied from time to time, but it gradually, though not continuously, increased. Thus in 1891 it had risen to seventeen; in 1895 to nineteen; in 1914 (at the beginning of the war) to twenty-two; in June, 1915 (the Coalition Government) to twenty-six.



Minister, "command the support of Parliament," to use popular expressions, though in fact what in general is really meant is the support of the House of Commons, or a majority thereof. To put the same thing in other words, the Prime Minister and the members of the Cabinet are the leaders of the party which forms the majority of the House of Commons. The next point to note is that the effect of true Cabinet government, wherever it exists, and now the avowed object of Cabinet government in England, is to establish that fusion of the Executive and the Legislature which is in Bagehot's eyes the extraordinary merit of the English Constitution, and that this end is attained by the selection of members of the Cabinet from among the parliamentary leaders of the party which commands the support of Parliament.<sup>5</sup>

Consider now the functions of the Cabinet. They may be described as the exercise of every kind of power which can belong to a strong Executive, and especially the right to propose and generally to carry any legislation deemed desirable, or at any rate necessary, by the Cabinet.<sup>6</sup> To one special power of our Executive Bagehot calls special attention:

"It is a committee which can dissolve the assembly which appointed it; it is a committee with a suspensive veto — a committee with a power of appeal."

The Cabinet therefore is, to use Bagehot's expressions, "a combining committee — a hyphen which joins, a buckle which fastens, the legislative part of the State to the Executive part of the State. In its origin it belongs to the one, in its functions it belongs to the other."

<sup>5</sup> Bagehot is aware of the importance of the difference between selection and election. Selection by the Prime Minister pretty well secures that he will and must choose as colleagues in the Cabinet the most eminent members of the Legislature who belong to the dominant party, of which he will be presumably the chief. Election to the Cabinet either by the two Houses of Parliament sitting together, or by the electorate of the United Kingdom, would probably in many cases have the result of placing in office not the candidate who had the greater number of ardent supporters, but the candidate who would on the whole excite the least opposition among the persons called upon to elect him. This at least is the conclusion a foreign critic is tempted to draw from the character of the Presidents of the Third French Republic who are elected by the two Houses of Parliament sitting together, and from the character of many of the American Presidents elected before the election of Lincoln.

<sup>6</sup> A private member can still introduce a Bill into Parliament, but his power of passing it through Parliament without the aid of the Government amounts, it is said, at the present day almost to nothing. Since the beginning of the war the authority given to legislation by means of Orders in Council places something very like unlimited legislative authority in the hands of the Cabinet.

But it is much more than this; it links together not only the Executive and the Legislature, but also in a great measure the Government, the Legislature, and the Electorate, or in popular language the people. In any case the

"English system therefore is not an absorption of the executive power by the legislative power, it is the fusion of the two. Either the Cabinet legislates and acts, or else it can dissolve. It is a creature, but it has the power of destroying its creator."

It is worth noting that the want of this power of dissolution produced singular and not always beneficial results on the working of Republican institutions in France. It can hardly be doubted, as Bagehot when quite a young man had the acuteness to discover, that in 1851 the French people desired the re-election of Louis Napoleon as President. The legislative assembly of that day could not be dissolved before the expiration of the term for which it was elected. A majority of the Assembly, if my memory does not deceive me, were willing to pass a law changing the Constitution which should make the President re-eligible, but this majority was not as large as the terms of the Constitution required. An appeal to the electors through a dissolution was impossible. It is at least, however, conceivable that such an appeal would have met the wish of the country, and by giving to Louis Napoleon a new term of office would have deprived him of the excuse, and possibly of the wish, for the *coup d'état* of the 2nd December, which in effect, though not immediately in form, changed a democratic Republic into a despotic Empire. Under the third Republic a dissolution is legally possible,<sup>7</sup> but it has never but once taken place, and the result of the precedent then set deprives it of authority. When Gambetta was Prime Minister and at the height of his popularity, the want of a right on his part to demand a dissolution prevented him from continuing at the head of the Government.

To Cabinet government, as it existed in England fifty years ago, Bagehot ascribes and, in the main with truth, some pre-eminent

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<sup>7</sup> A dissolution under the Third French Republic can take place only on the action of the President on the advice of the Senate. See Law of 25 Feb. 1875, s. 5.

"5. Le Président de la République peut, sur l'avis conforme du Sénat, dissoudre la Chambre des députés avant l'expiration légale de son mandat. — En ce cas, les collèges électoraux sont convoqués pour de nouvelles élections dans le délai de trois mois."



merits; he clearly holds it to be the best form of executive for any State which in reality enjoys a representative legislature. To him it is an instrument of government which works simply, easily, and effectively; the fusion which it creates between the Cabinet and the Legislature really increases the strength both of Parliament and of the Executive, and further, because legislation in England is so closely connected with the tenure of high office, keeps alive the interest of the people in the otherwise dull business of passing of Acts of Parliament. The Cabinet in his eyes again, by giving actual and exciting importance to parliamentary debate, is the educator of public opinion, whilst the Houses of Parliament, and especially the House of Commons, will be found to constitute the very best body conceivable for selecting the members of the Government; for every one of the men chosen by the Prime Minister to occupy a seat in the Cabinet must be a person well known to one of the two Houses, and probably to both; he must be a man of more than average talent, since, either by the gift of nature or by careful study, he has obtained the power of leadership among men, such as are Members of Parliament who have got to know both the strength and the weaknesses of their fellows. Cabinet government further, though it is a slow product of the complicated and exceptional history of England, and though it is favoured and strengthened by the traditional greatness and the living influence belonging to an English King, is a form of executive which in its essential characteristics can, if its nature be properly understood, be created in countries where no art of legislation can create a constitutional monarchy such as that which has grown up in England. Cabinet government, lastly, as Bagehot always implies, has the transcendent recommendation that it provides the most flexible form of executive which can be now found in any civilized State. Bagehot's belief in the excellence of Cabinet government is tempered by the soundness of his good sense and the acuteness of his insight with regard to all matters that came under his thoughtful observation. The very existence of the new constitutional experiment to which I am calling your readers' attention shows how justly Bagehot attributed flexibility to the English Cabinet. The Constitution of the Third French Republic, which has now stood the terrible test of time and has existed for more than forty years, proves decisively that a form of true Cabinet government may exist under Republican

institutions, and the annals of the five British Dominions show that the dignity and the prestige of the British monarchy are not essential to the maintenance of the power and the effectiveness of Cabinet government. So extraordinary is the genius of Bagehot that one hardly likes to dwell on the limitations within which his conclusions with regard to the English Constitution can now be accepted as altogether correct. Still they must be taken into account in order to make a fair comparison between the Cabinet government of 1867 and the new form of English Cabinet existing at least for the present in 1917. Bagehot seems to have given little study to the constitutions of foreign countries. He did not know what he certainly might have known, the singular and very successful attempt made in Switzerland to form an executive which, though appointed by the Houses of the Swiss Parliament, cannot be dismissed from office during the period (three years) for which the Council or Cabinet is elected. He had turned his mind towards the Presidential government of the United States. He perceived keenly some of its undeniable defects. But oddly enough the success with which Lincoln guided his countrymen through the perils of the Civil War hardly seems to have excited Bagehot's attention. He does not at any rate realise that at a crisis of a nation's history an elected but irremovable President may exercise a salutary power hardly to be obtained by a Prime Minister whose official existence depends at every moment on the will or the caprice of an elected legislature. It is somewhat singular too that Bagehot hardly notes the distinction, which has now become of great consequence, between the Cabinet which constitutes the real Executive and the large and constantly increasing body of Ministers who though not part of the Cabinet may hold offices of high importance and who lose, or may lose, office when the Cabinet ceases to command the support of Parliament.

In 1872 Bagehot, as appears from the second edition of his book,<sup>8</sup> foresaw that his account of the English Constitution was, owing to the advance of democracy, becoming more or less obsolete. He obviously could not by any possibility anticipate the decline in the authority of Benthamite liberalism which did not become easily noticeable till at least twenty years after his death, nor the extent

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<sup>8</sup> Which should always be supplemented by the perusal of Lowell's "Government of England," and especially of Part II which treats of the Party System.



to which the disbelief in *laissez faire* has stimulated the influence of Socialistic ideals. Still less could he foresee the immense effect which in one form or another is being already produced on the public opinion of the civilized world by the attempt to establish by force of arms the military despotism of Prussia throughout the civilized world. Still, whatever limitations must be placed upon our complete acceptance of Bagehot's constitutional doctrines, owing in the main to the effect of events which have taken place since his "English Constitution" was first published, he has drawn the truest picture anywhere to be found of English Cabinet government as it existed fifty years ago and as it was assumed, not with perfect truth, to work up to almost the end of last year. It is therefore with Cabinet government as described by Bagehot we had best compare the new English Executive of to-day.

#### THE WAR CABINET OF DECEMBER, 1916

This Cabinet is characterised by the following features:

(1) It consists of only five members. This Cabinet is smaller than any Cabinet known, I believe, to English history since Cabinet government came into existence.

The Cabinet is however a real Cabinet; it is understood to be the real executive which ultimately exercises the final decision as to any executive act, and of course is in a parliamentary sense responsible for the whole action of the executive.

(2) The Cabinet is itself a war committee charged specially with the conduct of the war, though one of its members, namely, the Chancellor of the Exchequer, who also undertakes to a great extent the leadership of the House of Commons, is not expected to attend the Cabinet meetings regularly.

(3) The smallness of the Cabinet is combined with the large number of other Ministers who have not seats in the Cabinet. These number at least twenty-eight.<sup>9</sup>

(4) The result is that the Cabinet, strictly speaking, and as contrasted with the Ministry, does not include most of the holders of the principal offices which have hitherto entitled a Minister to a

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<sup>9</sup> If we reckon as Ministers every man who would in the usual course of events cease to be one of the Ministry on the Cabinet going out of office, the other Ministers number sixty-five.

seat in the Cabinet. Thus the Lord Chancellor, the Home Secretary, the Foreign Secretary, the Secretary for War, and in fact most of the highest officials, have no seat in the Cabinet. In other words, leading statesmen holding the highest offices, and men of the highest reputation, such as the Lord Chancellor (Lord Finlay), the Foreign Secretary (Mr. Balfour), the Secretary for India (Mr. Chamberlain), and most of the other experienced statesmen making part of the Ministry, are not Cabinet Ministers.

(5) A good number of the Ministry are experts in different lines who have been called to office not because of their reputation in the House of Commons, but because of their known capacity in the discharge of different kinds of business, as to which it is specially desirable that the nation should profit by a man's special training and capacity. Such for example are the President of the Local Government Board (Lord Rhondda), the Shipping Controller (Sir Joseph Maclay), and Dr. H. A. L. Fisher. All, or nearly all, I am told, of the Ministers who have been invited and induced to join the Ministry on account of their special capacity and talent, though it may happen to be of a non-parliamentary character, if they are not already members of the House of Lords, have or will become members of the House of Commons. But what specially needs to be noted is that access to the present Ministry has been lavishly opened to men who have displayed talent, capacity and character, outside the sphere of parliamentary life.

#### COMPARISON BETWEEN THE NEW WAR CABINET AND THE CABINET AS DESCRIBED BY BAGEHOT

(1) The War Cabinet does not contain anything like all the most important officials of the Crown.

(2) The War Cabinet, small though it be in number, contains men who have not risen mainly by their parliamentary talents.

(3) The Ministers who do not belong to the Cabinet hold the greater number of the offices which used to give a title to a seat in the Cabinet. Among the members of the Ministry, though not of the Cabinet, are to be found men of high character and famed for their tried capacity in different lines of business, but who have been unknown to Parliament.

(4) The Cabinet of not more than five persons is ultimately



responsible for the government of the country. Ministers outside the Cabinet are really, however great their fame and influence, not responsible for the general government of the country.

The essential difference between the Cabinet of to-day and every Cabinet which has preceded it may be thus summed up:

The new Cabinet does not contain anything like the whole body of high government officials or of the men who at the present moment are the parliamentary leaders of the party which commands a majority in the House of Commons, whilst the Ministers who are part of the Ministry, but are not part of the Cabinet, hold among them most of the high offices which till almost the end of last year entitled their holders to a seat in the Cabinet.

#### WHAT ARE LIKELY TO BE THE RESULTS OF THE NEW FORM OF CABINET?

We must here distinguish between the immediate and the ultimate effects of the new form of government.

*As to the immediate effects.* The new War Cabinet has obviously been created for the carrying on of the war against Germany with the utmost vigour. It is possible, one may even hope that it is likely, that the hopes of the nation will in this respect not be disappointed. Concentration of responsibility upon a few men trusted by the country is calculated in itself to increase the energy of the Government. Many Englishmen believe that already they can perceive new energy and boldness on the part of the new Executive. The one thing which is certain is that even the nominal management of the war by a Cabinet of twenty-two persons is an impossibility. If any one doubts this, the first pages of the First Report of the Dardanelles<sup>10</sup> Commission are sufficient to banish such scepticism. The truth is that the War Cabinet is the admission of the fact, already widely suspected, that a large committee cannot direct the progress of a war, and that the nominal attempt to do so will inevitably throw the management, or mismanagement, into the hands of a much smaller body whose very names, except as members of the Cabinet, are unknown to the public.

The experiment of a small war Cabinet is in itself a very important

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<sup>10</sup> This Report came into my hands only yesterday. I have not yet read the whole of it. The article was in substance written before I received it.

fact. Wise and temperate men have recently been asking, Does not England for the conduct of a great war need a Dictator? The existence of the new Cabinet shows the method by which, without the passing of any Act of Parliament, or any revolutionary change, a virtual dictatorship may be created under the English Constitution.

*As to the future and possible effects.* It is certain that the existence of the War Cabinet — I had almost said that the circumstances of the time — demand a re-adjustment of our governmental machinery and also of many of our governmental conventions.<sup>11</sup> There is every reason to believe that the members of the Cabinet, and the very eminent men such as the Lord Chancellor, Mr. Balfour, Mr. Chamberlain, Sir Edward Carson, who stand outside the Cabinet, will loyally and cordially give full support and aid to the Cabinet. Yet certainly some understanding must gradually be formed as to the exact relation between the members of the Ministry and the members of the Cabinet. One is happy to perceive that the Prime Minister acknowledges this necessity, but that he thinks from experience that it can easily be met.<sup>12</sup> He is probably right. The mutual goodwill of Ministers whether within or without the Cabinet, and the common patriotism of all British statesmen are the best guarantee that the perplexities of a new form of government will not be allowed to frustrate the success longed for by the nation of a great constitutional experiment.

*A. V. Dicey.*

OXFORD, ENGLAND.

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<sup>11</sup> It is difficult to see how a Cabinet which also constitutes a war committee will be able to combine the secrecy of Cabinet meetings where no written note of its proceedings is taken, except by the Prime Minister, and that for the information of the King, with the use of a Secretary who, as I understand, has kept a record of what passed at the meetings of former war committees.

<sup>12</sup> See speech of the Prime Minister, Parliamentary Debates of 19th Dec., 1916, col. 1334.



## LOOKING FORWARD

LAWYERS have always held a higher place in their own esteem than in the regard of the general public. One recalls the mediaeval proverb: *Nullus causidicus nisi mendax*. The same feeling is not seldom exhibited in modern times, as in the will of an English admiral (if my memory is correct) made public some years ago, in which the testator took occasion to put on record the ill conceit which he had of the legal profession. It is not part of my present business to say if, and how far, this reproach is deserved. I prefer to consider a more agreeable theme, namely, the part which lawyers may play in promoting international harmony and in making the world a better place to live in. The subject is closely connected with the topic of legal education, *i. e.*, the best means of training our lawyers to realize the destiny which, if they are worthy of it, the future may hold in store for them.

Among the influences which tend to promote union or disunion between nations, language, religion, government and law all play their part. We may leave it to the political philosopher who like Machiavelli or Montesquieu occupies himself with the causes of the rise and fall of states to explain how these several forces act and react upon one another through the ages, here combining, there disintegrating, always restlessly at work. He would perhaps tell us that difference of law is closely parallel to difference of language. Just as we see communities speaking the same language, but owing allegiance to different sovereignties, or again one sovereignty exercised over communities speaking diverse tongues, so law sometimes transcends, sometimes stops short of, the limits of governmental authority. But language and law seem on the whole to exhibit opposite tendencies. If community of language has been in the modern, even more than in the ancient, world a powerful factor in developing a sense of common nationality, on the other hand difference of language is a strong motive of disintegration. But law exercises a more steady pressure towards union and away from disunion. Differences of law more readily than differences of language yield to the forces which make for unity.

Today we are feeling our way towards the larger unities which, passing beyond the limits of national life, will bring the nations into a harmony of sentiment and of interest heretofore unknown. What part can law and lawyers play in this wished-for consummation? The history of the legal systems of the world during the last century and a half may help us to an answer.

Let us carry our minds back to the time when Blackstone was writing his Commentaries and teaching Jurisprudence "to speak the language of the scholar and the gentleman." A glance at the legal map of Europe as it was then will afford an indication of the progress that has been made since that time towards unity of law. I am speaking of the pre-codification era, in which over a great part of Europe the law varied from province to province and almost from parish to parish. The kingdom of France was divided into the "countries of the written law" in which Roman Law was administered, diversely modified, however, by local customs, and the countries of the customary law, in most of which the Roman Law was appealed to *in subsidium*. In Germany and in Holland it had been "received" as a general common law, but local customs and the intrusive elements of feudal and canonical law produced endless complexity. Things were much the same in the other countries of the continent of Europe. The one harmonizing influence in so much diversity was the tradition of the Roman Law which gave to these multitudinous systems their vocabulary and very much of their substance. It made them at least intelligible to one another. The English law, meanwhile, like the strange islanders who followed it, was *penitus semota* — a thing apart; and it had conveyed its individual quality to such of the "distant plantations in America" as were occupied and peopled from the mother country.<sup>1</sup>

Napoleon's Civil Code promulgated in the year 1804 was not the first in date of modern codes, but it marked the beginning of a new era. The common legal tradition of the Latin races found in it expression in a form which with some modifications was easily adaptable to the needs of all of them. It was as if nations which had for centuries spoken dialects of an original tongue had arrived by consent at a common language. It would take too long to tell how the Code Napoléon set the standard of codification during the

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<sup>1</sup> 1 BL. COMM 106.



nineteenth century. Some codes followed it, others reacted from it, but all betrayed its influence. Today it is in force, fundamentally unaltered, in France and the French Colonies, in Belgium, and in the British Colonies of Mauritius and Seychelles. Codes more or less obviously derived from it have authority in Holland, Spain, Rumania, Egypt, Quebec, and Louisiana, as well as in Latin Central and Southern America.<sup>2</sup>

For the men of the beginning of the last century, who had grown up in an atmosphere of legal parochialism, infected with the misty exhalations of the dark ages, the promulgation of the Code Napoléon was as the rising of the sun. The diffusion of this Code over a great part of the world was the time of its meridian splendour. The end of the century saw its influence decline. The code for the German Empire marks a new departure, not merely on account of its conscious germanism, but, more important, as an attempt to base an ordered statement of the law of a country upon a reasoned foundation. The work of the commissioners who drafted the Code Napoléon was to codify the law of France. In doing so they had to supersede the multiplicity of existing systems by the simplicity of one harmonious whole. Their task was a task of selection. Here they followed the Roman Law, there they consecrated a custom, now, may be, the Custom of Paris, anon the Custom of Orléans. But they were still expositors, not censors, of the old laws. Out of many French laws they made a law for France which, in the event, proved fit to be the law of other nations as well. Their task was completed within four years. The German Code was on the anvil for twenty years.<sup>3</sup> The finished result of so much Teutonic labour has been pronounced superior to the French Code, whether the criterion be accuracy of expression, completeness of exposition, or the intellectual effort which went to its making. If it had been in all these qualities inferior to what it is, its influence would still have been profound from the mere fact of its existence. From the moment of its birth the supremacy of the French Code was challenged. The Civil Code of Japan came into effect in 1898. It is significant

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<sup>2</sup> Much interesting information with regard to the Code Civil and its influence during the nineteenth century is to be found in the *LIVRE DU CENTENAIRE*, Paris, Arthur Rousseau, 1904. The Code de Commerce, which took effect on Jan. 1, 1808, was an altogether inferior production.

<sup>3</sup> See "The Making of the German Civil Code" in 3 MAITLAND, *COLLECTED PAPERS*.

that it is very largely based upon the German Code,<sup>4</sup> while the earlier project of 1890, the work of a Frenchman, M. Boissonade, had been mainly based upon the French.<sup>5</sup> Henceforward, given intelligent compilers, each new national code will be better than the codes which have gone before. The latest example is the Civil Code of Switzerland, which took effect from 1st January, 1912. Others will follow. Codification has entered upon an era in which it endeavours to express not the laws of a country, but the best laws for a country. Once the two phrases might have been judged identical, but that is so no longer. More and more, as time goes on, the fundamental conditions of human life, for the ordering of which laws are framed, are becoming closely similar the world over. The world is narrowing. In moral standards, in social customs, in ideas, in dress, the nations are drawing together. More and more they are acting and reacting upon one another. It is obvious that law will not resist the general impulse.

Whether, then, we consider the course of legal history during the last century or estimate the social and economic forces of our time, we are conscious of law as of something which goes beyond the limits of nationality, as an influence tending to bring men into closer relation with one another. Now we must be blind indeed to what is going on about us if we do not see that it is upon such forces as these that the future of the world depends. Not nationalism alone will realize the Kingdom of God upon earth, or, what comes to the same thing, the rule of right and reason. The "super-man" has not proved a success, nor the "super-nation." What we are feeling after is "super-nationalism." This end we may promote by stimulating the forces which run athwart the strata of nationality. Foremost amongst these is Law, not the law of the parish or of the province, not even of the nation, but the law of our common humanity.

It may be objected that the idea of a "law of nations" is no new one; that it left its impress upon Roman Law: that it was a philosophical commonplace for some two thousand years; that it is no

<sup>4</sup> The German Code was promulgated Aug. 24, 1896, though it did not take effect until Jan. 1, 1900.

<sup>5</sup> The actual Code is by no means exclusively German in origin. Mr. Gorai in the *LIVRE DU CENTENAIRE* writes: "Bien que ce nouveau Code se soit inspiré, dans son plan général, du Code allemand, il se compose d'emprunts au Code français pour une moitié environ de ses dispositions."



longer in vogue. All this may be true. But what if the thing is with us, though the idea is not? We must dig up the old idea to meet the new state of facts. The modern *jus gentium* is not a speculative sophism. It is a vital energy. It may be consciously fostered and developed. In this field of activity, if in any, the lawyer who is not condemned by choice or circumstance to be a mere tradesman, may find his opportunity of social service. For the law school in particular there opens a new and wider horizon. It will be worth while to enquire what the law schools of this continent may do to promote the peace and well-being of the world, and what changes this may entail in the methods and range of their studies. The two questions are so intimately connected that I shall make no attempt to disentangle them. They are twin threads of a single skein. Besides this I shall have something to say on another closely allied topic — the codification of the Common Law.

We are all agreed, I suppose, that there is such a thing as legal science, and that it is the business of the law schools to teach it. I will add that the principal function of the law school is to teach law, not to teach men to be lawyers. This proposition, if admitted, involves some readjustment of methods of teaching. Perhaps we have been too apt to go for our law to the past, to regard legal study as matter of historical research. But if legal science is to play its part in reshaping the world, it must occupy itself with the future rather than with the past. It will no longer rest content to be a "chronicle of wasted time." Rather it must express "the prophetic soul of the wide world dreaming on things to come." A corresponding change must come over the law schools if they are to keep pace with the needs of the new age.

A French commentator on one of the modern codes remarks upon the surprising resemblance which these codes exhibit in some directions and the no less surprising divergence which they exhibit in others. The common element may be supposed to correspond very closely with those parts of the law which repose upon fundamental facts of human nature and human experience. With regard to this portion of the *corpus juris* the function of the law school will consist principally in finding the best form of expression for ascertained rules of law. The parts of the law which lie outside this solid nucleus are less securely grounded. They have not the same permanency. They are shaped and reshaped at the whim of the

legislature. In a word they have not emerged from the stage of experiment. Here the function of the law school will be to guide the experimenters, to direct their attention to the course of legislation in other lands. In matters of form they will fight against useless and arbitrary diversity in statutes, against the infirmity of the legislative mind which identifies change with improvement.

Thus far I have spoken of the future activities of the law school in what I will term the domestic forum. Success will attend its efforts only so far as it is able to enlist in its service the best juristic talent, and only so far as it is able to establish itself in the public confidence. To this end we must develop a state of sentiment in which the law schools will pronounce an authoritative word, if not in matters of substance (though that too may come), at least in matters of form. Our legislators must be taught to look to the law schools for guidance in all matters affecting the *technique* of legislation, as naturally as they turn to the medical profession in matters affecting the public health. The law schools, on the other hand, must take a wider view of their function and opportunity. Some of them will occupy themselves principally with research. All of them will supply courses of study designed as an introduction to various branches of public life. They will cease to be machines for turning out lawyers. They will become more than before schools of citizenship. Plato dreamed of a time when philosophers should be kings, and kings philosophers. May we not entertain a nearer vision of legislators who have been taught to legislate, and of law school graduates pledged to social service?

Let us then have in connection with our law schools bureaux of highly qualified investigators, whose business it will be to watch and direct the course of domestic legislation. This is already much, but it is only a beginning. By fostering personal relations, by exchanging ideas and perhaps students, with similar institutions in other lands, the law schools may become agents of international comity, promoters of international understanding, apostles of international peace; and all this within the field which is proper to them — the field of law. As to personal intercourse, I need not enlarge on methods which will occur to everyone. The way has been shown by interstate and inter-provincial meetings, and by such institutions as the International Law Association (not an association for the study of international law, but an international society of lawyers) which



for many years past has brought the lawyers of different countries together, and has done useful work in promoting uniformity in commercial law. The law schools, if they turned their attention to it, could further the same objects with more obvious and substantial results. We must have an International Association of Law Schools with a permanent staff. The central office will collect and disseminate information. Annual meetings will be held for the ventilation of matters of common interest. Another suggestion which I venture to make is that each law school of this continent should seek some special affiliation with one or more law faculties of the universities of Europe. An exchange of students and professors would follow. A close attachment of this sort might serve to concentrate effort and promote friendly rivalry between the associated groups.

That legal science would be advanced by the coördinated effort of the law schools of different nations will not be questioned. They have the world for their field, and they may do as much to shape the destinies of the world-law of the future as the Sabinians and the Proculians did for legal science under the early Roman Empire. I am speaking not of international law — *jus inter gentes* — which at the present moment is held in small esteem, but of that *jus gentium*, established, so the Romans taught, by natural reason amongst all peoples, which more and more extends its dominion over the commercial and the civil code. If indeed we have entered upon an era in which the contents of each system of positive law will be determined more by reason and less by tradition, will not reason in time eliminate what is unreasonable in each system, and will not community of ideas go some way towards reducing what is merely arbitrary and accidental in each system to a very considerable measure of uniformity? A universal code of commerce does not lie beyond the range of possibility. A universal civil code is perhaps not to be expected or desired, any more than a universal language. But all the indications point to a time when the legal systems of the world will come closer together in substance and even in form. To pursue the linguistic analogy — they will speak no longer a babel of voices, but various dialects of a common tongue.

I have hinted already that if the law schools of this continent are to rise to the measure of their opportunity they must to some extent change their methods. I trust that I may, without offence, revert

to this point, for it is a matter of great importance. The law schools of North America, with one or two exceptions, teach the Common Law. They teach it with marked success. But they teach nothing else. I wonder how many law school graduates have any knowledge of the Twelve Tables, or of the Praetor's Edict, or of Justinian's codification of the Roman Law. How many of them can explain the difference between *usufruct* and life estate, or between *fidei-commissum* and trust? Do they know what is meant by the "dotal system" or by "community of goods between spouses"? If they do not understand these things, in what are they fundamentally wiser or better than the students of Blackstone's day, immersed in the lore of fines and recoveries, trespass and case, contingent remainders and executory limitations? Has any one told them that the study of a single system of law, particularly of a system which is not very systematic, is an illiberal study? Do they know that to study law is not the same as to study the law of any one country? In England legal education has not reached any high point of development, but at least no young man can go through a law course at Oxford or Cambridge and carry away with him the impression that Law means the law of England, or that legal study means the study of the Common Law. On this continent the Common Law is too completely absorbed in self-contemplation, like a lady admiring her face in the glass. Let her beware lest she suffer the fate of Narcissus and "die of her own dear loveliness."

What has the Common Law done to hold its own in the world in competition with its rivals? We, who have been trained to it, boast of its perfection. We applaud its freedom from barren abstractions and niggling pedantries. But what have we done to make it intelligible or commendable to the foreigner? Has any law school on this continent undertaken a codification of the Common Law? The task would be worth attempting, if only for the sake of study and comparison. It is doubly worth attempting when the influence of the Common Law in the world — in South America for example — depends upon the manner of its presentation. If China comes to us for a code what have we to offer? She asks for bread, we give her a stone; — for a code, we produce a casebook.

In recommending codification to the earnest attention of common-lawyers I express no preference for a codified system as a system to live under. It may be that we are better off as we



are.<sup>6</sup> It may be that the time has not come for enacting the Common Law in the form of a Statute. But I am thinking not of enactment, but of influence. While the Common Law remains uncoded, it will have little weight in the world outside the countries (and the dependencies of the countries) in which it is at home. Another consideration to bear in mind is this. Code or no code, we cannot recommend our Common Law system to the lawyers of other nations, until we have learnt to present it to them in terms which they can understand; and to do that we must understand their law as well as our own.<sup>7</sup> This does not involve the mastery of a hundred different systems. It means a competent knowledge of Roman Law and of the institutions of customary origin which have combined with it to form the mixed systems of continental Europe and of Latin America. All these, diversely compounded out of the same materials, are fundamentally the same. To know one of them is to know the rest.

We are at the beginning of a new age. No one can forecast with any certainty what developments even some of us who are in middle life may live to see. There are those who think that the best hope for the world's future lies in the coöperation of the English-speaking nations to promote the ideals which they share in common. If this is our destiny, we must enlist all our forces in its service. Our law is one of the things we have in common. It is one of the best things we have. We have kept it to ourselves when we might have given it to the world. Is it too late to change our ways? Let the law schools answer. The future is in their hands.

*R. W. Lee.*

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<sup>6</sup> I am speaking, of course, of the Common Law States and Provinces of the United States and Canada. In my own Province of Quebec, as in Louisiana, the Civil Law is codified.

<sup>7</sup> See an address on the "Unification of Law" delivered before the Liverpool Board of Legal Studies by the late Lord Justice Kennedy, 10 J. SOC. OF COMPARATIVE LEGISLATION 218:

"Now, you will agree that in order to unify law we must try to understand and appreciate that law, different from our own, which is in force in those States, whose agreement to a common code we labour to secure. There is not much use in trying to persuade a man to prefer our system to his, or to modify his own, if he sees that we do not understand what the principles and rules of his system are."

While speaking of this matter, I gladly refer to the valuable *CONTINENTAL LEGAL HISTORY SERIES* published under the auspices of the Association of American Law Schools, which goes some way towards disseminating knowledge of legal systems other than the Common Law.

## COVERT LEGISLATION AND THE CONSTITUTION

THIS anniversary LAW REVIEW should perhaps be commemorative and marked rather by reminiscence than forecast. Yet even here the minor prophets have a place, and the following pages are an attempt to picture, rather than survey, a field of constitutional contest by no means unknown, but certain to produce in the future a crop of acrimonious litigation larger than it has yielded hitherto. Lawyers will increasingly deal with statutes whose constitutional support bears no sincere relation to the legislative and popular purposes sought to be attained. This is covert legislation.

Obviously the legislative will is more likely to be thus covertly embodied by Congress than by state legislatures, because in national law-making a definite constitutional peg must be found whereon to hang the statutes; states have the harder task of evading definite prohibition.

Appetite for broad general legislation grows, and the discovery of enough powers enumerated or implied to justify national and nation-wide regulation of industrial and social conditions becomes increasingly difficult. Why partisans of every shade vie in urging Congress "to do through the agency of the national government the things which the separate state governments formerly did adequately"<sup>1</sup> is interesting but immaterial; the fact remains and produces an indirection in statute-making sure to affect the constitutional theories of lawyers, because such indirection seems necessary to accomplish results apparently demanded by majorities of laymen. Further, the popular desire for *national* legislation minutely affecting interpersonal relations is fostered and supplemented by the urge of local leaders to get "from Washington" as much pecuniary support as possible.

It is common knowledge that we have a federal Constitution historically representing painful compromise with a popular wish to keep *all* power at home, *i. e.*, in the states; that home feeling,

<sup>1</sup> ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP, 367. That the states ever performed "adequately" sounds like a polite but hollow compliment; nor does the context show that Mr. Root intended more.



the provincial instinct, is decaying fast; and even where it is yet strongest (as in the South) insistence on local help through national legislation is stronger, and all men ultimately think most and best of the good provider. Today a majority of all citizens turn to the nation as the provider.

Our professional preparation for criticism of the legislation, which is the certain corollary of the foregoing axioms, is worth consideration, as is also some view of the existing legislative situation. Experience we have had, but past instances of congressional indirection have not often been of the sort to attract acute public discussion; they have not come very near daily life, or have been popularly viewed and excused as "war" measures.

Upon the postal monopoly has been hung one of the most curious and least noticed minor increments of national power. What is now quite well known as the "scheme to defraud" statute had its origin in the Act of June 8, 1872,<sup>2</sup> passed into Revised Statutes, Section 5480, and after sundry enlarging changes is now Section 215 of the Penal Code. It was primarily designed to punish "green goods men" for swindling their equally dishonest victims, by tricks always embracing a bringing of dupes from a distance and to a crowded city, there to be cheated. Such criminals always depended (for distribution of bait) directly on postal facilities as distinct from personal contact. Accordingly the first statute ran: "If any person having devised . . . any scheme to defraud . . . to be effected by . . . *opening correspondence*" with others, and used the mail for that purpose, he was guilty. Now, and for years back, the law is that "whoever having devised . . . any scheme . . . to defraud, *shall for the purpose of executing such scheme,*" use the mail is guilty of offending against the United States.

The judicial treatment of this growth is a not uninteresting study in minute legal history,<sup>3</sup> but the congressional advance is important. The nation has passed from trying to suppress a nuisance that depended on the mail for profitable existence, to punishing any and every procurement of money under false pretenses (and many other less definable frauds), if even inadvertently a postal card is mailed in the execution thereof. Those who have assisted in enforcing criminal law in centers of population, know well that the

<sup>2</sup> 17 STAT. AT L. 323.

<sup>3</sup> It may be traced in GOULD & TUCKER, NOTES ON THE REVISED STATUTES, § 5480.

use of the mail is but a peg whereon to hang prosecution; the real reason of the law is the wish to use a subpœna running over the whole country, and to overcome local parsimony which declines the expense of punishing the more elaborate methods of relieving gullible speculators of their property. One who cheats only those residing outside his own state is fairly safe from serious prosecution in that state; most citizens think the nation should pay the cost of such prosecutions. Congress has accepted the burden, hung it on the postal monopoly, and years of acquiescence have probably formed a national habit.<sup>4</sup>

Indeed the habit of construing most benevolently the grant of power to establish post roads is well established. When the charter of a continental railroad is supportable thereunder, its application in physical extent can go no further, and acceptance in this sense has a real influence over the minds of men — including lawyers. When the power of legislative exclusion from postal privileges extends not only to matters commonly thought *mala in se* but to *mala prohibita* by Congress,<sup>5</sup> what limit can be put to congressional prohibition?

Legislative (reflecting popular) feeling on the subject is well exemplified by the history of the first Cotton Futures Act.<sup>6</sup> The plain object of that legislation was to prevent the sale of cotton for future delivery under any form of contract other than the one in effect prescribed by Congress; and to accomplish such result, the original bill denounced as "prohibita" and denied transmission by post to all written evidences of, or correspondence relating to, "futures" when the government form was not used.

This did not become statutory. Congress finally chose the taxing power, rather than the postal monopoly, as the constitutional support for the regulation of a business almost invariably intra-

<sup>4</sup> In actual operation any fraud outside the common run of statutory larcenies, etc., may find its way into the federal courts, largely because the rules of trial for obtaining money under false pretenses do not apply. *Emanuel v. United States*, 196 Fed. 317, 322 (1912). *E. g.*, I have known two men who under pretense of finding capitalists who would finance inventions, took money from inventors, performed none of their promises, and never intended to. When looking for dupes in different towns in the same state, one of them forgot their mutual agreement to communicate only by telegraph, and wrote the other a letter which was duly received. This was enough to warrant a federal indictment, at the request of the county authorities.

<sup>5</sup> *In re Rapier*, 143 U. S. 110 (1891); *Rosen v. United States*, 161 U. S. 29 (1895).

<sup>6</sup> 38 STAT. AT L. 693.



state and not yet regarded as affected by a public use; but the suggestion then made, of regulation (as distinct from suppression) by exclusion from a beneficial governmental monopoly, is worthy of more thought<sup>7</sup> than has yet been given it.

The whole history of lotteries, and legislation concerning them, is instructive. As soon as a working majority of the people thought them wrong, the writings, without which they could not live, became *mala prohibita* and as such excluded from the mails for the same legal reason as obscene literature.<sup>8</sup> As soon as a like working majority comes to a similar conclusion as to tobacco, liquor,<sup>9</sup> patent medicines, corsets, or any other advertised article, no reason is seen why restriction by postal exclusion cannot claim the conclusive support of the lottery cases; but assuredly that result will not be reached without new and intensive litigation.

Since the circulation of the notes of state banks was suppressed by prohibitive taxation,<sup>10</sup> with the soothing judicial comment that the tax was not upon the obligation but on a particular use thereof (*i. e.*, the only profitable one), the covert capabilities of the taxing power have been sufficiently apparent. The only reason for not hanging more statutes on that constitutional peg has been absence of popular demand.

One of the smallest and most instructive of past congressional efforts in this direction is the Smoking Opium Act.<sup>11</sup> By this statute an enormous tax (\$10 per pound) was laid upon opium prepared for the pipe, while for the ostensible purpose of facilitating collection of undesired income, the manufacture of the product was surrounded with most of the incidents of license, bond, inspection and return, long used in respect of alcoholic spirits. No such license was ever taken out; no such tax was ever collected

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<sup>7</sup> The most accessible presentation of the case against the use of the postal monopoly as a weapon is Mr. James Coolidge Carter's argument in *Rapier's case* (143 U. S. 113). It is a pity that Bradley, J., did not live to answer it (p. 132). Mr. Carter's doctrine was utterly rejected; whether such rejection has left any logical limit to regulation by exclusion from the mails I venture to doubt.

<sup>8</sup> See *Horner v. United States*, 147 U. S. 449, for history of lottery legislation.

<sup>9</sup> Legislation of this sort against liquor advertising has often been proposed in Congress and is now there pending (and has become statutory since the text was written).

<sup>10</sup> *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533 (1869). This act, like the charters of transcontinental railways, was contemporaneously regarded by laymen as produced by the necessities of war.

<sup>11</sup> 26 STAT. AT L. 620, §§ 36-40.

nor wanted. The purpose was prevention, and under the penal sections of the law many Chinamen were convicted for preparing their own poison. Quite naturally the courts nibbled at the statute (after citizens had been convicted) by insisting on regarding it as a revenue act,<sup>12</sup> an almost jocular finding, which has not prevented fairly successful enforcement of its actual purpose.

The latest cognate statute, having for its real object suppression of habit-forming drug sales (the Harrison Act),<sup>13</sup> proceeds along newer and more delicate lines. The tax is nominal (\$1 for registration), but the penalties for selling without registration are severe, and one who registers and sells without a physician's prescription is guilty of crime against the United States, while such criminal will (in many of the states) also run counter to local laws of great stringency, with the national agents furnishing the evidence and the United States paying their salaries and expenses.<sup>14</sup> This last is a very modern development.

Oleomargarine in its earlier days encountered national treatment differing in degree only from that accorded smoking opium. *McCray v. United States*<sup>15</sup> was the result — a decision wherein the court used language inconsistent with any subsequent effort to go behind the declared purpose of any act when that avowed or ostensible purpose is constitutional taxation. Taxation in some form can nearly always be justified; rarely is a purpose to transfer money's worth from one person to another apparent on the face of the bill; then of course "it is none the less a robbery because it is done under the forms of law and is called taxation."<sup>16</sup>

From prohibitive taxation of a new, obnoxious, or unpopular thing to classification as a basis for graduated or selective taxation is a step that opens great possibilities of legislation and litigation. This method of covert regulation of business finds a most interesting illustration in the present Cotton Futures Act.<sup>17</sup>

<sup>12</sup> *Shelley v. United States*, 198 Fed. 88 (1912); *Seidler v. United States*, 228 Fed. 336 (1915).

<sup>13</sup> 38 STAT. AT L. 785.

<sup>14</sup> This statute has been considered in *Wilson v. United States*, 229 Fed. 344 (1916), which decision (and others similar) are undoubtedly overruled by *U. S. v. Jin Fuey Moy*, 241 U. S. 394, a ruling suggestive of the attacks to come upon legislation of the sort under consideration.

<sup>15</sup> 195 U. S. 27 (1903).

<sup>16</sup> *Loan Association v. Topeka*, 20 Wall. (U. S.) 655, 664 (1874).

<sup>17</sup> 39 STAT. AT L. 476.



This statute in effect divides all dealings in the staple made on an Exchange and for future delivery into two classes: those in which the government form of contract (created by the act itself) is used, and those in which it is not. On the privilege of dealing under the approved contract, no tax is laid; on that of dealing in any other way, an excise of crushing weight is imposed.

Classification for benefits or burdens, and taxation by selection, are familiar enough in legislation and decisions; but it seems a novel use of the process for Congress to make out of the whole cloth a new method of transacting an old business and then put all the old methods out of existence by a tax.

Most businesses and all recognized professions could be regulated along analogous lines, and the field thus simply and ingeniously opened for national control will surely be explored by legislators and lawyers far more thoroughly than in the past. Indeed this particular plan of campaign is (in the language of patents) "thought to be broadly new."

The restraint with which the commerce clause has been expounded for over a century is perhaps the most remarkable example of a certain continuity of thought in the Supreme Court persisting through generations of men and politics. No one has finally indicated its limits, perhaps because all felt that vision was as through a glass darkly. But in the past the questions presented for solution have for the most part called for definitions of commerce, or delimitation of its often shadowy boundaries. Cautiously worded statements have resulted, almost always capable of expansion without contradiction, when circumstances altered cases.

The very near future will call upon the profession to deal with increasing regulation of output or production, sheltered behind the proposition, unanswerable in itself, that what is produced in one state cannot get into another for gainful purposes without forming part of the interstate commerce of the nation.

The Pure Food Law<sup>18</sup> is in practice an excellent sample of what may be called habit-forming statutes. It prohibits, under penalties rising in severity with repetition of offenses, the carriage in interstate commerce of many things—some dangerous, some disgusting, more unsanitary, a smaller proportion mere advertisers'

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<sup>18</sup> 34 STAT. AT L. 768.

catchpennies, but all calculated to annoy the judicious when their innate untruthfulness is exposed.

In the constitutionality of this statute there has been a general acquiescence; except in the "blended whisky" matter<sup>19</sup> there has hardly been serious contest over its provisions. For most makers of food and drug products the effective implement of discipline has not been so much actual fine or imprisonment as the publication in journals or bulletins of wide circulation of the names and offenses of those successfully (and often unsuccessfully) proceeded against. This publicity lends quite a sharp edge to the statute by spoiling business. In practice this act regulates manufacture, for few producers are so local that an *agent provocateur* cannot get his order filled across the state line.<sup>20</sup>

The recently passed Grain Standards Act<sup>21</sup> seems to take another step forward. The main object of the Pure Food Law was to make men tell the truth about what they already had for sale, under penalty of forbidding interstate commerce in their falsehoods; but the Grain Act standardizes a method of telling the truth by creating a national inspection service, classifying and describing wheat, etc., and then forbidding the interstate transference of grain not so classified. And to this scheme for not only regulating commerce but regulating that which is to enter into commerce, is added the Warehouse Act,<sup>22</sup> which is probably intended to make it easier to store and deal in governmentally classified grain than in other and similar products of the soil not seeking national classification. The Child Labor Bill,<sup>23</sup> proceeding along analogous lines, renders penal the interstate transportation of anything toward the production of which (under certain circumstances) minors under sixteen have contributed labor.

The one thing common to all this regulation of behavior, pro-

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<sup>19</sup> GWINN, FOOD AND DRUGS ACT (Government Printing Office, 1914), 818 *et seq.*

<sup>20</sup> Of the practical working of the statute, *Brina v. United States*, 179 Fed. 373 (1910), and *Von Bremen v. United States*, 192 Fed. 904 (1912), are fair illustrations, the first of ease in reaching a small local dealer who commonly sold, and in the poorer quarters of New York City only, cottonseed oil as "Salad Oil," by implication olive oil. The second case shows the difficulty of similarly proceeding against a dealer who had behind him the ably represented producers of cottonseed oil. Yet upon the whole the regulatory object of this act has largely succeeded, apparently to popular satisfaction.

<sup>21</sup> 39 STAT. AT L. 482.

<sup>22</sup> 39 STAT. AT L. 486.

<sup>23</sup> 39 STAT. AT L. 675.



duction and business, is that the Congress, not being able directly to prohibit men from doing what they have hitherto done, nor directly compel them to do what the majority desires, has created by statute a new standard of conduct or method of business procedure, put upon it the seal of congressional approval, and by taxation, or exclusion from the post or interstate commerce, made life miserable for those who refuse to square their lives in accordance with the legislative preference.

The preparation of the bar, as represented by judicial decisions or other published studies, for criticism of what is already a fair list of covert statutes, seems to indicate welcome rather than hostility.

A tax, however onerous or unjust, if laid *secundum artem* must be sustained, unless it is

"plain to the judicial mind that the (taxing) power has been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests";

then it may be conceded

"that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred." <sup>24</sup>

Just when abuse of a conferred power becomes the exercise of unconferrred authority is indeed a puzzle, especially when the solution thereof seems to depend upon the discovery of some "principle of freedom and justice" itself protected by the Constitution and violated by the act, and when all courts must remember that annulment of statutes on "grounds merely of justice or reason or wisdom" constitutes the most far-reaching evil that could come to our system of government.<sup>25</sup>

The postal monopoly is apparently subject to no limitations save such as are imposed by malicious exercise of official power based on statutory authority, or by a statute's destructive or confiscatory effect on lawfully existing property rights.<sup>26</sup> But no instance can be cited of plain statutory exclusion in respect of writings or articles

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<sup>24</sup> *Per* White, J., 195 U. S., at p. 64.

<sup>25</sup> *Atkin v. Kansas*, 191 U. S. 207, 223 (1903).

<sup>26</sup> *Public Clearing House v. Coyne*, 194 U. S. 497 (1903).

allied with an unpopular business being held unconstitutional; and the difference between unpopularity and *malum prohibitum* is very easy to extinguish.

So far as the commerce clause is concerned, it is now beyond peradventure that Congress may keep "the channels of interstate commerce free from immoral and injurious use"<sup>27</sup> to the extent of severely penalizing an excursion from one state to another by a man and his mistress. The comparative demerits of *l'union libre* and impairing national stamina by child labor are not unlikely to be gravely discussed in our highest court; that we may discover whether the channels of freight are as well entitled to be freed from goods produced by youthful overexertion as is passenger traffic from human bodies immorally used.

While the postal monopoly, the taxing power, and the commerce clause by no means exhaust the list of constitutional supports for indirection and insincerity in law-making, they furnish enough food for thought.<sup>28</sup>

To the exercise of most law-making powers, classification is necessary, and inequality has often enough been held to be an inherent attribute of classification; the process, when it is mere selection of victims (as it often is), has long furnished the most debatable ground of litigation. Standardizing morals, behavior, and business, and penalizing non-conforming persons and things, is in essence classification; and no more definite test of valid classification has ever been given than that it must be reasonable and based on matters "which in the nature of things furnish a reasonable basis for separate laws and regulations."<sup>29</sup>

To be sure, "the simple decision of the legislature" has been refused recognition as such reasonable ground;<sup>30</sup> but the historic truth is stated in *Atchison, etc. Co. v. Matthews*,<sup>31</sup> by the admission that great diversity of opinion has existed on the subject, because

<sup>27</sup> *Caminetti v. United States* (U. S. S. C., Jan. 15, 1917).

<sup>28</sup> As a prop and cover for legislative activity the power of granting patents is worth some study, while tariffs could be adjusted with reference rather to manner of production than value of product. The Federal Farm Loan Act (39 STAT. AT L. 360) states that one of its presumably constitutional purposes is "to furnish a market for United States bonds." This is a thought capable of growth.

<sup>29</sup> *Gulf, etc. Co. v. Ellis*, 165 U. S. 150, 155 (1896).

<sup>30</sup> *Wisconsin, etc. R. Co. v. Jacobson*, 179 U. S. 287, 302 (1900).

<sup>31</sup> 174 U. S. 96, 105 (1898).



"to some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis for classification."

It is not likely that the problems presented by actualities in legislation, not to dwell on possibilities, will be advanced for decision as questions of classification. Every effort will be made to avoid that quagmire. But the moment the word "arbitrary" is injected into controversy (and it cannot be avoided) an inquiry is started soluble only by struggle with the same inherent difficulties that have attended contests over regulation of working conditions by many states.<sup>32</sup> The appeal to the courts against something complained of as arbitrary or unreasonable is usually based on the hope that some court will find it inexpedient — in the high sense of answering no necessity of the civilized requirements of the day.

As judicial comment now stands, if any step in the accomplishment of organized human design requires the employment of means *per se* subject to federal burdens or regulation, or constitutionally capable of federal encouragement or protection, the action of Congress in barring or aiding that step cannot be judicially set aside (no matter what ulterior purpose is plainly seen) without recourse to those rules of reason or expediency to which courts are more and more being driven. That method of decision makes every case one of fact, and yet under our system produces as precedents the opinions on those facts of a jury of judges, who in all good conscience are necessarily actuated or dominated by mental attitudes or predilections based on heredity, environment, and education, as all other juries are. This is truly a most unsatisfactory result from a juridical standpoint.

In practical operation these covert statutes are missionaries of centralization, and tend increasingly to destroy our inherited theories of local rule. A conscientious judge will of his own motion, and a careless one must on the defendant's motion, instruct juries that the federal crime of which they may find an accused guilty is not perpetrating a swindle, or selling decomposed matter for food, or poisoning the world with opium — but merely mailing or receiving a letter which of itself is harmless enough, or transporting

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<sup>32</sup> "Due Process of Law and the Eight-Hour Day," 21 HARV. L. REV. 495, is a careful study by Judge Learned Hand of some of these difficulties, which have certainly not grown smaller since that essay was written.

a can of lies across an artificial boundary line, or failing to pay a grotesque tax, as the case may be. Juries listen to the perfunctory charge on this head with open grins, but devote themselves conscientiously to considering exactly what Congress wanted them to decide, and rather enjoy the cleverness of the indirection.

This is a species of intellectual dishonesty anything but conducive to straight thinking and fair acting. How far the push for national management will take us along these tortuous paths is a serious question to which those lawyers who think of anything beyond their instant case would do well to give thought. Our present apparatus of statutes, decisions, and habits do not assist clear vision, nor make for a governmental system which legally and intellectually is straightforward and direct. If the result long ago sought by glorifying the "general welfare" preamble can be as nearly accomplished by indirection as now seems probable, and is certainly possible, it would be in the interest of common honesty that Congress at once receive full authority to reach the goal directly, and not as now by the back stairs.

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## NOVA METHODUS DISCENDAE DOCENDAEQUE JURISPRUDENTIAE

EVERY century or two, during the past millennium, a new method in the teaching of Law has appeared, to supplant or to modify the hitherto accepted system. The new method may not have been, in an absolute sense, an advance. Progress is always relative, — relative to the conditions and needs of the time. New conditions require changed methods. And so, in the ripeness of time, some new method has arisen, to supply an apter tool for newly felt needs.

### I

#### ON THE CONTINENT

About the time when Abelard was revolutionizing the methods of Theology at Paris, IRNERIUS was setting a new ensample for Law at Bologna, somewhere at the end of the 1100's.<sup>1</sup>

After two centuries, when the possibilities of his method had been exhausted, the next universally accepted method was that of BARTOLUS, whose fame gave currency, in the 1300's, to the maxim "*Nemo bonus jurista nisi Bartolista.*"<sup>2</sup>

After another two centuries the Humanist doctrine, led by ALCIAT, pointed the way again to a new method; the older one had outlived its usefulness. This time the congenial soil was France; and, under CUJAS and others, the "*mos Gallicus*" came to supplant the "*mos Italicus.*" To fulfill its destiny, another two centuries were required.

Meantime legal science was springing up in Germany; and the reception of Roman Law there, achieved in the 1500's, offered a fresh field for the struggle between the old and the new methods.

<sup>1</sup> There is an impressive modern fresco, idealizing this famous teacher and symbolizing his work, on the ceiling of the Palazzo del Podestà at Bologna. No portrait or sculpture of his features is extant.

<sup>2</sup> Tribute has been paid recently to some of his achievements by my distinguished classmate Beale's volume, *BARTOLUS ON THE CONFLICT OF LAWS*, transl. 1914; *TREATISE ON THE CONFLICT OF LAWS*, 1916, § 26; and the six hundredth anniversary of his birth was celebrated in 1914 by the universities of Italy.

But other influences in turn were rising, — the contrasted but complementary influences of Natural Law and of Nationalism; and in the 1600's and the 1700's they became dominant. Broader and at the same time more practical features of law were now conceived as composing legal science in general. New methods were needed.

In 1667, LEIBNITZ published his essay, "*Nova Methodus discendae docendaeque Jurisprudentiae*."<sup>3</sup> He was but twenty-one years old; the vast science of law was thus (in Hallam's phrase) "invaded by a boy."<sup>4</sup> He divided it into four parts or modes, — didactic, historic, exegetic, and polemic; and for each part he described the kinds of materials that should be used for study and the way of using them. Though his influence on educational method apparently did not extend beyond Germany, nevertheless he anticipated the great movements of the next two centuries, — national codification, for example, in the 1700's, and the historical school in the 1800's. His proposed "*Novum Corpus Juris*," or Justinian Rearranged, was first realized a century later in France, by Pothier. The polemic moots which he recommended are perhaps the precursors of von Ihering's practical exercises, introduced only in the last generation. His projected "*Theatrum Legale*" was an anticipation of the processes of Comparative Law which have come to pass only in the days of Maine, Kohler, and Dareste;<sup>5</sup> and, curiously enough, the Socratic method, as applied in the Harvard Law School under Ames and Keener, is foreshadowed in his preface.<sup>6</sup>

## II

### IN ENGLAND

In philosophic stimulus Leibnitz owed much to Bacon's "*Novum Organum*." Insular England had meanwhile been developing its own system of legal education, — the Inns of Court, with their

<sup>3</sup> 4 OPERA OMNIA, ed. Dutens (Geneva, 1768), 159. I desire to acknowledge the courtesy of the Librarian of Harvard University in lending me this volume.

<sup>4</sup> Moreover, the added marvel is (as Wolf tells us) that he composed it "in itinere, omni librorum apparatu destitutus."

<sup>5</sup> "Ex his alisque omnibus [gentium moribus] undecunque collectis, Deo dante, conficiemus aliquando *theatrum legale*, et in omnibus materiis omnium gentium, locorum, temporum placita παραλλήλως disponemus" (§ 29).

<sup>6</sup> "Judicium enim, etsi ante annos non veniat, potest tamen et in pueritia interrogando excitari; hoc enim voluit Platonis reminiscencia, exhibitumque specimen in



Moots. Here, as in everything, the British change was slower, and less radical when it came.

At a very early period the Inns of Court were, in effect, organizations clustering around the professors of the common law at London, maintaining its teaching and practice.<sup>7</sup> But, by the end of the 1500's they had lost this character, and up to the first half of the 1800's systematic legal education in England was stagnant. What was given at the universities does not seem to have had any value placed upon it. Lord Brougham once said,<sup>8</sup> "I won't say it's a humbug; but it's something very like it. When I was attending lectures on the civil law in Edinburgh, they were all in Latin. A set of Latin questions were proposed after the lecture to the students. Very difficult, indeed, some of them might be to answer, if a proper answer were required; but all we had to do was, if the question commenced with 'Nonne,' we said 'Etiam'; and if with 'An,' we replied, 'Non.'" The office of a practising lawyer was the only place in which the law could be learned, if at all. The eminent authority just mentioned thus sketched the process of legal apprenticeship in his day: "It is a most melancholy state of things. There is nothing like education for law students now. When I was in the chambers of Mr. (afterwards Chief-Justice) Tindal, we seldom or never saw our master; we were told, 'Copy whatever you can lay hold of,' and with that injunction we were left to ourselves."<sup>9</sup> Professor Dicey added his testimony concerning the state of affairs even in the '70's: "He is put to make bricks without straw, or rather without having even been taught how bricks are to be made. The oddity of the thing is that he, after all, gets in due time, mainly by the process of imitation, to make pretty tolerable bricks."<sup>10</sup>

Towards the middle of the 1800's an effort began to devise some-

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*Menone, ubi puerum Socrates a primis sensuque manifestis, nihil docens, interrogando tantum ad ea deducit quae vel subtilissimo cuique negotium facessant: incommensurabilitatem scilicet diagonii et lateris in quadrato."*

<sup>7</sup> FORTESCUE, *DE LAUDIBUS*, c. 48-9; 1 GNEIST, *ENGLISH CONSTITUTION*, 393; FOSS, *JUDGES OF ENGLAND*, II, 201, IV, 249; REPORT OF HOUSE OF COMMONS COMMITTEE ON LEGAL EDUCATION, 1846, 6; 1 BLACKSTONE, *COMMENTARIES*, 23.

<sup>8</sup> 12 LAW REVIEW, 114.

<sup>9</sup> "I myself read no treatises. . . . I learned law by reading the reports and attending the courts," said Chief Baron Pollock to his grandson, now Sir Frederick Pollock, *Bart.* (FIRST BOOK OF JURISPRUDENCE, 3 ed., 313.)

<sup>10</sup> 25 MACMILLAN'S MAG., 127, 209.

thing more helpful and better suited to the professional dignity of law. The matter was taken up by the Society for the Amendment of the Law and was vigorously discussed. A committee of inquiry of the House of Commons was appointed in 1846 to report on the state of legal education; and a commission, including Vice-Chancellor Wood and Sir John Coleridge, was appointed in 1855 to report on the Inns of Court. Both these bodies recommended the establishment of a University of Law, under the control of the Inns. But the outcome seems to have been not much more than a zealous increase of the number of lectures by the Readers of the Inns. The old system was revived, not materially altered. Apparently it was a case of "muddling through."

In 1871 (when Mr. Langdell's incumbency in the Harvard Law School had but just begun) Mr. Bryce and Mr. Dicey came to the United States and visited several law schools. The Columbia Law School received from them the most favorable comment;<sup>11</sup> at the head of it was then Theodore DWIGHT, a man of great personal magnetism and didactic skill. The idea of a University of Law was now again mooted by the Society for Legal Education, having at its head Lord Selborne, who carried through in 1873 the measure reforming the judiciary system. The principal material result seems to have been that the Readers of the Inns were replaced by Professors and Tutors, the number being increased. Among these were included, in 1873, such scholars as Amos, Broom, and Hunter, and, in 1886, Pollock, Bryce, and Harrison. But within the next fifteen or twenty years an extension of the number and scope of the subjects required for the law degree at the larger universities showed the wide workings of this spirit of improvement; and in 1883 appeared Mr. Dicey's plea for the teaching of English law at the universities.

Early in 1885 Mr. Finch visited the Harvard Law School; I remember that we students felt proud of the reason for his presence. On his return to Cambridge, England, his lectures then introduced what the Law Quarterly Review was willing to term "the method of Professor Langdell." In the fall of 1885 came Sir Frederick Pollock, and visited the Harvard Law School; and the impression produced on his mind by its method of instruction was an important influence (as he tells us in the preface to his "Treatise

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<sup>11</sup> See 25 MACMILLAN'S MAG., 127, 209.



on Torts,") not only in his teaching but in his writing also. Mr. Finch later published a "Selection of Cases on the English Law of Contract, Part I," and an inaugural address on "Legal Education, its Aim and Method."

The important features of this fourth stage of legal education in England were: (a) the radical change in the source of instruction, — for it now began to be given at universities by scholars holding university professorships, instead of in London by barristers under the auspices of the Inns of Court; (b) the adoption of the Langdell method by Mr. Finch.<sup>12</sup>

### III

#### IN AMERICA

Meantime, a century before, America had already made its first contribution to Anglo-American method, — the law school. At Litchfield in 1782 (the old schoolhouse is still standing; you can buy a picture-card of its dilapidated modesty) the example was set by REEVE, and then by GOULD. Harvard University now celebrates the hundredth anniversary of its own school, the oldest surviving one. There were other schools, which passed away, though notable in their day and region, — for example, those of NICHOLAS, PIRTLE, and ROBERTSON at Lexington, Kentucky (afterwards Transylvania University). But the didactic type was the same — set lecture and memorized treatise, or both, — though Smith's "Leading Cases" had long hinted at other possibilities.

Then came Christopher Columbus LANGDELL, with the insight of genius into the spirit and needs of Anglo-American legal sources.

### IV

#### THE LANGDELL METHOD AS A WORLD METHOD

It has always seemed to me that Langdell's method was an unconscious product of the scientific spirit of realism — that realism which was then just beginning to obtain the dominance now universal, — the scientific realism of Darwin, Comte, and Spencer, which has gradually spread into Art, Religion, and Industry. Of this aspect of his method, he himself may or may not have been

<sup>12</sup> The foregoing page or so has been lifted without quotation marks (but with slight revision) from an editorial note in the first volume (1887) of this REVIEW, 297. But to deflect the sleuth of plagiarists, let me confess that the anonymous author was myself. At the time I felt rather pleased with this editorial début.

conscious; but it was conceived in the spirit of looking at the ultimate facts as they are and of treating them inductively.

But I think that he must indeed have been conscious of the relation of his ideas to the modern movement of Science; for his formal exposition of principles, delivered at the Two Hundred and Fiftieth Anniversary Celebration, in 1886, begins with the mighty sentence: "LAW IS A SCIENCE!"

I was present, as a student, on that occasion; and often, in the ten years thereafter, when arrayed in the ranks of militant disciples of his method, I recalled that deliverance. To me it has the sonorous ring of a new gospel, the utterance of a prophet and a seer. In its rhetoric, as in its philosophic significance, it is, for us lawyers, what John's utterance ("not to speak it profanely") was to the theologians: "God is a Spirit, and they that worship him must worship him in spirit and in truth."

And it was a daring thing to say, in those days. His hearers believed in *him*; but I doubt if many of them believed in his utterance, or even grasped its full truth. The profession (let us acknowledge it) does not yet believe. For some years past, I have ventured to try the phrase "legal science" in this or that professional connection; and ever I find but a philistine reception for it. Outside of our profession, there is even less readiness to concede such a status to Law. Recently, before a Science Club, composed chiefly of professors in the natural sciences, I delivered, by request, an address on the topic, "Law as a Science, and its Methods Compared with those of Other Sciences." It was evident (at the outset, certainly) that any exponent of such a theme must yet expect to be on the defensive in claiming a genuine place for Law as a science.

Langdell's great truth, so boldly affirmed now thirty years ago, has another generation to run before it becomes a truism in Anglo-America.

His method, however, — the method founded on that truth, — has already been accorded universal acceptance. And if, beyond its native soil of America, it has received as yet only theoretical approval, in England and other countries of Anglo-American law, that is only because of temperamental obstacles to the free Socratic style of discussion which incidentally has gone with it,<sup>13</sup> and be-

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<sup>13</sup> Mr. Dicey pointed this out thirty years ago (2 L. QUART. REV. 88); and contemporary witnesses report little change today.



cause of the naturally slow spread of a truth beyond national borders in an applied science.

But its career is not to be bounded by the realms of Anglo-American law. In its emphasis on the inductive process in legal pedagogy, it has yet a solid service to perform in Continental law. Some of us are fond enough to believe that it will still play its part in all of Western Europe, — the countries now fettered in method by their codes and by other traditions. The exclusively dogmatic method has inherent shortcomings. There is both room and need, in their system of education, for inductive training. The Langdell system would supply that need. Therefore I believe that it will be adopted and adapted, in due course of destiny.

Signs have appeared there, for some time, of a readiness to appreciate this. In the history of Law, some have long ago begun to use it, in such works as Girard's "*Textes du droit romain*" and Lörsch and Schröder's "*Urkunden zur Geschichte des deutschen Privatrechts.*" They use it in practice manuals. And they are ripe to use it in the substantive law. What they now need is merely some demonstration of its possibilities in a class-room. Whether that will come about through the missionary work of some European students who have learned the method here, or through the example of some future American exchange professors, remains to be seen. But one may have faith that the need will be some day duly supplied, and that the Langdell method will complete the circuit of that world-influence which it merits.

This would be no more than the repetition of history. For all the great changes of method have spread only slowly from the country of origin to other countries. The "*mos Italicus*" took its time in reaching France; the "*mos Gallicus*" found acceptance only later in Germany and Holland; and Savigny's historical method had to wait before it commanded universal adherence in other countries.

## V

### HAS THE TIME ARRIVED FOR A NEWER METHOD?

In the country of its origin, time enough has not elapsed for the need of a new system to develop. The other great methods ran their race for two centuries or more. But has not time enough elapsed at least for the development of new applications of it?

We must remember two things, in this matter of time.

(1) One is that the Langdell method was belated. It came nearly a hundred years — perhaps more — behind its time. English law had long been based chiefly on judicial judgments. For nearly three centuries the reports of cases had been fairly ample. But since the very early 1800's (when Campbell began his *Nisi Prius* reporting) they had been copious. The method might have been aptly used at any time since (say) 1820, at least. Of course, there was reason enough for the delay. But, so far as concerns its aptness, a method which assumed that the main and ample sources of law for scientific study were printed reports of judgments would have been fully practicable at that date. The facts of law, in short, which the method fitted, were already facts a century ago.

(2) The second thing is that during that century legal conditions in America have ceased to be static. Of course, they are never absolutely static. But the movements of law are apt to be like those of a large river. It may flow on a broad level bed for many miles; the conditions of its movement are the same, in that stretch. But then the level of the country subsides abruptly; a defile is reached; and the smooth stream breaks into a swift torrent of tumultuous rocky rapids; until finally the volume of water demanding exit arrives at rest once more on the lower level in open country. Theoretically a river may descend peacefully (like the Amazon) through its entire length, from mountain to ocean. Practically, most rivers have these occasional sudden stretches of rapid change to the next level. So with Law. But, not to press the analogy too far, the period from 1800 to 1900, in American law, has been on the whole a period of gradual placid progress, through judicial logic and occasional legislative amendment. The present years, however, see us entering on a period of more or less radical change.

Moreover, social change in these days being more conscious than ever before, legal change is likely to be more rapid. The speed of evolution of humanity has increased enormously in ratio with the lapse of time. Paleontologists tell us, for example, that during the Third Interglacial and the Fourth Glacial periods of the world (represented by the Piltdown and the Neanderthal races of men) the time that elapsed was some 125,000 years; but that the entire human progress in the arts of life, made in that immense period, was represented only by improved methods of chipping the surface



of flints for the making of tools. The enormous increases, in the last twenty-five years, of modes of communication have resulted in almost corresponding growth in capacity for exchange, and therefore change, of social ideas. Hence, a change of conditions which might have required a century of time in the 1400's, or even the 1600's, would not now be an anomaly in a quarter of a century.

For these reasons it would not be anomalous to find that a method of legal education, invented half a century ago, and even then half a century belated, might now already be mature for readaptation to new conditions.

What is there, then, in the method which could be supposed not to fit present conditions? It seems to me that one can put a finger on the precise place. That place is what may be called the minor premise of the Langdell syllogism. "First, Law is a Science," was the major syllogism; and no one can be hardy enough to question this. But "Secondly," he announced, "*all the available materials of that science are contained in printed books,*"<sup>14</sup> *i. e. in reports of cases*. He did not say "reports of cases," but the spirit and the practice of his method were strictly thus limited.<sup>15</sup>

It is here that the doubt arises. Can we today concede that the reported judicial judgments are the sole sources for the science of Law? And if they are not, if there are other important sources, must not a sound method of legal education make regular use of them also? And, if so, what shall be those uses?

## VI

### THE SIX-PROCESS METHOD

At this point let me preferably shift the order of thought, and make my proposals after setting forth my own notions of the fundamental processes of Law.

My thesis will be this: Law, as a subject of thought and activity,

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<sup>14</sup> HARVARD LAW SCHOOL ASSOCIATION, REPORT OF THE ORGANIZATION AND FIRST GENERAL MEETING (Boston, 1887), 49.

<sup>15</sup> On this occasion the speeches all showed that such was the understood implication. Mr. Carter, *e. g.*, referred to "the great and principal cases in which are the real sources of the law" (p. 26). And such was the usage of the School at that time. It was, for instance, not thought necessary in 1887 for the Library to possess a complete set of the statutes of the several states. The main object was to get behind the treatises to the cases.

has several distinct categories or modes of being, and cannot be thought about except in one or another of these processes; hence, any curriculum of legal education must be based on these distinctions, by aiming to develop each process adequately.<sup>16</sup>

In a former number of this REVIEW<sup>17</sup> I was permitted to set forth a classification of Law into four branches, only two of which are here material. Law was classified according to the different activities of thought which deal with the fact of Law. Law, in the first place, may be conceived of as a thing to be *ascertained*; *i. e.* as a *mere fact* of human conduct; and Law, in the second place, may be conceived of as a thing to be questioned and *debated*, *i. e.* as a rule which by some standard *ought to be different* from what it is. The uncouth names given, for short, to these two general branches of legal science were Nomoscopy and Nomosophy; but the names are immaterial.

Now the *first* general branch has three subdivisions: (a) We may concern ourselves with ascertaining the *actual* rule of law of a given moment in a given country, by studying the sources in which that law is expressed; call this, Nomostatics. (b) We may concern ourselves with ascertaining the *former condition, history, and development* of a rule of law; call this, Nomogenetics. (c) We may concern ourselves with ascertaining the relation between Law and *other facts and their sciences*; call this, Nomophysics.

The *second* general branch above has two subdivisions: (1) We may take a standard of *logic*, analyze the rules of law, and examine their consistency as a system or part of a system; call this, Nomocritics. (2) We may take a standard of *ethics, economics, or politics*, and examine the rules of law with reference to their conformity to that standard; call this, Nomothetics or Nomopolitics.

But there is also a *third* general branch (not taken up in the above-cited article). We may take the Law of a given community, or one or more rules of it, and *compare* it with the law of another community, with reference to one or all of the above features, *i. e.* Comparative Law, or Supra-national Law.

What is the significance of these distinctions for legal education?

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<sup>16</sup> My conclusions will coincide in some respects with those of Professor Redlich, in his recent report to the Carnegie Foundation, but are reached by a different path.

<sup>17</sup> 28 HARV. L. REV. 1 (November, 1914); also in the writer's CASES ON TORTS, vol. II, Appendix A.



The significance of them is this: All of the above ways of thinking about Law are inherent and unavoidable, and are used in a lawyer's practical activity. Some are used always more than others, and some are used at certain periods of a nation's history more than others. But all are used, and all are necessary and inevitable. Hence, legal education should endeavor to train the student in the use of all of them, and not merely in one or two of them.

For educational purposes, then, how do they group themselves practically? That is, how far are they so distinct, in the mental processes involved, that practically they require separate attention in educational method?

Here, of course, experience as a student and a teacher comes into play. Speaking from such experience, I am convinced that there are substantially *six distinct mental processes*, which need separate attention and cultivation.

Without adhering formally, therefore, to the above artificial nomenclature, let me briefly set forth these six kinds of mental process which need to be cultivated in the embryo lawyer.

1. *Analytic process.* The first is the process of analyzing the judicial decisions, to determine the Law as it is, by tracing the logical implications of general principles as revealed in specific cases.

This process is what the case-study method provides for the student. And it is the *only* process (of the six) that it provides. Whether we are searching for the rule of mutual consent in contracts, or for the rule of liability of individual partners to firm creditors, or the rule of privilege for interested persons in defamation, or for any other actual rule of law, the process is always one of dissection or analysis, in logical detail.

This is indeed the process most used by practitioners in their ascertainment of the existing Law (Nomostatics). And in the past and present phase of our legal sources it is the most usually needed process. Therefore it calls for thorough mastery. And the great service of Langdell's method was and is that it supplies that mastery. But that process is not the only process of thought used and needed by the lawyer or the legal scholar. And in the coming state of our legal sources it will occupy, as a process, a place of less relative importance than hitherto (though still a larger place presumably than any one of the others). This was the shortcoming of the case-study method, — a shortcoming which in changed conditions may be termed serious.

2. *Historic process.* The second process of thought about Law is the thought of it as changing, moving, developing, from a past through a present into a future, — the historic process. This mode of thought becomes specially important to a lawyer in an epoch when his national law is in a period of rapid change, — that is, change maturing in his own lifetime. To any student it is an important intellectual stage when he first realizes that all law is in a state of constant motion, like a kaleidoscope. I do not remember just when this realization came to me; I know it was not while in the Law School; but as I look back, I note a great difference in all my notions about law since the time of that realization. I am convinced that the acquisition of it should be made at the stage of one's formal legal education.

Many have fondly believed that this can be done and is done by the case-study system. I doubt it. Something indeed can be done; but not enough. There are several reasons for this; to elaborate them would require too much space. But a most important one is that historic change of rule is the result always of causes, — causes more or less discernible but external; and the judicial opinions do not contain sufficient data of those causes. Who, for instance, could attempt to understand the causes that influenced the rule against general warrants, by merely reading Camden's eloquent opinions?

The historic sense is a necessary sense for the lawyer; and the case-study method does not supply data for its genuine cultivation.

3. *Legislative process.* A third process of thought about Law is the thought of it as something to be created, made by ourselves, and made to be perhaps different from what it now is, — in short, the legislative process. And, in a period of changing law, this too becomes an important process for the lawyer, — the most important in a civic sense.

Now the habitual analysis of judicial judgments does not in the least cultivate the acquisition of this process. The two are fairly alien to each other. One of the notable reasons for our American lack of legislative skill is that our judiciary committees of the legislature, who frame the statutes, are composed of men whose only training (hitherto) has been in the analysis of case-judgments. The really basic principles and problems that attend the legislative process have scarcely been dreamed of by our most competent practitioners. Any one who hesitates to accept so strong a statement



may be convinced by glancing at the current volume ("The Science of Legal Method") in the Modern Philosophy Series; or at the recent volume of Professor Ernst Freund of the University of Chicago, on "Standards of American Legislation."

The legislative process of thought about Law is necessary for the lawyer; and the case-study method does not cultivate it at all.

4. *Synthetic process.* A fourth process of thought about Law is the process of building up individual rules and principles into a consistent system — of being able to trace every rule backwards and upwards to its more and more general expressions and of harmonizing these, — in short, the synthetic process.

This process is needed and has always been used to some extent by lawyers. It characterizes the greatest of them in their arguments, and it ordinarily comes only at their maturest period. It represents their highest capacity. In a period of changing law it underlies the skill that is necessary in order to fit the new law well into the old, — like the skill of an architect restoring an old but solid building, who knows which beams, pillars, and girders are indispensable, and which ones can be removed without scruple.

The case-study method is capable, perhaps, of furnishing some of the material for this process. But it has ordinarily not been so used; in its ordinary use its service is purely or mainly analytic and not synthetic. The treatises on Analytic (thus miscalled) Jurisprudence purport to render the service; they represent synthesis. But their vogue has not been favored under the case-study system. The synthetic process of thought is often dismissed (as in a recent official utterance) with the epithet of "speculative jurisprudence." But its time must come, if our law is ever to be soundly reconstructed; and legal education must provide for this in its methods.

5. *Comparative process.* The fifth process of thought about Law is the process of looking outside our own actual law ("the" law), of conceiving a non-Ego in law, of realizing that other communities live and move under other legal systems, and that these must be reckoned with in the life of our own law among nations' laws, — in short, the comparative process. This consciousness of "a something not ourselves that makes for Law" (to paraphrase Matthew Arnold's phrase) — a sort of legal altruism, or anti-local spirit, — is an important one to acquire, especially in a period like the present. International relations are becoming more and more active

in daily commerce; and national insularization of law can no longer be reckoned upon.

Fortunately, our own federal form of national life has already tended strongly to cultivate in us this sense of law. The free comparison of common-law precedents from all the states has inevitably done this, even under the case-study method. Yet there remains the need of extending it to non-Anglo-American legal systems, and to the systems of law in other epochs.

The case-study materials, as hitherto provided, do not supply this need. Much remains to be done for cultivating the sense of national law as merely a member in the family of laws, — a family in which we must be prepared to seek harmonious adjustment and mutual profitable imitation.

6. *Operative process.* The sixth process of thought about Law conceives of law as being a nominal rule (as declared by courts and legislatures) which may in fact, however, not be enforced and practiced; it seeks constantly to keep aware of the gap, if any, between the nominal rule and the actual custom; it may be called the operative process. This is Professor Ehrlich's "living law."<sup>18</sup>

This is, in one sense, the "practical" side of law ("pragmatic" would more nearly describe it). It is often supposed to be taken care of by the so-called Practice courses; but that belief is an error. Those courses deal mainly with judicial procedure. The present process involves the substantive law. It concerns "practice," in that the attorney's intelligent advice to his client requires an acquaintance with actual commercial customs, and that this knowledge comes usually through practice only. In reality, this process concerns a specific and distinct conception of the Law, which is just as real and interesting for the scientific scholar as for the practitioner; and thus it ranks as a separate object of legal study, distinct from procedural skill and tact.

The case-study method does something for this object — perhaps a good deal — certainly very much more than in the code countries with which Professor Ehrlich is familiar and in which he saw the special need of study in this part of the field. For the case-reports contain copious data of actual commercial customs and of documents set forth verbatim. Again and again they exhibit edify-

<sup>18</sup> Set forth in his paper read at the 1915 meeting of the Association of American Law Schools.



ingly this contrast of light and shadow (so to speak), of law and custom. But what they do thus exhibit is only casual and scanty, in comparison with what could be and ought to be done. What ought to be done is, in every course, to provide a systematic apparatus of documents taken from today's customs of trade and industry, and to make occasional excursions of inquiry into statistics and other classes of facts. Thus only can this process of thought be adequately cultivated.<sup>19</sup>

Such are the six processes, or senses of Law, which legal education must be adapted to cultivate. How far does our present curriculum provide for them?

## VII

### A RECONSTRUCTED CURRICULUM

Taking the curriculum of the school with which I am most familiar, let us see how its courses of today distribute themselves with reference to their service in developing mainly one or another of the above six processes. They may be classified, roughly, as follows:

1. *Analytic process*: Contracts; Torts; Real Property; Common Law Procedure; Damages; Personal Property; Evidence; Quasi-Contracts; Agency; Commercial Paper; Crimes; Equity; Property II; Persons; Judgments, etc.; Public Officers; Carriers; Trusts; Insurance; Public Utilities; Equity Pleading; Bankruptcy; Suretyship; Constitutional Law; Property III; Criminal Procedure; Irrigation; Mining; Code Pleading; Mortgages; Municipal Corporations; Partnership; Federal Jurisdiction; — 33 courses, representing 84 semester hours.

2. *Historic process*: Legal Biography and History; Roman Law; Evolution of Law; — 3 courses, representing 6 semester hours.

3. *Legislative process*: Contemporary Legislation; Applied Criminology; Statute Law; — 3 courses, representing 4 semester hours.

4. *Synthetic process*: General Jurisprudence; Philosophy of Law; — 2 courses, representing 5 semester hours.

5. *Comparative process*: International Law; Roman Law; Conflict of Laws; Evolution of Law; — 4 courses, representing 13 semester hours.

6. *Operative process*: Conveyancing is virtually the only course directly aiming at this object. (But in any adequate method the

<sup>19</sup> At some more opportune time I should like to expound a method by which the practical obstacles to securing such an apparatus can be overcome.

process would form a fractional part in almost every course under 1 above; so that it cannot easily be compared in semester hours with the others.)

This survey shows that out of a total of some 112 semester units offered,<sup>20</sup> nearly five-sixths serve mainly or wholly the first above-named process, the analytic; while *all the other five processes together* are served (except incidentally, as noted under 2, 5 and 6) by only a little more than one-sixth of the units. Moreover, in the actual result this disproportion is increased; for since only 70 semester units are required to be achieved, and since in these 70 a minimum of 5 units only is required to be selected outside of the first group, the mass of students (following the orthodox lines) may and do content themselves with little more than that minimum (5 to 10 units) in making the selection. So that, in fact, more than six-sevenths of the education is spent in exercising the analytic process.

The question is, then, Is that enough? I am convinced that it is not. Even after all concessions made (*i. e.*, that the analytic process is the most common one for the practitioner, that it requires for its mastery long-continued and widely varied drill, etc., etc.), its share remains disproportionately large. That its mastery really needs, week after week for three years, in twenty-five or thirty different subjects, the repetition of that identical process of case-analysis, I have for some time ceased to believe. The same benefit could be obtained with less quantity of identical mental effort.

Moreover, the prestige given thus to the analytic process tends to repress in the student body an appreciation of the equal need of the other processes. The need for them is equal (though the quantity of exercise required may not be as much). But the orthodoxy of the first has thus far kept the others in the rank of heterodoxies. They should be given an equality of emphasis.

My proposal is, therefore, that the curriculum be re-grouped with reference to the above six distinct processes; that a better proportion be sought in distributing the pedagogic attention to them; that more suitable materials be devised for cultivating the five now heterodox processes; and that the required subjects be so enlarged that every student is certain to have had a fair elementary training in all of the processes.

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<sup>20</sup> The purely "Practice" courses have been omitted in the above grouping.



And now, in view of the skepticism which will doubtless greet this novel division into "processes," I venture, in its defense, to invoke analogy. No doubt (as the revered Professor Hill used to inculcate unsparingly) analogy is not argument. Nevertheless, it is often helpful and plausible. And I see a plausible analogy in physical training.

There are four processes or stages in physical training. (1) First come the individual muscles. We have at our disposal a score of different "chest-weight" exercises; each of them will reach a specific set of muscles. Suppose that we have carefully developed each one to a degree. (2) But we are yet unskilled in their coördination. Here the parallel bars, the horizontal bars, the rings, and other apparatus train us to use several sets of muscles at once, each playing a part and adjusting itself at the right moment to the others, to attain a total result. But thus far we are using muscles only. (3) The other bodily functions (lungs, stomach, etc.) remain to be drilled and coördinated with the muscles; endurance and economy of effort must be cultivated. Sparring, wrestling, fencing, track athletics, do this. They represent a stage beyond the former two. (4) But as yet the task is individual only. It must now become social. The whole skill of each Ego must merely contribute as a subordinate part of a larger whole. Team athletics supply this, — baseball, football, and the rest.

Here, then, are four distinct processes in athletic activity. No complete athlete can lack any of the four. Sound training must include specific and systematic attention to all four. A man who went no further than specializing in chest-weights would be athletically imperfect. And the most skilled team-player must possess a general foundation in individual muscle-development.

What I now point out, therefore, in legal education, is that, if these distinct processes be recognized to exist, each must be consciously cultivated by methods specifically adapted to that purpose.

## VIII

### CONCLUSION

To sum up: I invite assent to the following theses:

That Law is dealt with, in nature and in thought, by six distinct mental activities or processes, — the analytic, the historic, the legislative, the synthetic, the comparative, the operative;

That these six processes have greater or less importance at different epochs of a community's legal life; and that in our present epoch the second, third, fourth, and fifth have a relative importance which they have not had for a century past;

That the case-study method, as hitherto practiced, develops mainly the first only; and yet that method represents five-sixths or more of the student's activity under the ordinary curriculum of today; and that this is disproportionate;

That therefore greater relative place should be given to the others (relegating the analytic process to, say, one half of the course); and that more suitable methods and materials should be provided for their adequate cultivation.

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## GOOD AND BAD TRUSTS

THE term "trusts" has now come to refer to extensive combinations of capital in the commercial and industrial world, regardless of what the form of the organization may be. The combination may be by the agreement of the units combining that they will sell through a common board or committee,<sup>1</sup> or by the device of trustees holding under a trust agreement stock controls in subsidiary corporations, or the controlling interests in partnerships and other forms of industrial and commercial units,<sup>2</sup> or by a parent corporation holding stock controls in subsidiary corporations,<sup>3</sup> or by the actual purchase of plants and their operation as a single industrial unit by a single corporation.<sup>4</sup> In describing the size of the combination which is sufficient to warrant its being called a "trust," we may adopt the phraseology of the government in its brief in the *International Harvester* and *Steel Cases*. The combination to be a trust must embrace "units which together occupy a preponderant position in a given industry." To ask whether a trust is good or bad is only to ask where the line shall be drawn between combinations which are legal and those which are illegal. It will be convenient in the beginning to indicate, first those that are clearly illegal, and then those that are clearly legal. By this process we shall arrive at the debatable ground.

## I

Since the *Standard Oil* and *Tobacco Cases*,<sup>5</sup> it has become articulate that a combination of capital (in whatever form) which, by

<sup>1</sup> This was the form of the combination attacked by the government in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899).

<sup>2</sup> This was the form of the combination known as the Standard Oil Trust under the Standard Oil Trust agreement of 1882. *State v. Standard Oil Co.*, 49 Oh. St. 137, 30 N. E. 279 (1892); *Standard Oil Co. v. United States*, 221 U. S. 1 (1910).

<sup>3</sup> This was the form of organization of the Standard Oil Company of New Jersey as it was reorganized in 1899. *Standard Oil Co. v. United States*, 221 U. S. 1 (1910).

<sup>4</sup> This was the form of the combination of the International Harvester Company. *United States v. International Harvester Co.*, 214 Fed. 987 (1914).

<sup>5</sup> *Standard Oil Co. v. United States*, 221 U. S. 1 (1910); *United States v. American Tobacco Co.*, 221 U. S. 106 (1910).

reason of its size and preponderant position in the business, has the power and the purpose, or uses its power to exclude others from the business by illegal acts and unlawful and unfair methods of competition, is an attempt at monopoly, and a restraint of trade and illegal at common law, and, if interstate commerce is involved, under the Sherman Act. It is what may be called a bad trust.<sup>6</sup>

It seems incredible that anyone ever should have doubted the soundness of this proposition. The common-law conception of monopoly was that of a business carried on to the exclusion of others.<sup>7</sup> Formerly this was effected by the exercise of the proper governmental authority which directly excluded all but the favored person from carrying on the business and imposed penalties upon anyone who violated the excluding mandate. When, however, the crown attempted to grant the privilege of carrying on a trade exclusively of all others its action was held void in the *Case of Monopo-*

<sup>6</sup> *Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S. 227 (1908); *United States v. Motion Picture Patents Co.*, 225 Fed. 800 (1915) (*semble*); *United States v. Eastman Kodak Co.*, 226 Fed. 62 (1915); 230 Fed. 522 (1916); *United States v. Corn Products Refining Co.*, 234 Fed. 964 (1916); *Dunbar v. American Telephone Co.*, 224 Ill. 9, 79 N. E. 423 (1906); 238 Ill. 456, 87 N. E. 521 (1909); *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 41 N. E. 188 (1895); *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558 (1877).

One of the early examples of combination (often on rather a small scale) which had the purpose to exclude others by means of an unlawful excluding practice, is found in the cases where several competitors secretly combined and eliminated competition, while pretending to the public to be competing. *Craft v. McConoughy*, 79 Ill. 346 (1875); *Fairbank v. Leary*, 40 Wis. 637 (1876). This device obviously deceived the public and tended to keep others out of the business, since one would be less likely to enter a field already occupied by a considerable number of competitors, than if obliged to contend with only one other unit.

On the same principle the secret combination of bidders not to bid against each other at an auction is illegal. *Gibbs v. Smith*, 115 Mass. 592 (1874); *Woodruff v. Berry*, 40 Ark. 251 (1882); *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 159 (1869).

<sup>7</sup> 3 INSTR. 181; *Kellogg v. Larkin*, 3 Pinney (Wis.) 123 (1851).

*Chappel v. Brockway*, 21 Wend. (N. Y.) 157, 163 (1839). ("The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise.")

The *California Steam Navigation Co. v. Wright*, 6 Cal. 258 (1856) (last quotation approved); *HAWK. P. C.*, bk. 1, ch. 29 (quoted in the opinion of the court in *Standard Oil Co. v. United States*, 221 U. S. 1 (1910); *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711). See also the many cases where the absence of any exclusion of others is noted as minimizing the tendency toward monopoly. *Infra*, note 17.



lies.<sup>8</sup> In this decision the policy of the common law against monopoly in the sense of a special privilege to carry on a business to the exclusion of all others was established and found effective to nullify the grant of the crown. Quite recently large aggregations of capital occupying a preponderant position in the business have discovered that they possess a power (resulting from their size) to indulge in practices which actually operate to exclude smaller units from the field. Some of these were plainly unlawful, such as inducing another trader to break his contract, fraud, libel, intimidation, coercion, and transportation rebates. These may be called "unlawful competition."<sup>9</sup> Other excluding practices were more subtle and have become known as "unfair methods of competition." They are methods which may be lawful and proper when used by one unit against another which can retaliate on fairly even terms with the same methods.<sup>10</sup> They become unfair and unlawful at least when used by a unit occupying a preponderant position against a smaller one, which, because it is smaller, cannot retaliate effectively. Of these the most obvious and best known is "local price-cutting."<sup>11</sup> The large unit can put the small one out of business by price-cutting below cost in the locality or the market which the smaller unit serves. By thus demolishing each small unit singly, it may exclude all from the field. This was not, of course, as effective as an act of Parliament. Such methods might never result in an actual monopoly. But they were effective to accomplish enough in that direction to be an illegal attempt at monopoly. If the crown was denied on grounds of public policy any power to grant an exclusive privilege to carry on a business, is it not quite plain that a similar privilege granted by a "trust" to itself would be an illegal attempt at monopoly and a restraint of trade entirely contrary to the common law, and, if interstate commerce was involved, void under the Sherman Act?

The fact that the mere combination of competing railroads, or other competing public service corporations operating under special franchises, is illegal at common law and under the Sherman Act,

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<sup>8</sup> 11 Rep. 84 (1603).

<sup>9</sup> See WYMAN, *CONTROL OF THE MARKET*, 36 *et seq.*

<sup>10</sup> *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25.

<sup>11</sup> Other methods of unfair competition are listed and explained in an admirable article on Unfair Competition by William S. Stevens, 29 *POL. SCI. QUART.* 282, 461.

without regard to any purpose to monopolize, or excluding practices,<sup>12</sup> is an application of the principle which underlies the *Standard Oil* and *Tobacco Cases*. Railroads and many other public utilities cannot be constructed and operated without special legislative authority, the exercise of the right of eminent domain, and the right to use or cross the public streets and highways. It follows that the very nature of the business and the special privileges required are such that it is against the public interest to allow anybody and everybody to engage in it. It follows that one who is given the special privileges required is protected by the proper governmental authority from any competition. The exclusion of the public is supplied by the State just as clearly as where an act of Parliament granted to A. the exclusive privilege of carrying on a business and penalized all others who attempted to do it. If several persons are permitted to construct and operate the public utility in question on a competitive basis, they are still protected from any competition on the part of others. The field of this sort of business is unfree. Furthermore, the fact that several are permitted to operate a public utility in competition is a determination by the public authorities that competition between the units in the field is desirable. Under such circumstances the elimination of any existing competition between any of the units is, in and of itself, illegal. It defies the policy determined by the public authorities who have permitted a number of competitors to enter the field. It tends directly to produce monopoly regardless of any excluding purposes or practices because the exclusion of others is provided for by the non-action of governmental authority.

It is entirely possible that the public may be excluded from a given business by the conditions under which it is carried on or by an actual limitation of a natural resource or both. Thus, if several competitors controlled all the known mineral deposits of a certain sort, it might be that any combination between them would be

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<sup>12</sup> *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1896); *United States v. Joint-Traffic Ass'n*, 171 U. S. 505 (1898); *Northern Securities Co. v. United States*, 193 U. S. 197 (1903); *United States v. Union Pacific R. Co.*, 226 U. S. 61, 470 (1912); *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396 (1888); *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798 (1889); *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530, 13 N. E. 169 (1887); *Chic. M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 61 Fed. 993 (1894); *Texas & Pac. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970, 6 So. 888 (1889).



illegal. Certainly any combination which resulted in one having a preponderant position in the business might be regarded as, in and of itself, illegal. The field would be inherently unfree at the time the combination occurred. So those who controlled the only mineral deposits which were, on account of the transportation cost from other sources, practically available for a certain considerable area, might not be permitted to combine to the extent of conferring upon one unit a preponderant position in that business.<sup>13</sup> The so-called necessities of life must be had for use at once, or within a brief space of time. There may be a sufficient quantity on hand in the world at large, but the users cannot wait to have reserves brought up from a distance. There will be an ample supply after the next year's crops are harvested, but the population must have the present supply before that time. Such circumstances create the excluding conditions. Hence, a combination which attempts to secure the reserves of such supplies at any given point, and goes so far at least as to secure a preponderant position in the control of the market, has all the elements of an illegal attempt at monopoly. During the time that the supplies acquired are needed, the market is not free. All but those actually in it are excluded. The only protection of the public from monopoly prices is the maintenance of the *status quo* of existing competitions, or at least the prevention of any sudden and violent change in the competitive status of the units engaged. This is the basis for the illegality of the so-called "corner."<sup>14</sup> It makes no difference, of course, whether there is involved merely the union of properties by purchase, or of properties and managers by combination.

## II

Where a business is normally free to all to enter and no excluding conditions exist and no excluding practices are indulged in, it is clear that there may be a great deal of lawful combination among competitors which necessarily eliminates competition between the units combined. Indeed, it may safely be affirmed that all such combinations which do not result in a unit occupying a "preponderant position in the industry" are valid. This is clear where the combination

<sup>13</sup> See *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871); *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 58 N. E. 525 (1900).

<sup>14</sup> *Raymond v. Leavitt*, 46 Mich. 447, 9 N. W. 525 (1881); *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499 (1889).

of properties occurs by the purchase of the business of one competitor by another, and where not only is the sale valid, but a restrictive covenant on the part of the seller not to carry on the same business is also upheld.<sup>15</sup> So where the combination occurs by uniting not only the properties which formerly competed, it is valid and restrictive covenants on the part of the managers combining not to compete have been upheld.<sup>16</sup> These cases indicate that where

<sup>15</sup> *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 (1887); *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363 (1888); *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357 (1901); *United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946 (1894); *Kellogg v. Larkin*, 3 Pinney (Wis.) 123 (1851); *Chappel v. Brockway*, 21 Wend. (N. Y.) 157 (1839); *Van Marter v. Babcock*, 23 Barb. (N. Y.) 633 (1857); *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 So. 41 (1888); *Beard v. Dennis*, 6 Ind. 200 (1855); *California Steam Navigation Co. v. Wright*, 6 Cal. 258 (1856); *Hubbard v. Miller*, 27 Mich. 15 (1873); *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713 (1901); *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806 (1891); *Wickens v. Evans*, 3 Y. & J. 318 (1829).

<sup>16</sup> *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. 553 (1886); *United States v. Nelson*, 52 Fed. 646 (1892); *Robinson v. Suburban Brick Co.*, 127 Fed. 804 (1904); *United States v. Quaker Oats Co.*, 232 Fed. 499 (1916) (especially opinion of Mack, J.); *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant (U. C.) 540 (1871); *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 19 N. E. 629 (1887); *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005 (1891); *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509 (1898); *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880); *Meredith v. Zinc & Iron Co.*, 55 N. J. Eq. 211, 37 Atl. 539 (1897); *Marsh v. Russell*, 66 N. Y. 288 (1876); *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973 (1894); *Queen Ins. Co. v. State of Texas*, 86 Tex. 250, 24 S. W. 397 (1893); *Sayre v. Louisville Union Benevolent Ass'n*, 1 Duvall (Ky.) 143 (1863); *Jones v. North*, L. R. 19 Eq. 426 (1875). In *United States v. International Harvester Co.*, 214 Fed. 987 (1914), the court said, p. 999: "If the five companies which formed the International had been small, and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in restraint of trade, but in the furtherance of it; . . ." In the brief of the government presented to the United States Supreme Court in the same case it is conceded: "Nor was it intended to prohibit *all* combinations of competing units, but only such as are sufficiently important and comprehensive to bear some reasonable relation to the evils — the breakdown of the competitive system, etc. — against which the Act was designed to guard." On page 99, in summing up, the same brief states: "It [the Sherman Act] permits combinations of competitive units within limits." *Contra*, *Slaughter v. The Thacker Coal & Coke Co.*, 55 W. Va. 642, 47 S. E. 247 (1904) (where, however, the opinion of the court was delivered by the dissenting member, who sets forth in full the reasons against the decision).

Not infrequently it is difficult to say whether there has been a combination by the sale of properties to a competitor, or a combination of properties and managers as well. For instance, when a new corporation is formed and the properties of several competing units are transferred to it in return for stock which is distributed to the stockholders or the owners of the property sold, the transaction may be looked upon as a combina-



the combination does not occupy a preponderant position in the business, and there are no excluding purposes or practices, the mere elimination of competition between the units is not a ground for holding it illegal. The common law certainly has never attempted to put out a rule which would compel the maintenance of the *status quo* of every existing competition by enforcing general restraints on alienation to, and upon the freedom to contract and unite with, competitors. Neither has any court suggested that any difference of result could be made between a combination of properties which had competed, and a combination both of competing properties and managers as well. Imagine anyone objecting that all the partnerships of competing lawyers, bankers, and corner groceries were necessarily illegal because they were combinations of competing properties and managers which eliminated competition between them! Imagine anyone upholding a public policy in favor of the owner of a business having the privilege of selling his property with the greatest freedom at the best price obtainable, who would not admit the existence of the same policy in favor of a man in business selling his services and experience on the same terms!

The authorities which uphold the legality of combinations, whether of properties alone, or of properties and managers, where the combination does not result in a unit occupying a preponderant position in the business, are clearly sound.

Of course there is in every such case the elimination of competition between the competing units combined. This is not less in the case of the union of the properties by sales and the restriction by covenants not to compete, exacted from the sellers, than it is where the properties and the managers themselves are united. In both alike competition between the property and the managers is ended, at least for the time being. This, of course, tends in some degree toward monopoly. So long, however, as the combination does not

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tion of properties merely, the managers of the selling units going out of the business, or it may be that the managers of the selling units remain in the business, taking part as officers of the new corporation. *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973 (1894). So where two units in the same business agree to divide the territory and make reciprocal covenants with each other not to do business in the territory assigned to the other, the transaction may be looked at either as a sale of part of the business of each, and therefore a combination of properties only, or it may be looked at as a combination of properties and managers serving the entire field in a manner mutually arranged between them. *Wickens v. Evans*, 3 Y. & J. 318 (1829); *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806 (1891).

occupy a preponderant position in the business and there are no excluding purposes or practices,<sup>17</sup> much competition will remain,

<sup>17</sup> In the following cases, the absence of any exclusion of others from the business was noted as minimizing the tendency toward monopoly from the elimination of competition between the units combined.

*Diamond Match Co. v. Roeber*, 106 N.Y. 473, 483, 13 N. E. 19 (1887). ("But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry";) *Leslie v. Lorillard*, 110 N. Y. 519, 534, 18 N. E. 363 (1888) (same language).

*Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 551, 59 N. E. 357 (1901). ("But contracts between parties, which have for their object the removal of a rival and competitor in a business, are not to be regarded as contracts in restraint of trade. They do not close the field of competition, except to the particular party to be affected.")

*Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 487, 28 Atl. 973 (1894). ("But combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule." Page 488: "But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies.")

*Wickens v. Evans*, 3 Y. & J. 318, 329 (1829). ("Not a monopoly, except as between themselves; because every other man may come into their districts and vend his goods." Page 330: "If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would, perhaps, be, that the public would obtain the articles they deal in at a cheaper rate.")

*National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 275, 47 N. W. 806 (1891). ("Neither one nor both of these companies have any exclusive right to engage in this business, it being one open to all. Hence this contract does not, and cannot, create any monopoly.")

*United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946, 949 (1894). ("The facts of this case disclose no tendency to monopoly. Monopoly implies an exclusive right, from which all others are debarred, and to which they are subservient.")

*Kellogg v. Larkin*, 3 Pinney (Wis.) 123, 139 (1851). ("And while we have no privileged classes here, but little individual, and less associated capital, and while our resources are so imperfectly developed, while the avenues to enterprise are so multiplied, so tempting and so remunerative, giving to labor the greatest freedom for competition with capital, perhaps, that it has yet enjoyed, I question if we have much to fear from attempts to secure exclusive advantages in trade, or to reduce it to few hands." Page 145: "Now could the parties possibly have intended by this simple contract, to vest in the mill owners the sole exercise of the traffic in wheat, throughout the State of Wisconsin? . . . I say there was no monopoly intended, none effected. We cannot fail to perceive, that in spite of this contract, all the rest of Wisconsin was an open and unrestricted market for the sale of wheat. And even in Milwaukee, the market was open to the fiercest competition of all the world, except these obligors.")

*Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 523, 43 Atl. 723 (1899). ("The entire capital of the country, except theirs, is free to be employed in the manufacture.")

*Chappel v. Brockway*, 21 Wend. (N. Y.) 157, 163 (1839). ("The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only



and the progress toward monopoly will be comparatively slight. Such as may occur is entirely outweighed by the public interests which are subserved by permitting the combination.

*First*, there is the social interest in individual freedom of economic action. As applied to the situation under discussion this means that there is a public policy in favor of freedom to business managers and owners to run their business as they think best, combining with others or not, as they deem advisable. It is not infrequently spoken of as the fundamental policy in favor of freedom of contract, protected by the "due process" clause of our constitutions.<sup>18</sup>

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secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise.") *The California Steam Navigation Co. v. Wright*, 6 Cal. 258, 262 (1856) (last quotation approved).

<sup>18</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 482, 13 N. E. 19 (1887). ("It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions.")

*Leslie v. Lorillard*, 110 N. Y. 519, 533, 18 N. E. 363 (1888). ("The object of government, as interpreted by the judges, was not to interfere with the free right of man to dispose of his property or of his labor.")

*Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 551, 59 N. E. 357 (1901). ("In the present practically unlimited field of human enterprise there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business.")

*National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 276, 47 N. W. 806 (1891). ("A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract.")

*United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946, 949 (1894). ("In discussing this phase of the subject, we must not lose sight of some other principles, the disregard of which would be more harmful to public interest than monopolies. The right to contract is a cardinal element of constitutional liberty, and, as such, should be jealously guarded.")

*Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 105, 50 N. E. 509 (1898). ("The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old.")

*Smith's Appeal*, 113 Pa. St. 579, 590, 6 Atl. 251 (1886). ("The principle is this: Public policy requires that every man shall not be at liberty to deprive himself or the State of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to so sell it, 't is necessary

*Second*, there is the use of the combination as a means of eliminating ruinous competition. Competition in trade and industry is constantly inimical to the public interest in two respects: It tends to develop too much competition and consequent loss to everyone in the business.<sup>19</sup> Too much competition and the intensity of com-

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that he should be able to preclude himself from entering into competition with the purchaser.”)

*Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 514, 43 Atl. 723 (1899). (“A tradesman, for example, who has engaged in a manufacturing business and has purchased land, installed a plant, and acquired a trade connection and good will thereby, may sell his property and business with its good will. It is of public interest that he shall be able to make such a sale at a fair price and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor’s contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold.”) *Kellogg v. Larkin*, 3 Pinney (Wis.) 123 (1851).

<sup>19</sup> *Leslie v. Lorillard*, 110 N. Y. 519, 534, 18 N. E. 363 (1888). (“I do not think that competition is invariably a public benefaction; for it may be carried on to such a degree as to become a general evil.”)

*Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 487, 28 Atl. 973 (1894). (Agreement found to have been made on account of “a ruinous competition.”)

*Wickens v. Evans*, 3 Y. & J. 318, 328 (1829). (Agreement made in view of the fact that the parties “had sustained great loss and inconvenience by reason of exercising their trade in the same places.”)

*National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 275, 47 N. W. 806 (1891). (“Excessive competition is not now accepted as necessarily conducive to the public good.”)

*Whitney v. Slayton*, 40 Me. 224, 230–231 (1855). (“Whether competition in trade be useful to the public or otherwise, will depend on circumstances. I am rather inclined to believe, that, in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen, or men engaged in commercial concerns. There is a tendency, I think, to overdo trade, and such is the enterprise and activity of our citizens, that small discouragements will have no injurious effect, in checking in some degree, a spirit of competition.

“In this country, particularly, such is the facility with which persons are enabled, without capital, to embark in various enterprises, and such the desire to try experiments therein, that it often turns out, when these experiments have been successful, in some of these undertakings, others will enter into them in such numbers that ruin to most of them so engaged is the consequence. Hence those who retire, and for a proper consideration contract with others not to engage in any particular business for a limited time, and in a particular place, have often, if not generally, been the successful party.”)

*Chappel v. Brockway*, 21 Wend. (N. Y.) 157, 164 (1839). (“Competition in business, though generally beneficial to the public, may be carried to such excess as to become an evil.”)

*Kellogg v. Larkin*, 3 Pinney (Wis.) 123, 150 (1851). (“I believe universal observation will attest that for the last quarter of a century, competition in trade has caused more individual distress, if not more public injury, than the want of competition.”)

*Slaughter v. The Thacker Coal & Coke Co.*, 55 W. Va. 642, 650, 47 S. E. 247 (1904),



petitive methods may produce too little competition by eliminating others from the business. The competitive system looks to the operation of economic principles under freedom of action to avoid the evils of each extreme.<sup>20</sup> The freedom of others to enter the business prevents too little competition; the elimination of some competition from time to time prevents too much. A rule of law which made all sales to competitors, and all combinations of competitors, illegal, would leave the door open wide to an indefinite increase in competition, and at the same time obstruct the healthy lessening of competition. This would promote all the evils of too much competition in order to prevent the evils of too little. It would be a rule which encouraged competition only to require that the *status quo* of every existing competition be indefinitely retained. The public interest must suffer severely from any such rule. The unsuccessful competitor under it would in most instances be eliminated by a total failure and a maximum loss, instead of having a chance to save his loss by selling out to, or combining with, a more successful rival. Where the competitors were evenly matched all would be subjected indefinitely to a profitless competition or a maximum loss, instead of being permitted to combine and rescue their properties. Industrial depression, due to overproduction and to too many competitors, would necessarily right itself slowly and with a maximum of failures and losses.<sup>21</sup>

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*per* Poffenbarger, dissenting. ("Competition is said to be the life of trade, but undue or excessive competition has been judicially declared hurtful and injurious to the public.")

<sup>20</sup> *Per* Pitney, V. C., in *Meredith v. New Jersey Zinc & Iron Co.*, 55 N. J. Eq. 211, 221, 37 Atl. 539 (1897). ("Now, I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact, the essential quality of that series of acts or course of conduct which we call competition is that it shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty.") *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 19 (1887), *supra*.

<sup>21</sup> *Oakdale Manufacturing Co. v. Garst*, 18 R. I. 484, 487, 28 Atl. 973 (1894). ("But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure.")

*Third*, it can hardly be contended that mere combination and elimination of competition between the units combined creates exorbitant prices. What is the judicial test of an exorbitant or unreasonable price? There seems to have been an impression not entirely wanting in the judiciary that any rise in prices which follows a combination must be unreasonable. This is a shortsighted view. A moment's reflection should make it clear that general condemnation of advances in prices ultimately effects everyone unfavorably. It is equivalent to a general condemnation of prosperity. It is not the advance in prices which is objectionable, but only the unreasonable and excessive advance. In determining what prices are unreasonably high, are the courts to go into cost accounting and then add a percentage of profit and reach a specific finding as to what is an unreasonable price in any business under consideration? Obviously not. Such a course would be absurd and impracticable. The courts must find a workable and practicable general rule, the application of which will provide a wide margin of freedom to the business unit and a chance for the exceptional rewards which come from successful management. This leaves the courts no choice except to rely upon freedom to enter the business and freedom to continue in the business as the means of preventing excessive prices.<sup>22</sup> On the other hand they must allow combination to

<sup>22</sup> *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. 553, 555 (1886). ("Those who might be unwilling to pay the prices asked by the parties could find plenty of mechanics to make such machines, and the law of demand and supply would effectually counteract any serious mischief likely to arise from the attempt of the parties to get exorbitant prices for their machines. It is quite legitimate for any trader to obtain the highest price he can for any commodity in which he deals. It is equally legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods, and a division of their profits. It is not obnoxious to good morals, or to the rights of the public, that two rival traders agree to consolidate their concerns, and that one shall discontinue business, and become a partner with the other, for a specified term. It may happen, as the result of such an arrangement, that the public have to pay more for the commodities in which the parties deal; but the public are not obliged to buy of them. Certainly, the public have no right to complain, so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly.")

*United States v. Nelson*, 52 Fed. 646, 647 (1892). ("Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least.")

*Slaughter v. The Thacker Coal & Coke Co.*, 55 W. Va. 642, 649, 47 S. E. 247 (1904),



some extent to prevent unprofitable prices and ruinous competition. The highest price which can be obtained while the business is free to all to enter and no one in it occupies, as a result of combination, a preponderant position, must be taken by the courts as fair. The fact that prices are higher than they were as a result of some combination which eliminates some competition, does not make those prices exorbitant.

*Finally*, and most important of all, is the interest of society in the carrying on of business by larger units. This is not only favored by public policy, but it is a condition to the existence of our present social order. It is as vital to the welfare of the country as that freedom of contract — freedom of the managers of business to manage without interference from the Legislature — which the due process clause of the Constitution protects.<sup>23</sup> In the last century one of the phases of our industrial revolution has been the shift from small to large business units. In a century individuals have been succeeded by partnerships, partnerships by corporations, corporations of small or limited capital by corporations with large capital. Acts which limited corporate capital have been succeeded by acts which place no limit upon the amount of capital. Acts which placed obstructions in the way of increasing capital have been succeeded in some states by acts which allow the corporation to increase its capital stock at will. The large corporation has been succeeded by the parent company which has been allowed already in some states to hold stock controls in subsidiary corporations. If we look at industry and commerce from the outward physical point of view, it is plain that the admittedly legal operating unit of today is, in every line, incredibly large in comparison with the unit of half a century ago. When we turn to the labor units we find the same process going on of shifting from the individual to the collective unit. The individual labor units have been combined to make the local unions, local unions have been combined to make the state-wide and country-wide labor units. Unions have been combined not only locally, and nationally, according to occupation, but terri-

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*per* Poffenbarger, Pres. ("In the absence of some great combination, virtually controlling the production and price of a commodity in the country, the price is regulated and determined by the law of supply and demand.")

<sup>23</sup> "'Due Process,' the 'Inarticulate Major Premise, and the Adamson Act,'" 26 YALE L. J. 519, (May, 1917).

torially without regard to occupation. As one looks back upon what has been going on there can be no doubt that the social order has shifted from a primitive dependence upon the individual industrial unit to the collective unit, and then to the larger collective unit, and that the size of our industrial units has been magnified to an extraordinary degree. A very slight consideration of the matter makes it clear that to put commerce and industry back into the units of fifty, or even twenty-five years ago, would be to disrupt business and do an incalculable harm to the public welfare. Clearly, then, we may rely upon a strong public policy in favor of the shift from the individual and small collective unit to the larger collective unit.<sup>24</sup>

### III

Suppose now that we have, in a business normally free, a combination which on the one hand has no intent to exclude others from the business and is guilty of no unlawful or unfair excluding practices, but which, on the other hand, "embraces units which together occupy a preponderant position in a given industry." Is this a good trust or a bad trust? Is it illegal at common law, and, if interstate commerce be involved, under the Sherman Act?

We may safely assume that when the Sherman Act refers to combinations "in restraint of trade" or attempts to monopolize, it refers to such combinations as were illegal at common law because they restrained trade or were attempts to monopolize.<sup>25</sup> But this

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<sup>24</sup> *Jones v. Clifford's Ex'r*, 5 Fla. 510, 515 (1854): ("Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the Court, to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality. It made and conducts our government, constructs our railroads, our steam vessels, our magnificent ships, our temples of worship, structures for public and private use, our manufactories, creates our institutions for learning, builds up our cities and towns.

"Its very office is to do what individual exertion may not accomplish, and in a degree distinguishes civilized from savage life. Why then should this important agency be denied to this meritorious class of our citizens? They are in general men of small means, to whom an association may not only be desirable, but necessary and indispensable.")

<sup>25</sup> *Standard Oil Co. v. United States*, 221 U. S. 1 (1900). (After insisting "that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated," the opinion of the court proceeds as follows (p. 60): "Thus not specifying, but indubitably contemplating and requiring a *standard*, it follows that it was intended



does not carry us very far, because the common law, while it was clear about some results, gave no unequivocal answer to the problem now under consideration. Even if common-law authorities be found dealing with the point, nevertheless the Supreme Court of the United States is still entitled to declare for itself what the common law may be as a preliminary to applying the Sherman Act.<sup>26</sup> Hence the determination of the result in the case put will depend (apart from the question of whether interstate commerce is affected) upon considerations quite as much at large as if the case were being considered at common law.

The solution of our problem is to be attained by balancing the interests of the public and the parties involved.<sup>27</sup> In support of the legality of the combination is the public policy in favor of freedom to manage and carry on business, the elimination of ruinous competition, and the development of larger collective units. Against the legality of the combination is the tendency toward monopoly in the fact that competition between the units combined is eliminated. This, however, is minimized by the fact that there are no excluding purposes or unlawful or unfair excluding practices, and the field is free. Apart from the fact of size and preponderant position in the business the balance of interests is clearly in favor of the combination. The entire question is whether that balance is still maintained when we add the fact that the combination has a preponderant position in the business.

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that the *standard of reason which had been applied at the common law* and in this country in dealing with subjects of the character embraced by the statute was intended to be the *measure* used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided." Again the court says (p. 62) " . . . the *criteria* to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the *rule of reason guided by the established law*, etc. . . .")

<sup>26</sup> Thus in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 (1911), the Supreme Court of the United States decided in effect that the common law forbade such contracts to keep up the price on resale as were there involved in spite of the fact that there were common-law decisions by respectable courts to the contrary: *i. e.* *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909); *Elliman, Sons & Co. v. Carrington & Son*, [1901] 2 Ch. 275 (damages allowed); *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839 (1905) (injunction allowed against the defendant who secured a dealer to purchase for the purpose of breaking the contract upon a re-sale to the defendant); *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174 (1900) (damages allowed); *Clark v. Frank*, 17 Mo. App. 602 (1885) (contract to maintain the price of thread); *New York Ice Co. v. Parker*, 21 How. Pr. (N. Y.) 302 (1861) (contract to maintain price of ice).

<sup>27</sup> *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305, 317, 318.

Three courses are open to the courts: *First*, they may hold the fact of size and preponderant position in the industry to be, in and of itself, sufficient to turn the balance against the validity of the combination. This will mean that there can be no good or bad trusts. All trusts, in the sense of large combinations or aggregations of capital, occupying a preponderant position in the business, would be bad trusts. No other combinations would properly be called trusts. *Second*, the courts, on the other hand, might regard the fact of size and preponderant position as insufficient, in and of itself, to turn the balance of interests against the validity of the combination. This would mean that there might be good and bad trusts. The bad trusts would be those which had the power and the purpose, or used their power, to exclude others by illegal and unfair methods of competition. The others would be good trusts. *Third*, between these extremes there is an intermediate position. Size and preponderant position may be regarded as *prima facie* evidence of an intent to exclude others, or to use the power of the combination to effect unlawful and unfair excluding practices, — thus shifting to the combination the burden of going forward with evidence to negative such intent and use of power. In this view there will still be good trusts and bad trusts. The line between them will be drawn at the place where they have the excluding purpose or practice illegal and unfair excluding methods. But size and preponderant position are still given an important effect as *prima facie* evidence of the excluding intent.

### A

As to which of these positions the courts have taken, the cases are far from conclusive.

1. Several have adopted the second view, and sustained the legality of the combination.<sup>28</sup>

<sup>28</sup> *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 (1899); *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 510 (1915). ("Size does not of itself restrain trade or injure the public; on the contrary, it may increase trade and may benefit the consumer.")

*United States v. Prince Line*, 220 Fed. 230, 232 (1915). (Agreement between all the shipowners engaged in the same trade as to the number of vessels each should operate, the dates of sailings, exchange of freight between lines, and rates of freight. The court said: "At the time it was formed the parties were in the trade and handled all the trade there was. No one was frozen out by their combination and there was no greater monopoly than existed before.") *United States v. United States Steel Corporation*, 223 Fed. 55 (1915).



2. The third view was one of the grounds of decision in the *Standard Oil Case*<sup>29</sup> and was clearly announced in the opinion of the court. In stating the grounds for sustaining the findings and decision of the court below, the Supreme Court said:

"Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than

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United States v. Eastman Kodak Co., 226 Fed. 62, 80 (1915). (" . . . that the size and varied character of the enterprise do not of themselves constitute a violation of the statute. To this principle I assent. There is no limit in this country to the extent to which a business may grow, and the acquisitions of property in the present case, standing alone, would not be deemed an illegal monopoly; but when such acquisitions are accompanied by an intent to monopolize and restrain interstate trade by an arbitrary use of the power resulting from a large business to eliminate a weaker competitor, then they no doubt come within the meaning of the statute.")

United States v. American Can Co., 230 Fed. 859, 901 (1916), 234 Fed. 1019 (1916). (The court, though finding the American Can Co. was originally organized with the intent to exclude others, indulged in unlawful excluding practices, yet by reason of the fact that it had for a considerable period had no illegal purposes or used any excluding practices, a dissolution was refused, and the bill merely retained for a possible future action.)

United States v. Nelson, 52 Fed. 646, 647 (1892). ("Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion.")

See also *Queen Ins. Co. v. State of Texas*, 86 Tex. 250, 24 S.W. 397 (1893). (Combination of fifty-seven foreign insurance corporations doing business in the State of Texas.) *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973 (1894); *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880).

<sup>29</sup> *Standard Oil Co. v. United States*, 221 U. S. 1, 75 (1911). In *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 19 S. W. 274 (1892), where the combination was held illegal, the court, nevertheless, intimated that under certain circumstances it might appear that the same combination would be perfectly legal — thus indicating that the inference in favor of illegality arising from the combination's preponderant position in the industry might be rebutted. So in *Jones v. Clifford's Ex'r*, 5 Fla. 510 (1854), a combination of all the pilots serving a certain port, but merely for the purpose of apportioning their duties and earnings, was sustained. The facts rebutted any inference of an intent to exclude others. In *Skrainka v. Scharringhausen*, 22 Mo. App. 522 (1880), any intent to exclude others was rebutted by proof that the combination was necessary in order to stop a ruinous competition and promote the business.

would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.”<sup>30</sup>

Then the court justifies the decree below:

“Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization, resulting from the act of expanding the stock of the New Jersey corporation, and vesting it with such vast control of the oil industry, is made conclusive, etc. . . .”

A little later the court, in referring to certain facts which were urged as rebutting any monopoly tendency, said:

“. . . they might well serve to add additional cogency to the *presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.*”

Practically all the cases where the combination has been held illegal at common law or under the Sherman Act, without actual proof of any excluding purposes or practices, may be explained consistently with the third view. Thus in the *Addyston Pipe Case*<sup>31</sup> the facts relied upon by the United States Supreme Court to hold the combination illegal were those quoted from the opinion of Taft, J., in the Circuit Court of Appeals. These disclosed merely a combination occupying a preponderant position in a given market, and effected by a contract which provided for the making of sales, and the fixing of prices by a central authority or committee. It may be assumed that this is a case where size and preponderant position in the business without any excluding purposes or practices, caused the combination to be illegal.<sup>32</sup> Neither the opinion of the Court

<sup>30</sup> This is a particularly strong statement, because in the Standard Oil Case the combination attacked and dissolved was the Standard Oil of New Jersey reorganized as a holding company in 1899. It was not a combination of competing units. The subsidiaries had been non-competing (except perhaps in a few instances not disclosed in the cases reported) since a time prior to the passage of the Sherman Act. It could fairly be said that the units combined in the Standard Oil of New Jersey in 1899 never had competed. Hence, the *prima facie* evidence of intent to exclude others arose from size and preponderant position in the industry brought about by combination without the suppression of any existing competition between the units combined.

<sup>31</sup> *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (1898); 175 U. S. 211 (1899).

<sup>32</sup> Taft, J., in the Circuit Court of Appeals relied upon the illegal practice of the combination in suppressing competitive bidding on municipal contracts. This, the Supreme Court omitted all reference to, no doubt, upon the ground that if relied upon



of Appeal, nor the Supreme Court, in the least discloses whether the preponderant position is, in and of itself, a ground of illegality, or merely *prima facie* evidence of an excluding purpose to be carried out by illegal excluding practices. The result reached might go upon either ground. Many other cases are subject to a similar analysis.<sup>33</sup> So where the competing properties were bought up and united in a new corporation or board of trustees under the old managers, or under new managers, the size of the combination and its preponderant position in the business caused it to be held illegal.<sup>34</sup> But whether this result was reached because the size was,

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solely, it would not justify a dissolution of the combination, and if not so relied upon it was unnecessary to mention it at all.

<sup>33</sup> *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871) (Combination of all the bituminous coal mines in a given district, and all but one at that time open which supplied bituminous coal in a large district); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1886) (Combination included all the salt producers in a large salt-producing territory); *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785 (1893) (Combination of "all the retail coal dealers in the city of Lockport except one"); *People v. Milk Exchange*, 145 N. Y. 267, 272, 39 N. E. 1062 (1895) ("Acting upon these by-laws, the defendant's board of directors have from time to time during its corporate existence fixed the price of milk to be paid by dealers, and the prices so fixed have largely controlled the market in and about the city of New York and of the milk-producing territory contiguous thereto. These facts are significant, and we are unable to escape the conviction that there was a combination on the part of the milk dealers and creamery men in and about the city of New York to fix and control the price that they should pay for milk"); *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 403, 58 N. E. 525 (1900) (Assuming blue stone quarrying and selling to be a business separate from stone quarrying and selling generally, the combination in question was of fifteen producers "of nearly the whole product of Hudson river bluestone, and of at least ninety per centum of the whole amount of such stone sold in the New York market to customers in various states east of the Mississippi river"); *Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 321, 24 N. E. 660 (1890) (Combination of "the manufacturers of 95 per cent of the star candles in that part of the United States lying east of the 114° of longitude west of Greenwich, or substantially all the territory east of the western boundary of Utah"); *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 29 Atl. 102 (1894) (Combination of the forty-five brewers of the county of Philadelphia); *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 56 S. E. 264 (1906) (Combination of twenty coke manufacturing and producing corporations operating in the same field); *Milwaukee Masons & Builders' Ass'n v. Niezerowski*, 95 Wis. 129, 70 N. W. 166 (1897) (Combination of "nearly six-sevenths of the mason builders in Milwaukee"); *Stanton v. Allen*, 5 Denio (N. Y.) 434 (1848) (Combination among the whole, or a large proportion, of the proprietors of boats on the Erie and Oswego canals); *Hoffman v. Brooks*, 6 Ohio Dec. reprint, 1215 (1884) (Combination of all the tobacco warehousemen in Cincinnati); *McBirney & Johnston White Lead Co. v. Consolidated Lead Co.*, 8 Ohio Dec. 762 (1883) (Combination of the white lead manufacturers of the United States west of Buffalo).

<sup>34</sup> *Chapin v. Brown Bros.*, 83 Iowa 156, 48 N. W. 1074 (1891); *Distilling & Cattle*

in and of itself, a basis for illegality, or because it was only *prima facie* and un rebutted evidence of an intent to exclude others from the field, is not in the least made plain.

In a number of cases, it must be conceded, there was lacking direct proof of the preponderant position of the combination in the business.<sup>35</sup> In the *Standard Oil of Ohio Case*,<sup>36</sup> the record presented consisted of the petition, answer, and demurrer of the state. This record apparently presented no statement of the fact that the units combining in the Standard Oil Trust of 1882 were competing, nor did it disclose what capital they represented, or whether as combined they occupied a preponderant position in the industry. The court evidently took judicial notice of these important facts. It is clear that heretofore at least, courts have not been over particular about requiring records which showed the size and preponderant position of the combination in question. Yet it is not conceivable that these courts were holding illegal every combination however insignificant which eliminated competition between the units combined.<sup>37</sup> Hence some assumptions about size and preponderant position must be made in all cases where the combination has been held illegal. When such an assumption is made, the courts are absolutely silent as to whether the fact of size and preponderant position is, in and of itself, conclusive of illegality, or merely *prima facie* evidence of an excluding purpose.

3. Outside of the decision of the District Court in the *International Harvester Case*,<sup>38</sup> there have been no results and no *dicta* which clearly announce the first view. It must be conceded, however, that the language of the courts in a number of cases, which are, nevertheless, explainable on the ground that there was a *prima*

Feeding Co. v. People, 156 Ill. 448, 41 N. E. 188 (1895); Bishop v. American Preservers' Co., 157 Ill. 284, 41 N. E. 765 (1895); Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577 (1899).

<sup>35</sup> Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790 (1893); Texas Standard Oil Co. v. Adoue, 83 Tex. 650 (1892); Hooker v. Vandewater, 4 Denio (N. Y.) 349 (1847); De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co., 14 N. Y. Supp. 277 (1891); Anderson v. Jett, 89 Ky. 375 (1889); Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581 (1892); Ford v. Chicago Milk Shippers' Ass'n, 155 Ill. 166, 39 N. E. 651 (1895); India Bagging Ass'n v. Kock & Co., 14 La. Ann. 168 (1859); Urmston v. Whitelegg Bros., 63 L. T. (N. S.) 455 (1890).

<sup>36</sup> State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279 (1892).

<sup>37</sup> See cases *supra*, notes 15, 16.

<sup>38</sup> 214 Fed. 987 (1914) (now pending on writ of error in the Supreme Court of the United States).



*facie* inference of excluding purposes and practices, sound as if the court regarded the mere elimination of competition between the units combined as illegal *per se*.<sup>39</sup> So, scattered through cases where there was a clear purpose to exclude others by illegal methods of competition,<sup>40</sup> or a combination of railroads or public service corporations where the field was not, as a matter of law, free to the public to enter,<sup>41</sup> or where the problem here discussed was not involved, will be found many general expressions which make it appear as if the court thought mere size in any business was inimical to the public interest.<sup>42</sup> One reason for such expressions is now fairly clear.

<sup>39</sup> See cases *supra*, notes 33, 34.

<sup>40</sup> See cases *supra*, notes 5, 6.

<sup>41</sup> See cases *supra*, note 12.

<sup>42</sup> *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 303, 22 N.E. 798 (1889). ("We concur in the following views expressed by the supreme court of Georgia in the case of *Central R. R. Co. v. Collins*, *supra*, [40 Ga. 582]: 'All experience has shown that large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar facilities for such accumulation, and most governments have found it necessary to exercise great caution in their grants of corporate powers. Even religious corporations professing, and in the main, truly, nothing but the general good, have proven obnoxious to this objection, so that in England it was long ago found necessary to restrict them in their powers of acquiring real estate. Freed as such bodies are from the sure bound to the schemes of individuals, — the grave, — they are able to add field to field, and power to power, until they become entirely too strong for that society which is made up of those whose plans are limited by a single life.'")

*Woodbury v. McClurg*, 78 Miss. 831, 835, 29 So. 514, 515 (1901). (In holding an attempt at power in a corporation to purchase stock in other corporations not competing with it, the court said: "That the powers attempted to be lodged in the Laurel Gravel Company would be illegal, if granted, we cannot doubt. They would make it a stupendous monster, capable of swallowing into its insatiable maw all the mercantile and manufacturing institutions of the entire country, because none of them would be in any competition with it in the gravel business.")

*Richardson v. Buhl*, 77 Mich. 632, 658, 43 N. W. 1102 (1889). ("Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals.")

*State v. Standard Oil Co.*, 49 Ohio St. 137, 187, 30 N. E. 279 (1892). ("A society in which a few men are the employers and the great body are merely employees or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime.")

*United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 324 (1896). (" . . .

They were made for the most part in the '80s and '90s. That was a time when the process of shifting from smaller units to larger and still larger units was carried on with extraordinary rapidity and persistence. The power which came from the sudden combination was new and uncontrolled by those who possessed it. It had been, and was being, terribly abused. Unlawful excluding practices were the regular accompaniments of combinations which occupied a preponderant position in the business. The consequence was that all such combinations received a bad name. Combination was, in and of itself, regarded as dangerous and contrary to the interests of society. Furthermore, the courts did not at all appreciate that they could draw a sharp line between combinations which had the excluding purpose and used unlawful excluding practices and those which did not. They did not at all perceive that size and preponder-

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it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.")

Similar expressions occurred in the debate preceding the passage of the Sherman Act:

*United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 319 (1896). (The court, referring to these debates, said: "Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whisky Trust and many others, and these trusts it was stated had assumed an importance and had acquired a *power* which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity.")

Senator Sherman, opening the debate upon the Sherman Act, said (21 CONG. REC. 2457): "But associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination, commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president. . . .

"Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, and, by the rule of both the common and civil law, is null and void and the just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals. It is this kind of a combination we have to deal with now."



ant position in the business might be made, in and of itself, *prima facie* evidence of the intent to exclude by the use of unlawful excluding practices and thus require the combination to meet that case against it. In the face of the unlawful use of the power of combinations and the profound obscurity as to where the line was to be drawn against them, it is not to be wondered at that courts, while reaching sound results, should have stressed and fulminated against combinations as such, and looked upon size as something inherently reprehensible. But even so, it is apparent that these same courts made no conscious decision between the rule that size and preponderant position were, *per se*, illegal, and the rule which made them merely *prima facie* evidence of an intent to exclude others by unlawful means. The latter view is entirely consistent with the fear of size in combination though not always with the heat with which that fear is expressed.

It should be observed also that the concession of the District Court in the *International Harvester Case*<sup>43</sup> that "there is no limit under the American law to which a business may not independently grow," is difficult to reconcile with the proposition that mere size and preponderant position is, in and of itself, illegal. It is useless to insist that mere growth is normal and combination abnormal. Both are normal methods of growth. Combination is normal up to a certain point so long as it is legal. No advance is made by saying it is abnormal because it is illegal, when its abnormality is in turn used to prove its illegality. If size is a menace in the case of growth by combination it is a menace where there is growth without combination. How the growth may occur is immaterial. On the other hand, if size and preponderant position in the business are by themselves not a test of illegality, but only evidence of the excluding purpose, then we may fairly make a difference between independent and normal growth (so called) and combination. The former might properly furnish no *prima facie* evidence of the excluding purpose. The latter would.

It is generally assumed that an agreement between competitors, together occupying a preponderant position in the business, that they will maintain a fixed price or a fixed minimum price at least, is illegal.<sup>44</sup> From this it has been argued that a mere combination

<sup>43</sup> 214 Fed., 987 (1914).

<sup>44</sup> *Urmston v. Whitelegg Bros.*, 63 L. T. R. (N. S.) 455 (1890). It should be observed

of competing properties under one management without any agreement amounted to the same thing, and hence was, in and of itself, illegal.<sup>45</sup> The fallacy here is twofold. It is assumed that the fixing of the price is, in and of itself, illegal, when it may just as well be merely *prima facie* evidence of an assumption of the control of the market, and the purpose to exclude others. Indeed, the contract to maintain a certain price for any considerable period would hardly be sensible except upon these assumptions. But even if price-fixing agreements are, in and of themselves, illegal, it does not follow that the mere combination of the same units is, in and of itself, illegal. The vice of the price-fixing agreement is not merely the elimination of competition between the units. It is the assumption of the fact that the field of the business will not be free to others to enter, and the necessary inference from such an assumption that those combining have control of the market and intend to use their power to keep it. This may be so clear from the actual agreement that it is conclusive. When, however, the units combine without any agreement, the size and preponderant position of the combination in the business may be such as, *prima facie* to raise the inference that there is a purpose to exclude others and to use excluding practices. But there is nothing in any solemn agreement of the parties which in so many words declares that purpose. Hence the inference is rebuttable.

The *Dr. Miles Medical Co. Case*<sup>46</sup> clearly goes upon the ground that there was involved a combination of the manufacturer and distributing retailers which eliminated all competition between the retailers and maintained retail prices by agreement. It made no difference that the agreements which effected these objects were between the manufacturer and the retailers. The result was the same as if they had been between the retailers themselves. The

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that it is difficult to find cases of this sort, for the reason that most of the contracts provide for the fixing of prices from time to time by a central authority.

<sup>45</sup> Opinion of the majority of the District Court in *United States v. International Harvester Co.*, 214 Fed. 987, 999 (1914). ("We think it may be laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services they could not legally unite, and as the companies named did in effect unite the sole question is as to whether they would have agreed on prices and what collateral services they could render, when their companies were all prosperous and they jointly controlled eighty to eighty-five per cent of the business in that line in the United States. We think they could not have made such an agreement." Italics ours.)

<sup>46</sup> *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 (1911).



combination by agreement, therefore, assumed a command of the market, so far as the articles sold were concerned, and the fixing of prices assumed that, with the aid of the manufacturer, all others could be excluded from the retail business, and all competition between the retailers in the combination suppressed. The holding of such a scheme illegal does not in the least support the general proposition that mere elimination of competition by combining properties under a new management, or combining properties and managers in a new industrial unit is, in and of itself, illegal. This is clear, because the court itself tacitly conceded the point made by Mr. Justice Holmes in his dissenting opinion that if title to the goods did not pass, and the retailers were mere agents of the manufacturer, the same restrictions as to price would be valid. But that would have been just as much an elimination of competition between retailers as existed already, and if such elimination of competition be illegal *per se*, the form would be immaterial. It is clear, therefore, that the illegality of the combination in question arose from the price-fixing arrangement and the control of the market by excluding others which it assumed, and not merely from the elimination of competition between the retailers.

4. It is important to observe that in drawing the line between good and bad labor organizations, the courts have been quick to approve combinations among labor units no matter what the size or preponderant position of the union may be, up to the point where the combination has unlawful and excluding purposes or indulges in unlawful excluding practices, so that the labor market is no longer free to other labor units or to employers. Every labor union eliminates competition between the units combined, and while there may be no agreement as to price, they all have the purpose to secure as high wages as possible. They are not, however, illegal for that reason.<sup>47</sup> The interest of society in the freedom of men to combine to better their situation by eliminating too much competition and the doing of business by larger collective units overcomes any interest of the public in having unrestricted competition among labor units. But let the labor union acquire the purpose of excluding all

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<sup>47</sup> *The Master Stevedores' Ass'n v. Walsh*, 2 Daly (N. Y.) 1 (1867); *Snow v. Wheeler*, 113 Mass. 179 (1873); *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 853 (1894) (*per Taft*, Circuit Judge); *contra*, *Hornby v. Close*, L. R. 2 Q. B. 153 (1867), not followed. See *Collins v. Locke*, L. R. 4 A. C. 674 (1879).

others except its members from the labor market, or let the union commence unlawful or unfair excluding practices and methods so as to make the labor market unfree, and the organization becomes illegal at common law,<sup>48</sup> and, if interstate commerce is involved, under the Sherman Act. That is the only line attempted. No court has suggested that the mere size of a union or its preponderant position in the labor market makes it, *per se*, illegal. It has not even been suggested that size and preponderant position is *prima facie* evidence of an intent to exclude others or to indulge in excluding practices. This is significant because such excluding purposes and practices are quite as likely to follow from the acquisition by a union of a preponderant position in a given labor market as they are from the acquisition of a similar position in industry by the owners or managers of combined properties. More than one court has noted that, so far as the legality of combinations is concerned, combinations of property, or property and managers, are on the same footing as combinations of labor units.<sup>49</sup> No difference has been pointed out by anyone. If there is any difference based upon the different standing of labor units to unite and managing units controlling property to unite, it would be entirely satisfied by permitting the labor units to combine to any extent without such combination giving rise to any *prima facie* inference of an intent to exclude others, while, at the same time, a combination of managing and property units occupying a preponderant position in the business, necessarily gives rise to such a *prima facie* inference and must sustain the burden of meeting the case so made against it.

5. Our view of the state of the authorities should not be concluded without considering the relation between a certain class of cases arising under the "due process" clause and under the Sherman Act. Suppose in cases where the question is whether an act of the Legislature is "due process" which interferes with the management of business by prescribing hours of labor or methods

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<sup>48</sup> *People v. Fisher*, 14 Wend. (N. Y.) 9 (1835).

<sup>49</sup> *Queen Ins. Co. v. State of Texas*, 86 Tex. 250, 271, 24 S. W. 397 (1893). ("It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render services below a stipulated rate should be held contrary to public policy and void upon the same ground"); *Sayre v. Louisville Union Benevolent Ass'n*, 1 Duvall (Ky.) 143 (1863) (*semble*).



of payment of wages or the amount of wages, four judges out of nine are clear that the fundamentals of the social order are in jeopardy, and the act must be set aside. When these same judges come to draft or approve a judicial rule proscribing business organizations as illegal, they would consistently with their views on "due process" be inclined to impose only such restraint as seemed clearly to be called for to meet an undoubted evil — having in mind always the limits of such a judicial prohibition, and the avoidance of any rule founded upon doubtful or speculative economic data or results. Such judges might be expected to adopt as the test of illegality the existence of the excluding purposes or illegal excluding practices. Suppose in the same "due process" cases five judges are inclined to sustain the act. Three go upon a social bias in favor of the legislative restriction upon business. That is, upon balancing the interests, they regard the restriction upon business as for the general welfare. Two, however, if they exercised independent judgment in balancing the interests, would have regarded the legislation as opposed to the general welfare and inimical to the social order in accordance with the views of the minority. But they have felt bound to sustain the act in accordance with the rule that it must be upheld if any rational basis for it can be found after resolving all doubts in favor of the act. The moment these two come to consider the test of legality of business organizations they are released at once from the obligation of sustaining anything, if a rational basis can be found for it. With regard to a judge-made rule prohibiting certain business organizations, they are not only free to balance the interests for and against the prohibition involved, but they are subject to a counsel of caution that, when in doubt, they shall not extend the prohibition, but restrict it to cover only that generality of situations where the public interest is indubitably affected unfavorably.

## B

In 1911 Mr. Brandeis in testifying before the Senate Committee,<sup>50</sup> said:<sup>51</sup>

"You may have an organization in the community which is so powerful that in a particular branch of the trade it may dominate by mere size. Although its individual practices may be according to rules, it may be, nevertheless, a menace to the community; . . ."

Mr. Brandeis' experience and authority have been so great, and his views before the Senate Committee are expressed so fully and frankly, that it is worth considerable trouble to ascertain just what were the grounds for this opinion, and how far they may require a holding by a court that mere size is, in and of itself, illegal, rather than *prima facie* evidence of illegal excluding purposes and practices.

1. It is clear from Mr. Brandeis' testimony that he does not condemn mere size because it, in and of itself alone, tends to exclude others from the business. The main thesis of his testimony is that size — and he is referring particularly to the size of our so-called American Trusts — results in such economic inefficiency that without any excluding practices and purposes they must fail, or at least lose their relative position in the market by reason of successful competition carried on by smaller and more efficient units. His language to this effect is so strong and to the point that it should be read. After setting out the records of certain trusts,<sup>52</sup> he says:

<sup>50</sup> Reference is here and in succeeding paragraphs made to the testimony of Louis D. Brandeis before the Committee on Interstate Commerce of the United States Senate, 62d Congress. It was given on December 14, 15, 16, 1911. Mr. Brandeis is referred to in the capacity in which he testified.

<sup>51</sup> Report of hearing before Senate Committee on Interstate Commerce, *supra*, 1167.

<sup>52</sup> Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1148: "Now, that mere size does not bring efficiency, does not produce success, appears very clearly when you examine the records of the trusts.

"In the first place, most of the trusts which did not secure a domination of the industry — that is, the trusts that had the quality of size, but lacked the position of control of the industry, lacked the ability to control prices — have either failed or have shown no marked success. The record of the unsuccessful trusts is doubtless in all your minds. One of the earliest of the trusts which did not secure control was the Whisky Trust. It was not successful. The plight of the Cordage Trust and of the Malting Trust was worse. Consider other trusts now existing, the Print Papers Trust (the International Paper Co.); the Writing-Paper Trust (the American Writing-Paper Co.); the Upper Leather Trust (the American Hide & Leather Co.); the Union Bag Trust, the Sole Leather Trust; those trusts and a great number of others which did



"I believe that the existing trusts have acquired the position which they hold largely through methods which are in and of themselves reprehensible. I mean either through methods which are abuses of competition or by such methods as were pursued by the steel corporation in paying ridiculous values for property for the purpose of monopolistic control.

"I am so firmly convinced that the large unit is not as efficient — I not attain a monopoly and were therefore unable to fix prices have had but slight success as compared with their competitors. You will find daily evidence of their lack of success in market quotations of the common stock, where they are quoted at all, and the common stock of some has even fallen below the horizon of a quotation.

"Now take, in the second place, the trusts that have been markedly successful, like the Standard Oil Trust, the Shoe Machinery Trust, the Tobacco Trust. They have succeeded through their monopolistic position. They dominated the trade and were able to fix the prices at which articles should be sold. To this monopolistic power, in the main, and not to efficiency in management, are their great profits to be ascribed.

"Leaving the realm of industry for that of transportation, compare the failure of Mr. J. P. Morgan's creation — the International Mercantile Marine — and the astonishing success of the Pullman Car Co. The transatlantic steamship trade was open to competition, and could not, in spite of its price agreements, fix rates at an elevation sufficient to be remunerative. The Pullman Co., possessing an absolute monopoly, has made profits so large as to be deemed unconscionable.

"In the third place, take the class of cases where the trust has not controlled the market alone, but exerted control only through virtue of price agreements or understandings, as did the Sugar Trust and the Steel Trust. Those trusts paid large dividends, because they were able to fix remunerative prices for their product. But neither the Sugar Trust nor the Steel Trust has been able to hold its own against its competitors.

"Take it in the Sugar Trust. At the time of the Knight Case, a little less than twenty years ago, the Sugar Trust had practically the whole business of the country — I think the Supreme Court report shows something like 95 per cent. The company's reports to the stockholders of 1910, as I recall it, show that the company now controls only 42 per cent of the production of the country.

"The price agreements or understandings between the trust and its competitors had maintained the price, but they could not maintain for the trust its proportion of the business. The Sugar Trust's profits were maintained, as you so well know, not only through the price agreements, but through methods that were vulgarly criminal — through false weighing; through stealing of city water; through extensive railroad rebating.

"Then take the Steel Trust — that is a younger trust, only half the length of life of the Sugar Trust. But in the Steel Trust you have a similar manifestation of ebbing prestige. In spite of all this extraordinary power in the Steel Trust, the control of raw material, the control of transportation, the control of certain trade through its railroad associations, the control of other trade through its money power — and the addition of the Tennessee Coal & Iron Co. — in spite of all this the Steel Trust has been a steady loser in percentage of the iron and steel business of this country. And not only has it been a steady loser in the percentage of business in this country, but despite its ability to largely maintain prices, notably of steel rails, throughout that period, the later years show a diminishing return upon the capital invested as compared with the earlier years of the trust."

mean the very large unit — is not as efficient as the smaller unit, that I believe *if it were possible today to make the corporations act in accordance with what doubtless all of us would agree should be the rules of trade no huge corporation would be created, or, if created, would be successful.* I do not mean by that to say that it is not good to have the limitation [on size] in the law. What I mean is that *I am so convinced of the economic fallacy in the huge unit that if we make competition possible, if we create conditions where there could be reasonable competition, that these monsters would fall to the ground, that I do not consider the need of such a limitation urgent.*" <sup>53</sup>

It is quite obvious that the so-called trust cannot at the same time exclude others because of its size, and fail or decline by reason of the successful competition of others for the same reason. It cannot be that mere size alone tends to exclude others, and that size results in such inefficiency that others are able to enter the business easily and compete successfully. One or the other of these results must be discarded on the ground of inconsistency. As Mr. Brandeis' main thesis was that size breeds inefficiency and failure in the competitive struggle, it is fair to say that he does not place the "menace" of the trust which has no excluding purposes, and uses no excluding practices, upon the fact that mere size alone tends to exclude others. He would not argue that it was the usual effect of mere size to "overawe" the smaller competitor,<sup>54</sup> or to "make men hesitate to enter the field against it," or "to prevent the entrance of new capital and new competition into the industry."<sup>55</sup>

2. It has been urged that if five plants are supplying a given trade, the union of those plants tends to exclude others, because there will be no chance for anyone else to supply a demand which is already being adequately served.<sup>56</sup> This exhibits a child-like power of reasoning as to economic effect. Mr. Brandeis, of course, made no such point. His main thesis, that size was so inconsistent

<sup>53</sup> Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1170. Italics ours.

<sup>54</sup> Brief of Government in *International Harvester Co. v. United States* (now pending in the Supreme Court of the United States), 88.

<sup>55</sup> *Ibid.*

<sup>56</sup> Senator Sherman's speech, opening the debate on the Sherman Anti-Trust Act, 21 CONG. REC. 2460. ("But, they say, competition is open to all; if you do not like our prices, establish another combination or trust. As was said by the supreme court of New York [*People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354, 377], when the combination already includes all or nearly all the producers, *what room is there for another?*")



with efficiency that a trust without any excluding purposes or practices was an easy mark for independent competition, is utterly inconsistent with the contention that when all the units in a given business have combined, there is no room for anyone else.

3. Mr. Brandeis does suggest<sup>57</sup> that "the mere *power of endurance* of the large company would be sufficient to give it mastery of the field." He was speaking at the time of the Tobacco Trust. The context is as follows:

"I found, for instance, in the tobacco company this situation — and it was one of the many objections to the plan of so-called disintegration — that the American Tobacco Co. in various departments were controlling about 40 per cent or over of the American business. We found there that in this way the American Tobacco Co. alone, and each one of the other two large companies, would control a proportion of the total business of the country in certain departments of the trade which was from one to seven times the aggregate of the business of all of the independents. Now, I believe that fair competition is not possible under those conditions, because the mere power of endurance of the large company would be sufficient to give it mastery of the field."

The purport of this is somewhat vague. If excluding practices are used, or if from the mere size of the Tobacco Company units which were provided for in the disintegration plan referred to, there was still a *prima facie* inference that excluding practices would be used, then of course the "trust" would have a "power of endurance" which would keep out its competitors, and give it mastery of the field. This is probably Mr. Brandeis' meaning, for his main thesis is that mere size without excluding purposes or practices is a source of economic weakness and operates to give competitors an advantage based on efficiency. This is entirely inconsistent with the view that mere size produces any mastery of the field. Others, however, may insist that the resources of a so-called trust are so great that the combination could practice universal price-cutting below cost in order to destroy all rivals and exclude others. The reserves, however, of such an organization are not necessarily proportionately larger than those of smaller units. It may fairly be denied that there are any such resources in the hands of a so-called trust as will enable it to keep up universal price-cutting below cost

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<sup>57</sup> Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1175. Italics ours.

on a country-wide basis longer than a smaller unit can keep up the same price-cutting in the smaller field where it operates. Of course no court can deal with the question of legality on the fortuitous basis of what proportion of reserve capital one corporation may have in comparison with that of its rival or possible rival. Even if one could imagine a trust punishing itself by universal price-cutting to the extent assumed, how is the public injured? Surely not by the introduction of prices so low that no one cares to enter the business or to stay in the business and the retention of such prices in general whenever any competitor appeared in any part of the country.

4. Perhaps it will be said that the large combination will absorb all the best talent in the community for the business, and so make competition impossible. This position, however, is equally inconsistent with Mr. Brandeis' main thesis. If such were the fact, then the "trusts" would not fail for inefficiency or be subject to successful competition from new capital. Furthermore, there will still be infinite dispute as to whether the "trust" does, in fact, secure the best talent. If the subject were investigated able men could no doubt be found to testify that the more progressive and inventive minds arise among the independent smaller units, and that the large unit tends to conservative methods, lack of initiative, and want of inventive power — indeed, that it is subject to all the evils of a bureaucracy. For instance, between the independent telephone engineers and inventors and the engineers and inventors of the Bell system will be found a long standing dispute as to the merits and abilities of the men in each group. Furthermore, it may well be doubted whether efficiency and experience can be regarded as limited to any such degree that it can be "cornered."<sup>58</sup>

5. Combination resulting in a unit occupying a preponderant position in the business has been objected to because it tends unduly to enhance prices. The idea is that there is a necessary connection between size and high prices. This rests, of course, upon the belief that there is a necessary connection between mere size (without any excluding purposes or practices) and the exclusion of others from the business. When the latter is exploded, does anything re-

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<sup>58</sup> Thus Mr. Justice Day, sitting as a Justice in the Circuit Court of Appeals in the *Cash Register Case*, 222 Fed. 599, 619 (1915), observed that "possibly, efficiency is so abundant that in experience there never will be as there never has been such a monopolizing."



main of the former? Any idea that there is a *necessary* connection must certainly be abandoned. It is significant that when Mr. Brandeis was asked whether he would regard 15 per cent return on \$10,000,000 of capital an extortionate profit, he not only refused any percentage as a test of fair profit, but plainly indicated that the only test of extortionate prices which he had in mind was the fact that the market was unfree; — in short, that the unit fixing the prices had the excluding purpose and used unlawful excluding practices. He said:<sup>59</sup> [*Italics ours*]

“In a business which is a competitive business, I believe we can safely leave the percentage of profit to that which the business will bear, and I think it is in the interest of business and the interest of the community to let people who are conducting business which is competitive understand that *there is no profit too great to be approved, if it is the result of the exercise of brains and character, under conditions of industrial liberty.* I think we want to let people understand that it is not 15 or 20 or 30 or 100 per cent that we condemn. We ought to congratulate people in making that much, and we ought to congratulate ourselves that they are making it, if it is made *under conditions of natural competition.* And it is only *when conditions are constrained* that we have any interest in how large returns are made.”

6. The difficulty in determining what size is illegal is a strong argument against making size, in and of itself, a judicial test of illegality. Whether the unit attacked occupies a preponderant position in the business may possibly be ascertained like other ultimate facts to which legal consequences attach. But in many cases it certainly cannot be known in advance. It will depend upon the conditions of each business and upon surrounding circumstances of an intricate and changing character. It may be that in one industry a single unit doing 25 per cent of the business might occupy a preponderant position, while in another, one with 40 per cent might not. When asked by the Senate Committee what limit he would place on the size of corporations, what standard he would fix, and how he would phrase it, Mr. Brandeis said:<sup>60</sup>

“I do not think that I am able at this time to state the exact provision which I should make. I feel very clear on the proposition, but I do not

<sup>59</sup> Report of hearing before the Senate Committee on Interstate Commerce, 1245.

<sup>60</sup> *Ibid.*, 1174.

feel equally clear as to what machinery should be invoked or the specific provision by which that proposition could be enforced."

Then he goes on to say:<sup>61</sup>

"I am very clear that the maximum limit could not be properly fixed in dollars, because what would be just enough for one business would be far too much for many others."

Apparently he favored some standard which took account of the percentage of the market controlled. But even here he was vague as to what percentage would be illegal. He was clear that 10 per cent would be legal, but that 40 per cent might not.<sup>62</sup> Mr. Brandeis' difficulties in dealing with the standard of size for business and industrial units where the power of the legislature was involved, are surely not diminished where the power of the court is invoked. The difficulty is not solved by being embalmed in any such phrase as "preponderant position in the business." It is clear that whether a business occupies such a position is a good deal like determining whether anyone has been guilty of negligence. No one can tell what the legal consequences of acts may be until the trial is had, and the courts are through. Can the control of property engaged in industrial and commercial pursuits and operating in a delicately adjusted field from day to day stand being faced at all times with such a test of legality? If such a test were adopted, the motive to err on the safe side in order to avoid indictment might so impede the shift from smaller to larger units as to result in positive public evil. Where the violation of a highly penal statute like the Sherman Act is involved, is it fair to subject business men to indictment for crime upon an issue which involved merely the size of the business which they went into together?

The courts have had at least one unfortunate experience in making property rights depend upon a question of size. When a non-exclusive power was created in A. to appoint among a class with a gift in default of appointment to the class, A. must appoint something to each one. If A. appointed too small an amount to one, it was treated in a court of equity as no appointment at all. It was called an illusory appointment. This was a very pretty doctrine sentimentally, but it made litigation every time any appointee got a

<sup>61</sup> Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1175.

<sup>62</sup> *Ibid.*, 1175.



considerable amount less than the others, and no test of what was a substantial appointment could ever be worked out. It always depended on the size and character of the estate and surrounding circumstances. The doctrine was spoken of with contempt by judges and writers who had had any experience with it, and was finally abolished by act of Parliament.<sup>63</sup> In this country courts have refused to recognize it.<sup>64</sup> There are the same fundamental objections (many times magnified) against putting the invalidity of great business organizations upon any test of size alone.

It will be said, however, that if the line as to size can be drawn for the purpose of determining what is *prima facie* evidence of the intent to exclude others, it can be drawn as a test for illegality itself. It is not at all denied that such a line can be drawn. The argument is that when drawn as a test of illegality, it is one which the courts should not draw, but as evidence of an ultimate fact of excluding purpose, it may be considered alone or with other evidence for what it is worth, subject like other evidence to have the inferences arising from it rebutted.

7. It is a fair inference from Mr. Brandeis' testimony that he did not draw any line between combinations of labor units and combinations of managing units, so far as illegal attempts at monopoly were concerned. He was asked:<sup>65</sup>

"Do you regard the closed shop in labor as a tendency toward monopoly, *just as you do a combination of plants?* "

to which he answered:

"Yes."

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<sup>63</sup> "Powers in Trust," John Chipman Gray, 25 HARV. L. REV. 1, 26: "But the rule as to illusory appointments is unique in the law. Other rules of doubtful character have found defenders or apologists, but no one has had a good word for this. It has been condemned in the most unmeasured terms by judge after judge; by Sir Richard Pepper Arden (afterwards Lord Alvanley), M. R., in *Spencer v. Spencer*, 5 Ves. 362 (1800); *Kemp v. Kemp*, *ibid.*, 849 (1801); by Sir William Grant, M. R., in *Butcher v. Butcher*, 9 Ves. 382 (1804); and by Lord Eldon, C., in *Bax v. Whitbread*, 16 Ves. 15 (1809), and *Butcher v. Butcher*, 1 Ves. & B. 79, 94, 96 (1812).

"This state of things was so intolerably inconvenient and mischievous that a statute was passed abolishing the rule as to illusory appointments." [St. 11 Geo. IV. & 1 Wm. IV. c. 46 (1830).]

<sup>64</sup> *Graeff v. DeTurk*, 44 Pa. 527 (1863); *Hawthorn v. Ulrich*, 207 Ill. 430, 69 N. E. 885 (1904).

<sup>65</sup> Report of hearing before the Senate Committee on Interstate Commerce, *supra*, 1180.

It seems hardly conceivable that Mr. Brandeis would have made mere size and preponderant position in a labor market of a given labor union, in and of itself, a test of illegality. Indeed, it seems generally accepted that labor unions can be as large as possible and occupy as preponderant a position in the labor market as size can give, and that they only become illegal when they have the excluding purposes or indulge in unlawful excluding practices.<sup>66</sup> Why, then, it may be asked, make the size of combinations of managers and their properties, or of the properties alone, in and of itself, illegal?

8. It will be argued, however, that if size is not in and of itself illegal, then if 100 per cent of all the property and managers engaged in a given industry unite and have no excluding purposes or indulge in no unlawful excluding practices, the combination would be valid, although, until others could come into the field, it would have an absolute monopoly.

In meeting the argument based upon this extreme case, we must first assume that there is no such control of natural resources or strategic points as practically to exclude others, or to make their entrance into the business unusually difficult. The case put must be looked at as one in which the field is really free to others to enter. With this condition properly emphasized the combination of 100 per cent of all those engaged in a given business presents no special feature except the fact that for some time, not at all clearly defined, but upon our assumption of a free field, comparatively short, the combination could, if it chose, fix such prices as it pleased. This is offset by Mr. Brandeis' view that size alone without any excluding purposes, practices, or surrounding conditions is quickly self-destructive by reason of the inefficiency of the combination and the resulting successful competition. It is also offset, in part at least, by the natural motive to sell cheaply enough to cause the public to buy, and at the same time not unduly to encourage others to come into the business. Such prices would be fair prices because they would be the highest possible, taking into account the proper reaction from the fact that the market was free to others.

Suppose, however, the 100 per cent combination did continue for an appreciable term and attempted, in disregard of these natural motives, to enter upon a debauch of exorbitant and monopoly prices,

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<sup>66</sup> See cases, *supra*, notes 47-49.



regardless of consequences, during such period as was possible. That would clearly be contrary to the public interest. Nevertheless, the more outrageous the conduct of the temporary monopoly the quicker would be the relief by the entry of others and the greater the load of unpopularity which the combination would have acquired. The question is: Should the public interest be left thus to suffer temporarily in this largely problematical case, rather than that every combination of capital which approached the vague standard of a preponderant position in the business should be subjected to the terrors of indictment and uncertainty as to the legality of its business organization, and that every combination which had a clear preponderant position in the business, because it had from 40 per cent to 80 per cent of the market should be *ipso facto* illegal when it had no such power over prices as in the hypothetical case put? It is submitted that the hypothetical case of the 100 per cent combination which used its position for however short a time to charge exorbitant prices, should be left to be dealt with by the legislature, or by the courts when that case arises. The result which the court might conceivably feel obliged to reach in such a case is no argument in favor of the court drafting a judicial test of illegality for all combinations based upon size and preponderant position in the business, and that alone.

In the same way many arguments in favor of mere size being made the test of illegality, founded upon some extraordinary hypothetical action of a combination with a preponderant position in the business, may be met. For instance, it is said that a trust might withdraw "temporarily from the market" so that prices would rise, or it might release "an unusual quantity of goods upon the market" so that prices would fall.<sup>67</sup> There are limits to be observed by the courts in the placing of restrictions upon the legality of business organizations which certainly affect the freedom of action of all in order to take care of a few problematical and remotely probable situations.

9. The effort to make mere size a test of illegality always includes the argument that preponderant position in the business confers such power and opportunity for illegal excluding practices, and the danger of their being used is so great that the entire combination

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<sup>67</sup> Brief of the Government in *International Harvester Co. v. United States* (now pending in the United States Supreme Court), 86.

should be condemned on the basis of size only. Obviously, however, if the mere possession of the power to commit a wrongful act were itself a wrong, the number of unlawful status would increase to the extent of the number of possible natural and artificial persons multiplied by the number of possible offenses. Even to be guilty of an attempt to commit a crime, the mere power is not enough. The actor must take substantial steps in the direction of the criminal act. Certainly the mere possession of power to commit a wrongful act can only become a wrong when the wrongful use of the power is so likely to follow from its possession, and is so difficult to reach, in and of itself, that the mere possession of the power must be condemned as in itself illegal. No court has yet said, and it is believed no court should, in view of our recent experiences, undertake to say, that it is necessary to hold the mere possession of the power to exclude others by illegal practices itself illegal, in order to prevent the unlawful use of that power. It is enough to point to the combinations occupying a preponderant position in different industries which the government has recently investigated to make clear that since business has discovered that excluding purposes and practices are illegal, there has been an obvious tendency to abandon them entirely. This appears particularly in the case of *United States v. Keystone Watch Case Co.*,<sup>68</sup> *United States v. United States Steel Corporation*,<sup>69</sup> and *United States v. American Can Co.*<sup>70</sup> The *International Harvester Co.*<sup>71</sup> appears never to have indulged in any unlawful excluding practices, or to have had any excluding purposes.

10. In Mr. Brandeis' testimony only one suggestion has been found in support of his opinion that a combination occupying a preponderant position in the business may, by reason of its size alone, be "a menace to the community." It is as follows:<sup>72</sup>

"I have considered and do consider that the proposition that mere bigness cannot be an offense against society is false, because I believe that our society, which rests upon democracy, cannot endure under such conditions. Something approaching equality is essential."

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<sup>68</sup> 218 Fed. 502 (1915).

<sup>69</sup> 223 Fed. 55 (1915).

<sup>70</sup> 230 Fed. 859; 234 Fed. 1019 (1916).

<sup>71</sup> 214 Fed. 987 (1914).

<sup>72</sup> Report of hearing before the Senate Committee on Interstate Commerce, *supra*,



This is an echo of views which have been expressed by courts from time to time.<sup>73</sup> The trusts, it is said, take opportunity from independent business men. They make an industrial world of employees instead of independent business men. They menace equality of opportunity and consequently that ideal of democracy which rests upon such equality.

A good deal involved in this view does not square with Mr. Brandeis' main thesis that the trust which has only size is so inefficient that it must fail or decline in the face of the successful competition of smaller and more efficient units. If the bigness which, *ex hypothesi*, menaces democracy is also a menace to itself, how can it menace democracy, or the privilege of doing business in the smaller units? The fact is that when the mind is convinced that excluding purposes and practices can be separated from size and suppressed apart from holding mere size illegal, the substantial objections to size, as such, disappear. All that is left is a residue of fear and bias — fear that large combinations may at any time resort to a use of their power to exclude others from the business; bias against size which took root during the period when size and excluding purposes and practices were inseparable. All reasonable concessions are made to this "fear" and this "bias" when the preponderant position of any combination is made *prima facie* evidence of its excluding purposes and practices and hence of its illegality. It is not at all clear from Mr. Brandeis' testimony in 1911 that he would have rejected such a position if it had been presented to his mind.

In some cases, no doubt, a bias against size may be founded upon an individual preference for the simplicity of the social and industrial order of the frontier. That may be put down as incurable. Old men may hark back to the days of their youth, but courts cannot contribute to the running of the social order of the present and the future by confining themselves to the use of such important improvements as the horse cars and gas mains of the 70's. The simplicity of the frontier is now largely prehistoric. The combinations which are, and indeed must be, permitted mean substantially an industrial world of employees rather than of independent individuals engaged in business. Under any restriction as to size, which the courts could possibly pronounce, the ideal of a frontier

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<sup>73</sup> Some of these cases have been collected, *supra*, note 42.

order of society with its equal opportunity for all would not conceivably be reached. It is unthinkable that any court should settle the size of industrial units by a judicial fiat which was founded only in a sentimental bias in favor of the simplicity of life as it existed in the frontier days of half a century ago.

11. Finally, it is important to observe that in the making of a prohibition upon the size of combinations and business units, the courts are in a very different position from the legislature, and that one who addresses a legislative committee on the subject very properly enters upon an expression of views and proposals which the court in considering the same subject could not entertain. The legislature may mark out lines as to size as it pleases with such qualifications and exceptions as it deems expedient. In so doing it may go upon views of economic fact which are speculative. It may even promulgate a rule founded upon the passion and prejudices of a majority.

The courts, on the other hand, in fixing the size of industrial and commercial units, must, from the nature of their function, promulgate a prohibition which is couched in general terms, universally applicable, and without illogical or detailed exceptions. It must run the chance of being too liberal and letting in some results concededly against the public interest, which the legislature must deal with in detail, rather than draw the line too tight and unduly embarrass the freedom of managers in the industrial and commercial world in their determination of the most efficient and economically proper unit of size. It must beware of basing a restriction upon economic conclusions which are uncertain and speculative, and which may be founded upon passion and prejudice rather than knowledge of essential facts and sound analysis of the situation.<sup>74</sup>

The making of the rule against perpetuities is a fair example of the observance by a court of these limitations. From the time that

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<sup>74</sup> *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant (U. C.) 540, 549 (1871), Strong, V. C., in upholding a combination of salt producers, said: "Did I even think otherwise than I do, that this arrangement was injurious to the public interests, I should hesitate much before I acted on such an opinion, for I should feel that I was called on to relieve parties from a solemn contract, not by the mere application of some well-established rule of law, but upon my own notions of what the public good required — in effect to arbitrarily make the law for the occasion. I can conceive no more objectionable instance of what is called judge-made law, than a decision by a single judge in a new and doubtful case that a contract is not to bind on the ground of public policy."



the rule began to take shape as a result of Lord Nottingham's decision in the *Duke of Norfolk's Case*,<sup>75</sup> the English courts have constantly adopted liberal boundary lines so as to permit testators to do what they had been accustomed to do up to the point where the courts were certain that the owner of property was going too far in the creation of remote limitations. In the *Duke of Norfolk's Case*, which was the beginning of this process, there was a fundamental struggle to make a far stricter rule — to draw an artificial line between future interests in terms after a life estate, and future interests in terms taking effect at the death of the first taker, but after an absolute interest. Indeed, it was only by the narrowest margin that this step was avoided and Lord Nottingham's view adopted.<sup>76</sup> The generalization thus worked out permitted Peter Thellusson to direct an accumulation of his estate for a period measured by a considerable number of lives in being at his death.<sup>77</sup> He could, as a matter of fact, have provided for an accumulation for the period of these lives and twenty-one years thereafter. The result thus reached under the rule against perpetuities was regarded as contrary to the public interest, and the Thellusson Act was passed to control accumulations for the future. In this country some legislatures have thought the common-law rule against perpetuities too liberal, and have made the limit two lives in being, without any term of twenty-one years.

Apply to our problem the vision and judgment which Lord Nottingham brought to the creation of a test regarding the validity of future interests, and our conclusions are not in doubt: When the courts took the stand that a combination occupying a preponderant position and having excluding purposes or using unlawful excluding practices was illegal they took sure ground and have had no reason to regret it. They will equally be on safe ground if they hold that size and preponderant position are *prima facie* evidence of the pur-

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<sup>75</sup> 3 Ch. Cas. 1 (1682).

<sup>76</sup> In the *Duke of Norfolk's Case*, 3 Ch. Cas. 1, Lord Chancellor Nottingham was assisted by Lord Chief Justice Pemberton, Lord Chief Justice North, and Lord Chief Baron Montague. The Lord Chancellor differed from these judges, and entered a decree in accordance with his own opinion, and disregarded the opinions of those whom he had asked to assist him. After Lord Nottingham's death, Lord North became Lord Keeper of the Great Seal, and upon a bill of review he reversed the decree of Lord Nottingham, but on appeal to the House of Lords the decree of the Lord Keeper was reversed and the decree of the Lord Chancellor affirmed.

<sup>77</sup> *Thellusson v. Woodford*, 11 Ves. 112 (1805).

pose to exclude others which places upon the combination the burden of rebutting the inference of excluding purposes and practices. But when the courts undertake to say that mere size alone is against the public interest they enter the realm of uncertainty and speculation both as to economic facts and results. It is the realm where law-making "may degenerate into the mere private discretion of the majority of the court as to a subject of all others most open to difference of opinion and most liable to be affected by changing circumstances,"<sup>78</sup> and where the quaint language of an English judge becomes applicable:

"Public policy is an unruly horse, and when once you get astride it, you never know where it will carry you."<sup>79</sup>

In the decades from 1880 to 1900 a great fear of the power of new combinations spread throughout the United States. The power which came from combination had been, and was being, abused. Unlawful excluding purposes and practices were the regular accompaniments of combinations which occupied a preponderant position in the business. All such combinations, therefore, received a bad name, and combination was, in and of itself, distrusted. Since perhaps 1910 it has become each year more apparent that the evil side of combination was the existence of the excluding purposes and the use of unlawful excluding practices. Each year it has become more apparent that these excluding purposes and practices may be eliminated, and the freedom of the market secured, without touching the combination itself. It has become more and more apparent that the transition of business units from smaller to larger, and then to still larger units is a desirable side of combination, and a movement in which the public has a vital interest. It has become more and more apparent that some experiment was necessary to determine what was the most efficient size for business units in a given branch of industry, and that where the field is really free to others to enter, the determination of the question of proper size may be left to the play of economic forces. If these observations are sound, they clearly point to the drawing of the line between good and bad

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<sup>78</sup> Comment on *Hilton v. Eckersley*, 6 E. & B. 47 (1855) by the editors of SMITH'S LEADING CASES, Mr. Justice Willes and Mr. Justice Keating (4 ed. vol. 1, p. 286).

<sup>79</sup> *Per Burrough, J.*, in *Richardson v. Mellish*, 2 Bing. 229, 252 (1824).



trusts at the place where the excluding purposes or unlawful excluding practices commence. It is sufficient protection to the public and a sufficient concession to the possible abuse of power by combinations, and any bias against them, that every combination having a preponderant position at the time it is organized must sustain the burden of rebutting a *prima facie* inference of excluding purposes and unlawful excluding practices.

*Albert M. Kales.*

HARVARD LAW SCHOOL.

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With the coming of this month the Harvard Law School completes one hundred years of life. Though the active process of the building of the School has as yet by no means ceased, as any one who has known it during the last five years can testify, in time at least the moment has arrived when men will look at a completed work and compare it with beginnings. It was on May 14, 1817, that the Harvard Corporation, on the advice of the Royall Professor of Law, Judge Isaac Parker, voted: "That some Counsellor, learned in the law, be elected, to be denominated University Professor of Law, who shall reside in Cambridge, and open and keep a school for the instruction of graduates of this or any other University, and of such others as, according to the rules of admission, as attorneys, may be admitted after five years' study in the office of some Counsellor." And it was with the adoption of that vote on the next day by the Overseers, and the subsequent appointment of the Hon. Asahel Stearns as first University Professor, that the Law School as an institution began.

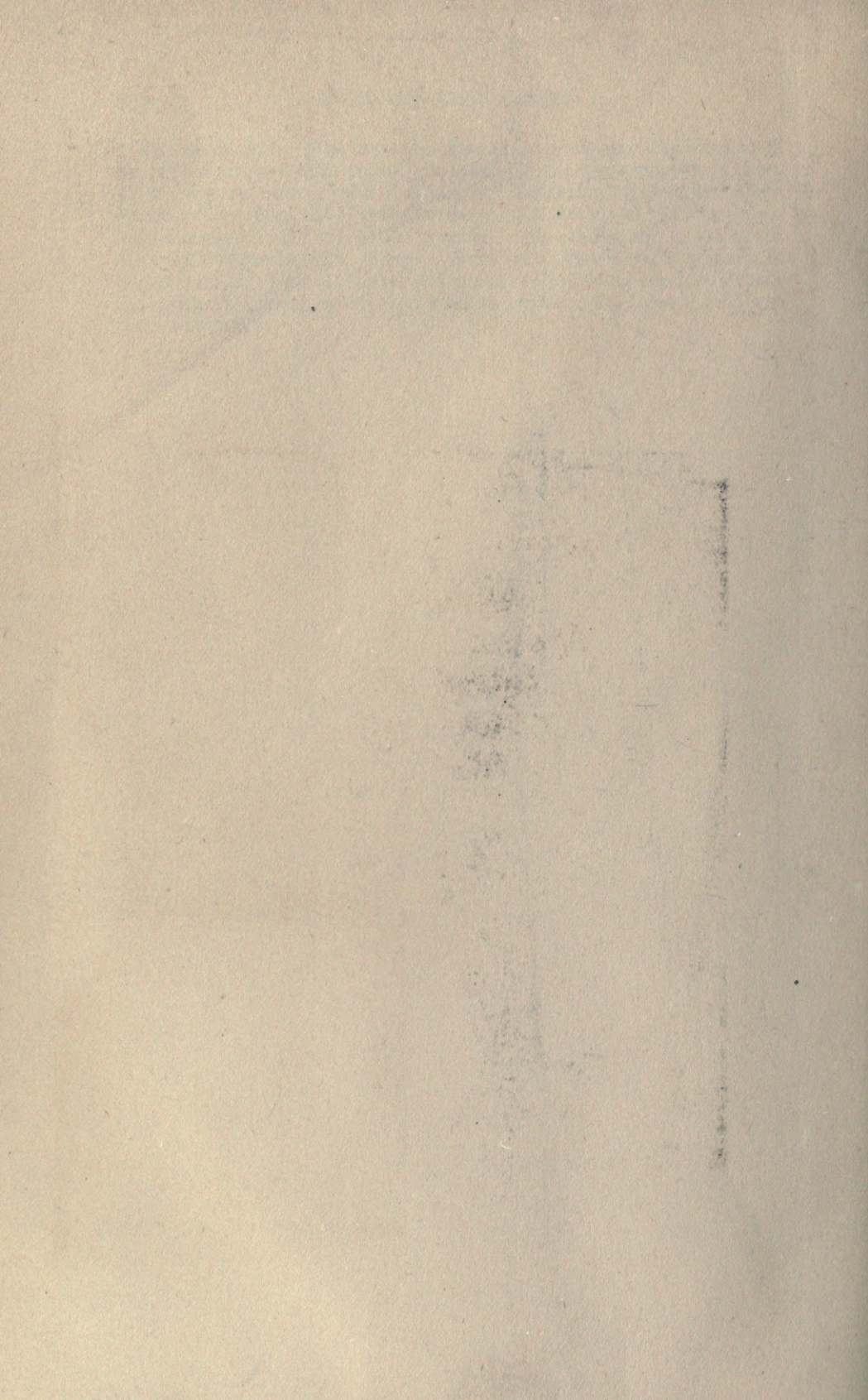
The history of the School, from that day until now, from the one lone scholar of the fall of 1817 to the 858 of the fall of 1916, its varied operations, methods, fortunes, and the natures of the men who shaped them, have been set forth in another place. Sufficient for the present if we celebrate the Century. To the Harvard Law School, then, on the completion, in growing vigor and increasing usefulness, of the first hundred years of its existence, the Editors of this REVIEW gladly dedicate this number.



As announced by letter from the committee in charge, all graduates of the School are invited to attend the events of the celebration days, June 18 to June 20, ending with a dinner on Wednesday evening at which President Lowell of the University and Justice Loring of the Massachusetts Supreme Court will be the speakers. An oration will be delivered Tuesday evening by Hon. Henry L. Stimson of New York at which it is hoped that Mr. Justice Holmes will preside. Following the Law School Association's annual meeting on Wednesday morning, Dean Pound will make an address.









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